[***Rackstraw (Litigation guardian of) v. Robertson, [2011] B.C.J. No. 1354***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22KP-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

B. Fisher J.

Heard: July 5, 2011.

Judgment: July 14, 2011.

Docket: M075011

Registry: Vancouver

**[2011] B.C.J. No. 1354** | 2011 BCSC 947 | 2011 CarswellBC 1927 | 205 A.C.W.S. (3d) 602

Between Aaron William Rackstraw also known as Aaron William Peters and Simon Peter Rackstraw, Infants by their Litigation Guardian, Gertie Rackstraw, Gertie Rackstraw and Andrew Travis Rackstraw also known as Andrew Travis Peters, Plaintiffs, and William J. Robertson, A.M. P.M. Landclearing & Demolition Ltd., Matsqui-Sumas-Abbotsford General Hospital, Fraser Health Authority, Dr. John Doe #1, Dr. John Doe #2, Dr. John Doe #3, Dr. John Doe #4, Dr. John Doe #5; Nurse Jane Doe #1, Nurse Jane Doe #2, Nurse Jane Doe #3, Nurse Jane Doe #4, Nurse Jane Doe #5, Physiotherapist Jane Doe #1, Physiotherapist Jane Doe #2, John Doe #1, John Doe #2, John Doe #3, Defendants

(38 paras.)

**Case Summary**

**Transportation law — Motor vehicle and highway traffic — Rules of the road — Care and control of vehicle — Proper lookout — *Negligence* — Signs and signals — Failure to obey — Yielding — Liability — Civil actions — Breach of rules of the road — Cohabiting family member — *Negligence* — Action by family of deceased for damages for *negligence* arising from motor vehicle accident dismissed — As defendant was passing another vehicle on roadway, deceased turned onto roadway, without having stopped at stop sign, and was struck by defendant's vehicle — Deceased was thrown from vehicle, suffered serious injuries and later died in hospital — Accident caused solely by deceased — Deceased owed duty of care to other drivers and breached that duty by failing to stop at stop sign, failing to keep proper lookout and failing to yield.**

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| Action by the family of the deceased for damages for ***negligence*** arising from a motor vehicle accident. In November 2005, the deceased and the defendant Robertson were involved in a motor vehicle accident. Robertson was driving a large tractor-trailer, owned by the defendant A.M. P.M. Landclearing and Demolition Ltd., on a two-lane road and decided to pass a vehicle ahead of him. As Robertson completed the pass, the deceased turned onto the road in front of him, without having stopped at a stop sign at the intersection. The deceased's vehicle hit the truck and veered into a ditch. The deceased was thrown from the vehicle through the windshield. He subsequently died in hospital. The windows of the deceased's vehicle were icy and non-transparent, having only had a small area cleared of ice. The deceased's wife and children commenced a claim against Robertson, A.M. P.M. Landclearing and Demolition Ltd. and others under the Family Compensation Act. They claimed that the accident was caused in part by the ***negligence*** of Robertson, who was driving a vehicle owned by the company. The defendants sought the dismissal of the action against them on the basis that the accident was caused solely by the ***negligence*** of the deceased.  HELD: Action dismissed.  The accident was caused solely by the deceased. The deceased owed a duty of care to other drivers, in particular Robertson, and he breached that duty by failing to stop at the stop sign, failing to keep a proper lookout and failing to yield to Robertson's vehicle. Robertson complied with the Motor Vehicle Act as he kept a proper lookout for what was ahead of him. Although he was travelling slightly over the speed limit when the accident occurred, there was no evidence that his speed prevented him from taking reasonable evasive action and there was no time for him to sound his horn. |

**Statutes, Regulations and Rules Cited:**

Family Compensation Act, [*RSBC 1996, CHAPTER 126, s. 2*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FM1-FCK4-G051-00000-00&context=)

Motor Vehicle Act, R.S.B.C., c. 318, s. 147(1), s. 157(1), s. 159, s. 160, s. 175, s. 175(1), s. 175(2), s. 186

***Negligence*** Act, [*RSBC 1996, CHAPTER 333, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JBDT-B066-00000-00&context=)

Supreme Court Civil Rules, *B.C. Reg. 168/2009, Rule 9-7*

**Counsel**

Counsel for the plaintiffs: D.M. Mah.

Counsel for the defendants William J. Robertson and A.M. P.M. Landclearing & Demolition Ltd: A. Leoni.

**Reasons for Judgment**

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| **B. FISHER J.** |

**1**   On November 22, 2005, Peter Rackstraw was injured in a tragic motor vehicle accident. He subsequently died in hospital. His wife and children claim damages against the defendants William Robertson and A.M. P.M. Landclearing & Demolition Ltd. under the *Family Compensation Act*, *R.S.B.C. 1996, c. 126*, for ***negligence*** arising from the accident. These defendants seek a dismissal of the claim against them under Rule 9-7 of the *Supreme Court Civil Rules*, *B.C. Reg. 168/2009*. The plaintiffs have discontinued the action against the remaining defendants.

**2**  The plaintiffs do not dispute the suitability of a summary trial to determine the issue of liability for the motor vehicle accident. The essential facts are not in dispute.

**The action**

**3**  Section 2 of the *Family Compensation Act* provides:

If the death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not resulted, have entitled the party injured to maintain an action and recover damages for it, any person, partnership or corporation which would have been liable if death had not resulted is liable in an action for damages, despite the death of the person injured, and although the death has been caused under circumstances that amount in law to an indictable offence.

**4**  The plaintiffs claim that the accident was caused in part by the ***negligence*** of the defendant Robertson, who was driving a vehicle owned by the defendant company. These defendants say that the accident was caused solely by the ***negligence*** of Mr. Rackstraw.

**The evidence**

**5**  The accident occurred shortly before 7:00 am on November 22, 2005, at the intersection of Mount Lehman Road and Sunset Crescent in Abbotsford, B.C. Mount Lehman Road and Sunset Crescent meet in a T-intersection. Mount Lehman Road runs north-south and Sunset Crescent, which runs east-west, meets Mount Lehman on the west side. There are no traffic lights at the intersection. A stop sign governs the eastbound traffic on Sunset Crescent. The roads are straight and flat. Mount Lehman Road has one lane of travel in each direction, separated by a single, broken line in the vicinity of the intersection.

**6**  The speed limit on Mount Lehman Road was 60 kph[**1**](#Forward_fnref_fnr-1), except for a school zone that is south of Sunset Crescent, where the speed limit was 50 kph at the time of day the accident occurred.

**7**  Mr. Robertson was driving a large tractor-trailer, traveling north on Mount Lehman Road. He decided to pass a northbound vehicle ahead of him. He did so at the end of the school zone where the centre line was broken. As the cab of his truck was just about at Sunset Crescent, Mr. Robertson first saw the vehicle driven by Mr. Rackstraw, about a car and a half length from the stop sign on Sunset. He said that he could only see the first 20 to 25 feet of Sunset because the view is obstructed by a house and a hedge. Mr. Robertson also saw the vehicle proceed around the corner to head south on Mount Lehman, without stopping at the stop sign. At that point, he had not completed his pass and the trailer was still in the southbound lane. He felt the Rackstraw vehicle hit the driver's side front axle of the trailer. Mr. Robertson estimated that he was traveling approximately 65 kph at the time of the collision. He said in discovery that did not honk his horn because he had "no time to do anything."

**8**  Mr. Robertson pulled over and stopped his vehicle. The other northbound vehicle did the same. Mr. Rackstraw's vehicle was in a ditch on the west side of Mount Lehman Road and Mr. Rackstraw had been thrown out of the vehicle through the passenger side windshield.

**9**  Sander Ketellapper was the driver of the other northbound vehicle. He deposed that the tractor-trailer pulled into the southbound lane to pass him before he reached Sunset Crescent and was almost back into the northbound lane when it collided with the other car. He estimated that he was driving approximately 45 kph and the tractor-trailer accelerated to a speed over 60 kph when passing.

**10**  There is some inconsistency in the evidence about the weather and road conditions. Mr. Robertson deposed that the weather was clear, the roads dry and it was dark out with the temperature close to freezing. In discovery, Mr. Robertson described the condition as "early light" with good visibility. Mr. Ketellapper deposed that it was dark and foggy and the road was damp but not icy. Given the evidence that Mr. Robertson was only able to see 20 to 25 feet down Sunset and that he saw the Rackstraw vehicle as it was approaching the intersection, I do not think that much turns on whether it was foggy or clear. The accident occurred before 7:00 am in November, so it would not have been completely dark.

**11**  Police attended at the scene very shortly after the collision. Constable Leisa Shea was the principal investigating officer. She deposed that she observed the windows of the Rackstraw vehicle to be icy and non-transparent. The driver's side windshield had a 12 by 24 inch area where the ice had been scraped and there was one patch on the driver's side window, approximately 12 inches high, which had also been scraped. The passenger side window had not been scraped. It was not possible to determine the state of the passenger side windshield, as it had broken away when Mr. Rackstraw was ejected from the vehicle.

**The positions of the parties**

**12**  The plaintiffs admit that Mr. Rackstraw had a duty to stop at the stop sign on Sunset Crescent and failed to do so, and consequently he shares liability for the accident. They say that Mr. Robertson also shares liability because he was negligent in attempting to pass another vehicle in the southbound lane of Mount Lehman Road when it was not safe to do so.

**13**  These defendants say that the accident was caused solely by the ***negligence*** of Mr. Rackstraw in failing to stop at the stop sign, failing to clear the windows of his vehicle, failing to keep a proper lookout and failing to yield to through traffic on the highway that was so close as to constitute an immediate hazard.

**Legal principles**

**1. The Motor Vehicle Act - rules of the road**

1. ***Dominant and servient drivers***

**14**  Mr. Rackstraw, in approaching the intersection of Sunset Crescent and Mount Lehman Road against a stop sign, was the driver of the vehicle in the servient position and as such had the obligation to yield to vehicles travelling on Mount Lehman Road. Section 186 of the *Motor Vehicle Act*, R.S.B.C., c. 318 [the *Act*] requires a driver to stop at a marked stop line, or if there is no stop line at the point nearest the intersecting highway from which the driver has a view of approaching traffic. Section 175 requires a driver who has stopped at a stop sign to yield the right of way to traffic on the through highway:

1. If a vehicle that is about to enter a through highway has stopped in compliance with section 186,
2. the driver of the vehicle must yield the right of way to traffic that has entered the intersection on the through highway or is approaching so closely on it that it constitutes an immediate hazard, and
3. having yielded, the driver may proceed with caution.

**15**  It is only where the driver has complied with s. 175(1) that the servient position moves to a driver in the position of Mr. Robertson. Subsection (2) provides:

1. If a vehicle is entering a through highway in compliance with subsection (1), traffic approaching the intersection on the highway must yield the right of way to the entering vehicle while it is proceeding into or across the highway.

**16**  In this case, Mr. Rackstraw did not comply with s. 186 or s. 175(2), so the Robertson vehicle maintained the dominant position.

**17**  While the servient driver has the obligation to yield, the dominant driver has a duty to act so as to avoid a collision if reasonable care on his part will prevent it. In *Walker v. Brownlee*, [*[1952] 2 D.L.R. 450*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YH41-JX8W-M05P-00000-00&context=) (S.C.C.) Cartwright J. adopted the principle that the dominant driver ought not to exercise his right of way if the circumstances are such that the result of his doing so will be a collision which he reasonably should have foreseen and avoided.

**18**  Cartwright J. went on to discuss at p. 461 what the servient driver must prove in order to place any fault on the dominant driver:

... when A, the driver in the servient position, proceeds through an intersection in complete disregard of his statutory duty to yield the right-of-way and a collision results, if he seeks to cast any portion of the blame upon B, the driver having the right-of-way, A must establish that after B became aware, or by the exercise of reasonable care should have become aware, of A's disregard of the law B had in fact a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed himself; and I do not think that in such circumstances any doubts should be resolved in favour of A, whose unlawful conduct was *fons et origo mali*.

**19**  This has not been interpreted to mean that the dominant driver is required to take extraordinary steps to avoid the collision. In *Salaam v. Abramovic*, [*2010 BCCA 212*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-62YV-00000-00&context=), the court stated at para. 25:

A driver like the defendant, who is in a dominant position, will not typically be found to be liable for an accident. Drivers are generally entitled to assume that others will obey the rules of the road. Further, though defensive driving and courteous operation of motor vehicles are to be encouraged, they do not necessarily represent the standard of care for the purposes of a ***negligence*** action. A driver will not be held to have breached the standard of care simply because he or she failed to take extraordinary steps to avoid an accident or to show exceptional proficiency in the operation of a motor vehicle.

1. ***Overtaking vehicles***

**20**  Rules with respect to overtaking vehicles in circumstances similar to this case are set out in ss. 157(1), 159 and 160 of the *Act*:

157 (1) Except as provided in section 158, the driver of a vehicle overtaking another vehicle

1. must cause the vehicle to pass to the left of the other vehicle at a safe distance, and
2. must not cause or permit the vehicle to return to the right side of the highway until safely clear of the overtaken vehicle.

...

159 A driver of a vehicle must not drive to the left side of the roadway in overtaking and passing another vehicle unless the driver can do so in safety.

160 A driver of a vehicle must not drive to or on the left side of the roadway, other than on a one way highway, unless the driver has a clear view of the roadway for a safe distance, having regard for all the circumstances.

**2. Common law duty of care**

**21**  The provisions of the *Act* do not provide a complete legal framework but are to be regarded as guidelines for assessing fault in motor vehicle accident cases. In *Salaam* at para. 21, the court held:

In the end, a court must determine whether, and to what extent, each of the players in an accident met their common law duties of care to other users of the road. In making that determination, a court will be informed by the rules of the road, but those rules do not eliminate the need to consider the reasonableness of the actions of the parties. This is both because the rules of the road cannot comprehensively cover all possible scenarios, and because users of the road are expected to exercise reasonable care, even when others have failed to respect their right of way. While s. 175 of the *Motor Vehicle Act* and other rules of the road are important in determining whether the standard of care was met, they are not the exclusive measures of that standard.

**22**  More particularly, the court said this about s. 175 of the *Act*, at para. 33:

The words "immediate hazard" appear in both ss. 174 and 175 of the *Motor Vehicle Act* and are used to determine when a vehicle may lawfully enter an intersection. They determine who is the dominant driver, but do not, in themselves, define the standard of care in a ***negligence*** action.

**3. Apportionment of liability**

**23**  Finally, if I determine that the damage or loss was caused by the fault of both Mr. Rackstraw and Mr. Robertson, I must apportion liability between them. Section 1 of the ***Negligence*** *Act*, *R.S.B.C. 1996, c. 333*, provides:

1. If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.
2. Despite subsection (1), if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.
3. Nothing in this section operates to make a person liable for damage or loss to which the person's fault has not contributed.

**24**  There are a number of factors that may be considered in assessing the relative degrees of fault. These are summarized in *Cavezza Estate v. Seifred*, [*2009 BCSC 447*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S45P-00000-00&context=), aff'd [*2010 BCCA 404*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JNY7-X493-00000-00&context=). Counsel for the plaintiffs relied on these factors as a basis for establishing liability. This is not correct. In the context of apportionment, the court assesses degrees of fault, or blameworthiness. Blameworthiness is not the degree to which each party's fault has caused the loss but rather the degree to which each party is at fault.

**Findings and analysis**

**25**  Mr. Rackstraw owed a duty of care to other drivers travelling on Mount Lehman Road, in particular Mr. Robertson. He breached that duty by failing to stop at the stop sign, failing to keep a proper lookout and failing to yield to the Robertson vehicle when he entered the roadway on Mount Lehman Road. Mr. Rackstraw was the servient driver at all times.

**26**  Mr. Robertson also owed a duty of care to other drivers travelling on Mount Lehman Road when he decided to pass the vehicle in front of him and enter the southbound lane. The plaintiffs say that Robertson breached his duty by failing to ensure that he had a clear view of the roadway for a safe distance, including eastbound traffic on Sunset Crescent. With respect, I disagree.

**27**  Mr. Robertson complied with ss. 157(1), 159 and 160 of the *Act*. He had a clear view of Mount Lehman Road for a safe distance ahead before he started his pass. He did not look for traffic approaching from Sunset Crescent. The law imposes a duty on him to keep a lookout for what was ahead of him: see *Samograd v. Collison* [*(1995), 17 B.C.L.R. (3d) 51*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F2F4-G25W-00000-00&context=) (C.A.). It does not impose a duty to keep a lookout for traffic on intersecting roads; to do so would indeed be dangerous. Mr. Robertson was entitled to assume that other drivers would observe the rules of the road, particularly those in the position of Mr. Rackstraw, who was governed by a stop sign and an obligation to yield: *Salaam*; *Pacheco (Guardian ad litem) v. Robinson* [*(1993), 75 B.C.L.R. (2d) 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JG02-S1F6-00000-00&context=) (C.A.).

**28**  Mr. Robertson was at all times the dominant driver. However, in accordance with *Walker,* he had a duty to act so as to avoid a collision if reasonable care on his part would have prevented it. In order to ground any liability on Robertson, the plaintiffs have to establish that after he became aware, or should have become aware, that Rackstraw was proceeding on to the roadway without stopping, he had a sufficient opportunity to avoid the accident.

**29**  The plaintiffs point to three things: Robertson's speed, his failure to sound his horn and the size of his vehicle.

**30**  Robertson was travelling at approximately 65 kph in a 60 kph zone. The plaintiffs say that he started his pass when he was still in the school zone, where the speed limit was 50 kph at that time of day. However, the evidence does not establish precisely where the school zone stopped and the 60 kph speed limit resumed. While there is a posted 60 kph limit on Mount Lehman Road just south of Sunset Crescent, s. 147(1) of the *Act* provides:

A person driving a vehicle on a regular school day and on a highway where signs are displayed stating a speed limit of 30 km/h, or on which the numerals "30" are prominently shown, must drive at a rate of speed not exceeding 30 km/h while approaching or passing the school building and school grounds to which the signs relate, between 8 a.m. and 5 p.m., or subject to subsection (1.1), between any extended times that are stated on the signs. [Emphasis added.]

**31**  The evidence shows that Robertson began his pass when the centre line became a broken line, which appears to be after he had passed the school grounds.

**32**  In any event, the fact that Robertson was travelling over the speed limit will only constitute ***negligence*** if his speed is what prevented him from taking reasonable evasive action: see *Cooper v. Garrett*, [*2009 BCSC 35*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B0WX-00000-00&context=) at para. 42. In my view, there is no evidence which establishes that Robertson's speed prevented him from doing so. His truck was just about at the intersection when he first saw Rackstraw's vehicle, and only his trailer, or part of it, was still in the southbound lane when the impact occurred. Robertson's evidence about this was consistent with that of the only other witness, Mr. Ketellapper, who placed Robertson's truck and trailer almost back into the northbound lane when the collision occurred.

**33**  Robertson did not sound his horn. While he acknowledged that it would normally take him a second to do so, he said that he had no time to do anything. While it may have been prudent for Robertson to have sounded his horn as a warning, there is again no evidence that he had sufficient reaction time or that a warning would have made any difference. The circumstances here are quite different from those in *Pipe v. Dusome*, [*2007 BCSC 1066*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-F5KY-B1K3-00000-00&context=), and *Eccleston v. Dresen*, [*2009 BCSC 332*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3Y1-00000-00&context=), cited by the plaintiffs. In each of those cases, the defendant attempted to pass the plaintiff's vehicle when there was some uncertainty about what the plaintiff was going to do and there was no suggestion that the defendant had insufficient time to sound a warning.

**34**  The plaintiffs say that Robertson's conduct in attempting to pass on an urban, residential road in a large tractor-trailer created a serious risk of injury to Mr. Rackstraw and other motorists. They submitted that because the vehicle was much longer than a conventional one, Robertson knew or ought to have known that any pass should have been carried out only where all traffic - oncoming, eastbound and westbound - could be seen. They also submitted that in these circumstances, Robertson should have completed his pass before he reached the intersection.

**35**  I have already concluded that Robertson did not have a duty to keep a lookout for traffic on intersecting roads. I cannot accept the plaintiff's submission that Robertson created a serious risk of injury by passing another vehicle while driving a large tractor-trailer. The rules of the road apply to all vehicles. While the nature of a vehicle may have a bearing on what is reasonable conduct, in the circumstances of this case, I cannot conclude that Robertson breached his duty of care. There is no basis to find that he ought to have completed his pass before he reached Sunset Crescent.

**36**  The circumstances of this case are similar to those in *Ferguson v. All-Can Express Ltd. et al*, [*2001 BCCA 57*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JJD0-G168-00000-00&context=), where the plaintiff was in a similar position as Mr. Robertson. While the plaintiff was attempting to pass a large truck and trailer, the defendant entered the highway from a driveway on the left side of the road and turned right, into the lane in which the plaintiff was approaching. The plaintiff had no opportunity to see the other vehicle until it entered the highway and neither party was able to take any steps to avoid the collision. The trial judge found the plaintiff to be partially at fault, but this was reversed on appeal. After referring to *Walker*, McEachern, C.J.B.C. held for a unanimous court:

[23] As I see it in this case, the plaintiff was clearly in the position of the dominant driver. The defendant was the serviant driver. The plaintiff could only be found to have not used reasonable care if he should have become aware of the defendant's failure to comply with the obligation cast by law upon him and if the plaintiff had sufficient opportunity to avoid the accident of which a reasonable, careful and skilful driver would have availed himself.

[24] As I see it there was no opportunity for the plaintiff to avoid this accident. As he was engaged in a lawful manoeuvre I cannot agree with the learned trial judge, with respect, when she found an apportionment of liability should be made against the plaintiff.

[25] In my judgment this accident was caused solely by the failure of the defendant to comply with the statutory requirements and with the common law that imposed upon him an obligation not to put him in the position where an accident of this kind would be inevitable once he entered upon the highway without making sure he could do so without safety.

**37**  Similarly, it is my opinion that the accident in the case at bar was caused solely by the failure of Mr. Rackstraw to stop at the stop sign, to keep a proper lookout and to yield to the Robertson vehicle when he entered the roadway on Mount Lehman Road. When Robertson started his pass, there was no reason for him to believe that he could not do so safely or that he would interfere with the travel of another vehicle. As in *Ferguson*, he was engaged in a lawful manoeuvre. He did not see, and could not reasonably have seen, the Rackstraw vehicle until he was just about at the intersection and he had no reasonable opportunity to avoid the collision.

**38**  In these circumstances, the plaintiffs' claim in ***negligence*** against William Robertson and A.M. P.M. Landclearing & Demolition Ltd. must be dismissed, with costs to the defendants.

B. FISHER J.

[**1**](#Backward_fnref_fnr-1) This was confirmed in a video taken by one of the plaintiffs depicting the northbound route on Mount Lehman Road towards Sunset Crescent, which shows a 60 kph sign before the school zone begins. While there is no evidence as to when the video was taken, both counsel agreed that the video is an accurate depiction of the state of the roadway as of the date of the accident. There is another posted 60 kph sign just south of Sunset Crescent, which is shown in photographs.

**End of Document**

[***Rhodes v. Surrey (City), [2016] B.C.J. No. 2154***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5M13-K1S1-JKHB-6453-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

R.W. Jenkins J.

Heard: By written submissions of the Plaintiff,

March 7 and 17, 2016 and of

the Defendant, March 14, 2016.

Judgment: October 14, 2016.

Docket: S127541

Registry: New Westminster

**[2016] B.C.J. No. 2154** | 2016 BCSC 1880

Between Michele Rhodes, Plaintiff, and City of Surrey, Defendant

(20 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Trials — Jury trials — Verdicts — Application by the plaintiff Rhodes to strike a portion of a jury verdict relating to the finding that Rhodes was contributorily negligent dismissed — Rhodes was injured in a single vehicle accident — The jury found the defendant City of Surrey negligent in failing to adequately maintain roads in winter conditions — The jury found Rhodes contributorily negligent and apportioned liability at 75 per cent for Rhodes and 25 per cent for the City — Rhodes submitted that the jury's finding of contributory *negligence* was unsupportable — There was circumstantial evidence which supported the jury's finding.**

**Damages — Proceedings — Practice and procedure — Application by the plaintiff Rhodes to strike a portion of a jury verdict relating to the finding that Rhodes was contributorily negligent dismissed — Rhodes was injured in a single vehicle accident — The jury found the defendant City of Surrey negligent in failing to adequately maintain roads in winter conditions — The jury found Rhodes contributorily negligent and apportioned liability at 75 per cent for Rhodes and 25 per cent for the City — Rhodes submitted that the jury's finding of contributory *negligence* was unsupportable — There was circumstantial evidence which supported the jury's finding.**

**Tort law — Practice and procedure — Trials — Functions of judge and jury — Judge — Power to override jury's verdict — Jury — Determining contributory *negligence* — Application by the plaintiff Rhodes to strike a portion of a jury verdict relating to the finding that Rhodes was contributorily negligent dismissed — Rhodes was injured in a single vehicle accident — The jury found the defendant City of Surrey negligent in failing to adequately maintain roads in winter conditions — The jury found Rhodes contributorily negligent and apportioned liability at 75 per cent for Rhodes and 25 per cent for the City — Rhodes submitted that the jury's finding of contributory *negligence* was unsupportable — There was circumstantial evidence which supported the jury's finding.**

**Counsel**

Counsel for the Plaintiff: J.S. Stanley, B. Brooke, J. Nieuwenburg.

Counsel for the Defendant: L. Robinson, A. Ross.

**Reasons for Judgment Regarding Jury Verdict**

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| **R.W. JENKINS J.** |

**1**   The plaintiff has applied to strike a portion of a jury verdict relating to the jury's finding that the plaintiff was contributorily negligent. After 22 days of trial, the jury found the defendant, the City of Surrey, negligent in failing to adequately maintain roads in Surrey, B.C. in winter conditions, specifically ice and snow, and that the city's ***negligence*** led to the single vehicle accident in which the plaintiff was injured. The jury found the plaintiff to have been contributorily negligent and apportioned liability at 75% for the plaintiff and 25% for the City of Surrey. The jury also found that the plaintiff had failed to mitigate her loss for which the award was reduced by a further 75%.

**2**  The plaintiff submits that no evidence was put forward at trial of negligent conduct on the part of the plaintiff and therefore asserts that the jury's finding of contributory ***negligence*** is "unreasonable, unjudicial and thus unsupportable" (Plaintiff's submissions, para. 7). The defence submits that it was open for the jury to find the plaintiff contributorily negligent "in causing her alleged medical condition by finding that the problems were caused by careless and blameworthy conduct on her part" (Defendant's submissions, para.13).

**3**  It is not disputed that there was no direct evidence of what caused Ms. Rhodes' vehicle to leave the road on the day in question before impacting a gasoline pump island in a service station adjacent to the highway except for the plaintiff's testimony.

**4**  In these reasons for judgment, I will review the jury's decision, assess evidence relevant to contributory ***negligence*** and apply the law.

***The Jury Verdict***

**5**  On December 14, 2009, the plaintiff was driving to work on a cold morning in the westbound direction on 80th Ave. in Surrey. When approaching the intersection of 80th Ave. and 192nd St. which called for a four-way stop, the plaintiff applied her brakes in icy conditions and began to slide to her right, into a convenience store / gas station business, when her car eventually struck a concrete pedestal on which gasoline pumps were located.

**6**  The injuries claimed by the plaintiff were primarily psychiatric disorders including post-traumatic stress syndrome and depression. Additionally, she argued that she suffered injuries to her vestibular system and balance mechanism.

**7**  The questions for the jury were agreed upon by counsel and are set out below in their entirety, along with the jury's answers to the questions:

QUESTIONS FOR THE JURY

1. Was the defendant City of Surrey, or its employees or agents, negligent for causing the accident that occurred on December 14, 2009, and the injuries claimed by the plaintiff Michele Rhodes in this lawsuit?

Answer: Yes **X** No []

(If the answer to Question 1 is **No**, you do not need to answer the questions listed below. If the answer to Question 1 is **Yes**, proceed to answer the following questions).

1. Was the plaintiff, Michele Rhodes, negligent for causing the accident that occurred on December 14, 2009, and the injuries which she has claimed in this lawsuit?

Answer: Yes **X** No []

(If the answer to Question 2 is **No**, skip Question 3 and proceed to Question 4. If the answer to Question 2 is **Yes**, proceed to answer Question 3.)

1. If the answers to Questions 1 and Question 2 are both Yes, and you have found that both the defendant City of Surrey and the plaintiff Michele Rhodes, were both negligent, what is the percentage of fault that you apportion to each for the damages claimed by the plaintiff in the lawsuit?

Answer: Plaintiff Michele Rhodes **75%**

Defendant City of Surrey **25%**

Total **100%** (must add up to 100%)

1. Disregarding any apportionment of ***negligence*** you may have made in Question 3, at what amount do you assess the damages sustained by the Plaintiff Michele Rhodes in the following categories?
2. Non-pecuniary Loss:

Pain, injury, suffering and loss of enjoyment of life

**Total Non-pecuniary Loss** **$100,000** (A)

1. Pecuniary Loss
2. Past loss of income from

December 14, 2009 to start of trial **$305,000**

1. Future loss of income from start of trial

going forward **$1,085,000**

1. Special Damages (out of pocket Expenses) **$45,000**
2. Cost of future care **$1,955,000**
3. Ministry of Health **$36,600**
4. In-Trust Claim (for care provided by Chase Browning) **$50,000**

**TOTAL Pecuniary Loss** **$3,476,600** (B)

1. **TOTAL DAMAGES**

**Sum of A + B** **$3,576,600**

1. Did the Plaintiff Michele Rhodes take reasonable steps to mitigate her damages?

Answer: Yes [] No **X**

(If the answer to Question 5 is **Yes**, you do not

need to answer any further questions. If the answer to

Question 5 is **No**, proceed to answer Question 6.)

1. If the answer to Question 5 is No, what percentage do you reduce the damages of the Plaintiff, Michele Rhodes, for failing to take reasonable steps to mitigate his damages?

Answer: **75%**

**8**  The jury's decision resulted in an award of $223,537.50 after their findings of contributory ***negligence*** and failure to mitigate.

***The Evidence Relative to Contributory Negligence***

**9**  In this case, the only witness to the accident was the plaintiff. No other person testified seeing the incident or being in the immediate area of the accident when it occurred. Accordingly, the only direct evidence about the accident on that morning came from the plaintiff herself. Several witnesses who passed through the intersection in question at different points on the morning of the accident testified, as did one witness who approached the intersection from the east on 80th Ave. and pulled into the convenience store / gas station premises shortly after the accident and found the plaintiff at the wheel of her vehicle.

**10**  Counsel for the plaintiff has reproduced in his submissions para. 117 of my charge to the jury in which I stated:

[117] During the trial, Mr. Kerr, M. Robinson and Mr. Springman had all approached the intersection of 80th Ave. on the morning of December 14 and were able to come to a stop. Curtis Rhodes said otherwise, i.e. he slid through the intersection. There was no evidence put forward as to negligent conduct on the part of the plaintiff.

The closing sentence of the above paragraph reflected the fact that no other person, besides the plaintiff, could testify about seeing the accident or the plaintiff's driving. The defence made reference in their written submissions to the following paragraphs from the jury charge which relate to contributory ***negligence***:

[118] You may find that the ***negligence*** of Surrey and the ***negligence*** of Ms. Rhodes contributed equally to Ms. Rhodes' injuries, or you may find that you cannot decide how to divide the blame. In that case you would find them each 50% to blame. Liability will then be divided equally between them.

[119] On the other hand, you may find Surrey, say 75% to blame and Ms. Rhodes 25% to blame, or conversely, you may find Ms. Rhodes, say, 60% to blame and Surrey 40% to blame, or any other combination that adds up to 100%...

[120] You may find the blame in any degree you see fit. It will be for you to decide what the degrees of fault, if any, are on the part of Surrey and on the part of Ms. Rhodes. If you conclude that both Ms. Rhodes and Surrey contributed to Ms. Rhodes' injuries, but you cannot decide how to divide the blame, you should find them each 50% to blame.

**11**  In the charge to the jury in which I summarized the evidence relating to the accident at paras. 89 and 90, I stated, *inter alia*:

[89] ...She stated that conditions in Langley, ie. heading west up to 196 St. were black and bare but worsened once she crossed over the border at 196 St. where she recalled she did not "feel traction" with her car, it was "slippery, there was glistening on the road".

[90] She continued to state that her speed approaching the intersection at 192 St. was between 25-35 km/h and she did not feel safe, "could not feel traction". She knew she would have to brake at 192 St. and did so, applied the brakes "once", lost control, and spun towards the gas pumps. She testified she saw the gas pumps coming closer and with the impact thought her car hit the pumps. The impact was behind the driver's door, she had slid sideways.

**12**  Other evidence referred to in the charge to the jury, under the heading "Summary of Evidence on the Issue of Liability" and sub-heading of "Liability Witnesses" included testimony from witnesses and experts:

Jill Robinson

[67] Jill Robinson was a witness for the plaintiff and was the first person to come across the plaintiff after the accident. Ms. Robinson had driven westward down 80th Ave. shortly after 7 a.m. on December 14, 2009 and had turned into the Mountain View Market. She described road conditions on the roads she first travelled that morning, i.e. 88 Ave. as "fairly clear, slippery in spots" and 200 St. [which is in Langley] as "clear". She described the conditions on 80th Ave. to be "icy" and "slippery", with no snow and that she had managed to slow down and turn into the Mountain View Market lot "without sliding".

Doran Springman

[70] On the morning of December 14 Mr. Springman travelled from Abbotsford west on Highway #1, south on 200 St. in Langley and then onto 80th Ave. westbound on his way to work. He approached the intersection of 80th Ave. and 192 St. at 5:45 a.m., ie. shortly before the plaintiff arrived at that intersection. He testified that 80th Ave. was "icy" in a very treed area and then opens up towards 192 St. He testified he was able to stop "but it was slippery" and "did not lose control".

Tim Leggett

[81] In his direct examination Mr. Leggett [an accident reconstruction engineer with a specialty in winter road maintenance issues and expert for the plaintiff] testified that he was not able to calculate the speed at which the plaintiff's vehicle was travelling due to no physical evidence being available which would have been measurements, photos. However, he stated that the vehicle had not been travelling at high speed and guesstimated that it was travelling at 20 km/h, later estimating an "initial speed" of 35 km/h

Curtis Rhodes

[97] ...He testified that 80th Ave. was "bare and wet" from 200 St. to 196 St., the border with Surrey and that thereafter on 80 Ave. there was "snow and ice on the road" before 192 St. He stated he went through the intersection at 80 Ave. and 192 St., it was "very slippery, I touched the brakes and slid through the intersection while going 10 to 20 km/h.

Raymond Kerr

[112] On Monday, December 14 he drove through the intersection of 192 St. and 80 Ave. and there were no issues as he approached 192 St. westbound on 80 Avenue.

**13**  Each of the above witnesses testified and the jury was able to assess their credibility. The plaintiff testified for several days, and was questioned in both direct and cross-examination on all issues, including liability, the injuries she suffered in the accident, treatment and efforts to mitigate her loss. The jury was instructed to and presumably did consider all of the plaintiff's evidence when assessing her credibility. The jury came to a decision on contributory ***negligence***. We will never know precisely what the jury considered before concluding that the plaintiff was negligent.

***Applicable Law***

**14**  In her submissions, the plaintiff set out the following quotation from *C.N.R. v. Lancia,* [*[1949] S.C.R. 177*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-FBV7-B0BV-00000-00&context=), [*[1949] 1 D.L.R. 737*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-FBV7-B0BV-00000-00&context=), in which Kellock J. described the obligation on an instructing judge as follows at pp. 191-192:

It is of course clear that while it is for the jury to find the facts it is the function of the court to determine whether or not there is any evidence to support the findings and also to decide whether any particular answer is in law a finding of fault or ***negligence***.

**15**  The plaintiff also referred to the decision of my colleague, Abrioux J. in *Maras v. Seemore Entertainment Ltd.,* [*2014 BCSC 1121*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B0YC-00000-00&context=) at para. 11, [*[2014] B.C.J. No. 1260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B0YC-00000-00&context=) [*Maras*] which is most helpful on the issue as to what questions ought properly be left to the jury:

[11] Insofar as contributory ***negligence*** and provocation are concerned, I have considered counsel's submissions within the context of the following principles:

1. my task is to determine whether there is any evidence on which the jury, properly instructed and acting reasonably, could find for the plaintiff as against the defendants on the issues in question;
2. if there is direct evidence on an issue, I am not to weigh the evidence, but only to consider whether it meets the threshold of reasonableness such that the jury, properly instructed, could make the requisite finding;
3. in the case of elements of a cause of action supported solely by circumstantial evidence, I should engage in a limited weighing of the evidence to ensure that it is reasonably capable of bridging the inferential gap between the evidence proffered and the element to be proved;
4. the judge does not decide whether the jury will accept the evidence, but rather whether the inference that the party seeks in its favour could be drawn from the evidence adduced, if the jury chose to accept it;
5. it is for the judge to determine whether there is some evidence on each element of the cause of action required to be proved by the party; it is for the jury to determine whether that evidence is sufficient to justify a verdict for the party on that issue;
6. "mere speculation" does not constitute evidence which meets the standard of reasonableness; and
7. the test in terms of the threshold is a low one.

**16**  The plaintiff also responded to the submissions of the defence by stating that the defence conceded there was no evidence that the plaintiff was negligent in the operation of her vehicle and points to the statement in para. 117 of the charge to the jury that "...there was no evidence put forward as to negligent conduct on the part of the plaintiff". That quotation in the charge followed references to others who had traversed the intersection at about the same time as the plaintiff and were able to do so safely, with the exception of her husband at the time, who testified to sliding through the intersection. None of the other witnesses were able to testify about the plaintiff's driving because they did not witness the accident, hence, there was no direct evidence of the plaintiff's ***negligence***. There was some evidence of others being able to traverse the intersection without difficulty which, is, as contemplated in para. 11(e) of the *Maras* decision, some evidence on which the jury could rely.

**17**  The plaintiff continued in her Reply Submissions that:

1. The fact that others were not in a collision cannot in and of itself lead to a conclusion that the plaintiff herself acted negligently. The defendant seeks to support the jury's verdict by arguing it was free to decide the case on the basis of *res ipsa loquitur* logic. That principle was discarded in *Fontaine v. British Columbia (Official Administrator),* [*[1998] 1 SCR 424*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M3WJ-00000-00&context=) [*Fontaine*].

It is correct to say that in *Fontaine*, the Supreme Court of Canada discarded *res ipsa loquitur* as a doctrine of law and construed it as nothing more than "an attempt to deal with circumstantial evidence". I quote Major J. at paras. 26 and 27 of *Fontaine*:

[26] Whatever value *res ipsa loquitur* may have once provided is gone, Various attempts to apply the so-called doctrine have been more confusing than helpful. Its use has been restricted to cases where the facts permitted an inference of ***negligence*** and there was no other reasonable explanation for the accident. Given its limited use it is somewhat meaningless to refer to that use as a doctrine of law.

[27] It would appear that the law would be better served if the maxim was treated as expired and no longer used as a separate component in ***negligence*** actions. After all, it was nothing more than an attempt to deal with circumstantial evidence. That evidence is more sensibly dealt with by the trier of fact, who 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. Once the plaintiff has done so, the defendant must present evidence negating that of the plaintiff or necessarily the plaintiff will succeed.

**18**  In applying the principles above in *Fontaine*, Major J. continued, at para. 28:

*C. Application to this case*

[28] In this appeal, the trial judge had to consider whether there was direct evidence from which the cause of the accident could be determined, or, failing that, whether there was circumstantial evidence from which it could be inferred that the accident was caused by ***negligence*** attributable to Loewen.

**19**  At trial, the burden was on the defence to prove Ms. Rhodes' contributory ***negligence***. In assessing the evidence, the jury had Ms. Rhodes' testimony as well as that of those persons referred to above who travelled through or near the intersection at about the same time on the day in question. Ms. Rhodes' evidence was the only direct evidence as to her driving. The other evidence before the jury, all of which was circumstantial, was that of the other drivers and the expert witness, Mr. Leggett. The jury was free to accept or reject the evidence of those witnesses, including Ms. Rhodes' evidence, and I can only assume they did assess that evidence. Also, as stated by Justice Abrioux, "the test in terms of threshold is a low one" and cannot be based on mere speculation. There was circumstantial evidence which supported the jury's finding on contributory ***negligence***.

**20**  I conclude that the verdict of the jury is to be entered as a judgment of the Court, subject to the rights of the parties to make further submissions on the issues related to tax gross-up, management fees, deductibility of collateral benefits and costs all as reserved for decision by the trial judge as agreed by the parties.

R.W. JENKINS J.

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[***R. v. Collins, [2006] B.C.J. No. 2715***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JX3N-B1V7-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Kamloops, British Columbia

Powers J.

Heard: September 18 - 22, 2006.

Judgment: October 18, 2006.

Kamloops Registry No. 76265

**[2006] B.C.J. No. 2715** | 2006 BCSC 1531 | 42 C.R. (6th) 321 | 71 W.C.B. (2d) 947 | 2006 CarswellBC 2530

Between Regina, and Richard Steven Collins and James Wade French

(103 paras.)

**Case Summary**

**Criminal law — Offences — Offences against person and reputation — Criminal *negligence* — Causing death — Accused acquitted of criminal *negligence* causing death — Accused drank with woman who was beaten earlier in day — Accused took woman to apartment, laid her on floor where she subsequently died — Evidence did not establish action by accused changed outcome, where woman sustained injuries significantly earlier and suffered blood loss prior to coming under charge of accused — Criminal Code, ss. 215, 219, 222(5), 236(b).**

**Criminal law — Evidence — Burden and standard of proof — Standard of proof — Beyond a reasonable doubt — For criminal *negligence* causing death, Crown required to prove beyond reasonable doubt actions or inactions of accused were significant contributing factor to death — Accused acquitted where they drank with woman who was beaten earlier in day, took woman to apartment, laid her on floor where she subsequently died — Evidence did not establish action by accused changed outcome, where woman sustained injuries significantly earlier and suffered blood loss prior to coming under charge of accused.**

|  |
| --- |
| Trial of Collins and French on charges of manslaughter -- Pete brutally beaten in afternoon, receiving 25 blows to head -- Pete subsequently went drinking with Collins and French in dark alcove of school building -- Collins and French took Pete by taxi to French's apartment at 10:00 p.m., laid her on apartment floor and continued to drink -- Pete died from head injuries during night -- Time of death approximated by pathologist to be between 2:00 and 4:00 a.m. -- Crown alleged actions by accused amounted to criminal ***negligence*** -- Taxi driver testified he was called to drive parties to French's apartment, but refused because accused were too drunk and Pete was passed out -- French gave police statement he only saw blood on Pete after calling for taxi, as he did not see her in light prior to that -- Second taxi driver took parties to French's apartment, testified accused were drunk and Pete was passed out with blood on her -- Taxi driver did not think Pete was in imminent danger of death, testified she was in no worse shape than others that had been in his taxi on prior occasions -- Manager of nearby pizza store would have called 911 for Pete, seeing her lying in school ground, but did not because accused took her into taxi -- No evidence showed Pete able to move under her own power by 10:00 p.m. -- Collins and French confirmed they took Pete to French's apartment -- Blood found in entranceway, stairway to apartment, and on carpet and baseboards -- Body located laying face down in hallway of apartment -- French claimed body left in hallway so Pete would see washroom when she woke up -- Collins reported Pete's death at Friendship Centre following morning -- While waiting for RCMP to arrive, Collins stated he and French took Pete in to try to repair her injuries -- French did not awake when officers entered apartment with Collins to check on Pete -- Both accused conceded Pete was under their charge, unable to provide necessaries of life for herself and unable to withdraw from their charge -- French admitted Pete's ear was almost ripped off -- Medical evidence showed Pete's injuries were treatable, and that Pete would have survived if treated promptly -- Injuries would have impaired Pete's mental state -- Face-down position of body may have interfered with breathing -- Amount of alcohol in Pete's system increased her chances of death -- Injuries may have accounted of death without consequent blood loss -- HELD: Both Collins and French acquitted -- French's failure to obtain medical attention for Pete was marked departure from standard expected of reasonable person -- Subjective circumstances of extreme intoxication not answer to charge -- Crown not required to prove exact cause of Pete's death, but required to prove beyond reasonable doubt actions or inactions of accused were significant contributing factor to death -- Considering amount of blood loss at school, prior to 10:00 p.m., and length of time that already passed from time Pete was injured, judge could not conclude action by accused made any difference to Pete's outcome. |

**Statutes, Regulations and Rules Cited:**

Canadian Charter of Rights and Freedoms, 1982

Criminal Code, [*R.S.C. 1985, c. C-46, s. 215*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5X64-9NV1-DXWW-20G8-00000-00&context=)(1), s. 219(1), s. 219(2), s. 222(5), s. 236(b)

**Counsel**

Counsel for the Crown: I.A. Currie

Counsel for Richard Steven Collins: R.A. Bruneau

Counsel for James Wade French: D.G. Campbell

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| **POWERS J.** |

***INTRODUCTION***

**1**  Ms. Thelma Pete was brutally beaten in the late afternoon or early evening of December 2, 2004. She received approximately twenty-five blows to the head. Subsequently, she was in the company of the accused, Collins and French, in a darkened entrance to an abandoned school building. They consumed alcohol at this location. Collins and French, at approximately 10:00 p.m., took Ms. Pete by taxi to an apartment occupied by French. They laid her on the floor of that apartment and continued to drink. She died from her injuries sometime during the night.

**2**  Collins and French are charged with manslaughter. The Crown does not allege that they had anything to do with her beating. The Crown does allege that they are guilty of manslaughter because their actions amounted to criminal ***negligence***. The Crown relies on s. 222(5) of the ***Criminal Code***, R.S.C. 1985, c. 46 (the **"*Code*"**):

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | **222.**(5) |  | A person commits culpable homicide when he causes the death of a human being, |  |

...

(*b*) by criminal ***negligence***;

**3**  A person who commits manslaughter is liable to imprisonment for life (s. 236(b) of the ***Code***).

**4**  Criminal ***negligence*** is an offence defined by s. 219(1) of the ***Code*** which provides:

**219.**(1) Every one is criminally negligent who

(*a*) in doing anything, or

1. in omitting to do anything that it is his duty to do,

shows wanton or reckless disregard for the lives or safety of other persons.

1. For the purposes of this section, "duty" means a duty imposed by law.

**5**  The Crown argues, that in the circumstances, moving Ms. Pete to the apartment after they were aware she was injured, was criminally negligent because it prevented anyone from finding and assisting her.

**6**  The Crown also refers to s. 215(1) of the ***Code*** which provides:

**215.**(1) Every one is under a legal duty

...

1. to provide necessaries of life to a person under his charge if that person

...

1. is unable, by reason of detention, age, illness, mental disorder or other cause, to withdraw himself from that charge, and
2. is unable to provide himself with necessaries of life.

**7**  The Crown argues that when Collins and French physically moved Ms. Pete in circumstances where she was unable to provide for herself that she was under their charge. She was unable by reason of her injuries to remove herself from their charge or provide herself with the necessaries of life, in particular, medical attention. The Crown argues that they failed to provide these necessaries and therefore failed to meet that duty imposed by law.

**8**  Collins and French do not argue with the Crown's proposition that manslaughter can be committed in this manner. They agree with the Crown that when they placed her in the taxi cab in a semi-conscious condition and took her to French's apartment that she was under their charge. They concede she was unable to remove herself from their charge due to her injuries or to provide herself with the necessaries of life, including medical treatment.

**9**  Collins and French, however, argue that even if their actions or omissions were criminally negligent, the Crown has failed to prove beyond a reasonable doubt that they caused the death of Ms. Pete. French also argues that in all of the circumstances, his actions were reasonable and did not amount to criminal ***negligence*** in the sense of being a wanton or reckless disregard for the life or safety of Ms. Pete, or a marked departure from the standard which could be expected of a reasonably prudent person in the circumstances.

***THE EVIDENCE***

**10**  I heard evidence from a number of witnesses. Exhibit 1 is admissions made by both Collins and French. Exhibit 2 is an admission made by French. Exhibit 2 is a DVD and a transcript of a statement made by French to an R.C.M.P. officer on December 5, 2004. That statement is admitted to be voluntary and admissible against Mr. French. I keep in mind that it is not admissible against Collins. Collins did make statements to two workers at the Interior Friendship Centre on the morning of December 3, and those statements are admissible. Collins also made statements to an R.C.M.P. officer on the morning of December 3. A *voir dire* was held to determine the voluntariness and admissibility of those statements. They were admitted to be voluntary by Mr. Collins and he acknowledged that there were no ***Charter*** issues raised with regard to those statements. The evidence in the *voir dire* became evidence in the trial. I keep in mind that the statements made by Collins are not evidence against French.

**11**  Ms. Pete was approximately 43 years of age when she died. She was seen on December 2, 2004 shortly before 4:30 p.m. by a friend, Tom Lee. She told him that she was going to drink. He saw her shortly after in the company of two men, not Collins or French. He recognized one of the men as one of her drinking buddies. Mr. Lee confirmed that she "could hold her own very good", meaning she could function well with a high level of alcohol.

**12**  Collins met Ms. Pete at the entrance to the old school between 6:00 and 6:30 p.m. He knew her but did not know her name. They were there when French came by looking for Collins, one of his drinking friends. French got some sherry at the nearby liquor store at approximately 6:36 p.m. and returned. It was dark in the entrance. They drank there because it was dark and they were not visible from the street to people passing by or the police. It was one of their common drinking areas. Collins and Pete appeared to be asleep when French returned. Pete had her head near Collins knees. Collins got up and had a drink with French. Pete got up and French offered her a drink, which she had before lying down again.

**13**  It was a cold evening and at approximately 9:45 to 10:00 p.m., French decided to go to his apartment. According to his statement, he offered to allow Collins and Ms. Pete to come with him. Collins and French began trying to move Ms. Pete from the entrance of the school in the direction of the apartment but she was too heavy to carry. French, by his statement, decided to call a taxi and left to do so. He returned with the taxi and by then Collins and Ms. Pete were away from the school building and into an area that had some light. The taxi driver's evidence is that he got a call to go to Extra Foods. He picked up a "native guy" (French is Aboriginal). He was told to go across the street to pick up two other buddies and they drove across the street to a flower shop. The driver saw a lady and a "black guy" (Collins is black) sitting on the side of the parking lot. They were approximately thirty to forty feet away from him. The first man got out of the cab and said a number of times "let's go", but the lady did not get up and the taxi driver does not remember if she moved. He concluded that she was really drunk and he was concerned that if she was drunk that she may get sick in the cab. He decided that he would not take them because they were too drunk. His evidence was that the two fellows were also very drunk. He told them that they were too drunk and if they wanted, he would call an ambulance, but the first man said "No, don't worry about it".

**14**  French in his statement to the police said that when he got back from telephoning the first taxi that he saw Ms. Pete in the light and that was when he saw all the blood on her. He said that he told Collins that the taxi would not take her covered in blood, but they tried anyway. In his statement, French said that he could not see the blood on Pete and Collins when they were in the entrance to the old school. It is dark there and that is why they drink there. French called a second cab.

**15**  The driver of the second cab gave evidence that he picked up a native person at the Extra Foods. This was close to 10:00 p.m. He was told to cross the street to pick up his buddy, that a black guy came out and that there was a lady lying on the side of the parking lot. The native person and the black guy started to pick her up. He was concerned that she was drunk and might get sick in the cab. He told them if she did, they would have to pay extra. He did not see much of the lady because there was a coat lying over her hair when she was lying down. The two men placed her in the cab and said that they would take care of her and that he should not worry about it. He believed the black guy said something about her bleeding and asked what happened and there was no response. He drove to an apartment building and the two removed her from the vehicle. This was a four or five minute trip. The native fellow told him that he could go now, that they would take care of her. The driver said that when they removed her from the taxi the coat came off her head and he could see blood on her cheek and her mouth and she moaned. He asked if she was drunk and he was told not to worry about it.

**16**  The taxi driver said that it was not unusual in that area to pick up people who were drunk and were injured, or had blood on them. He said there was no more blood than he was used to seeing. He had no concerns that she might die if she were not taken to the hospital. He said later on he noticed a small blood stain on the seat.

**17**  The statements of Collins and French confirm that they did take Ms. Pete to French's apartment. There were blood smears in the entrance way to French's apartment, on the floor, and the wall of the stairway. Blood was found on the carpet in the living room and on some baseboards. Ms. Pete's body was found laying face down in a hallway. She lost a sufficient amount of blood from her head injuries that the blood pooled and was smeared. It was smeared either by her moving or someone moving her.

**18**  The blood stain pattern expert gave evidence about the amounts of blood found at the entrance to the old school and along the wall towards the parking area. He described some of what he found as smears or swipes and some hair transfers in which blood on a person's scalp had left an impression on a surface.

**19**  French's statement to the police took approximately two hours. Exhibit 2 is part of the admission and contains a transcript of that statement; exhibit B to exhibit 2. Exhibit A is a DVD of that statement. The DVD was played in court and the transcript appears to be accurate. The admission is that it is sufficiently accurate as to be of assistance in following the statement. French confirms that he invited Collins back to the apartment because he knew that Collins slept outside and that it was cold. They had consumed a bottle of sherry outside and French had another bottle that he was going to take home and drink.

**20**  French confirms that they carried Ms. Pete into the apartment. She was left at the bottom of the stairs while he changed his clothes, and that she was then carried up the stairs. French's statement is that she was placed on the floor in the living room on her side. He said she was moving her arms and legs and was moaning, and that he thought she was smearing blood onto the carpet. He told Collins that they would have to move her down the hall. They placed her in the hallway by the bathroom. French said that they did this so that she would see the bathroom when she woke up. They placed her on her side because they thought it would be better for her breathing than being on her back.

**21**  French was asked how bad she was bleeding and he said it did not look that bad until he saw the floor; that was when he woke up in the early morning hours. He said there was not a puddle of blood there until he woke up, and that the night before it seemed like she was just smearing the blood off her clothing.

**22**  French had continued to drink when they returned to the apartment. French said when he saw Ms. Pete at approximately 4:30 a.m., he did not think she was breathing. He woke Collins up who confirmed that she was not breathing. French said he then told Collins to go and call the police because she was his friend and his responsibility. He said the most blood he saw was the puddle when he woke up and found her and that the rest were just smears. French told the officer that she had been in the living room between five and fifteen minutes at the most, and that she was moving around and getting blood on the carpet. He confirms that she was moaning and groaning while she was moving. He said approximately fifteen minutes or so after they moved her that he went to sleep. He did say that he asked Collins if she needed an ambulance. This was before they fell asleep. He also said that he did not think she was going to die; that he thought she was just bleeding a little. He said that he had been hit in the head with a wine bottle before and he had bled quite a lot and he did not die. He did see her ear and he said it looked like it was ripped off, but that was the only injury which he saw on her.

**23**  Collins attended at the Interior Friendship Centre sometime after 8:30 on the morning of December 3 and asked the woman at the desk to call the R.C.M.P. because he knew where a deceased body was. He appeared nervous, scared and traumatized. She said that he appeared upset, shaking and that his voice was shaky. She knew Mr. Collins because he had attended at the Friendship Centre on other occasions and usually he was very calm and polite.

**24**  Collins also spoke to Barry James, another worker at the Friendship Centre while he waited for the R.C.M.P. to arrive. Mr. James remembers asking Mr. Collins how things were going and Mr. Collins said things were not looking too good; somebody had died and he was somehow involved. He said that "Someone died, we have to call the police". He had been drinking with his friend and they had taken somebody to the friend's apartment from the old school. They had done this because she was beaten badly and they wanted to help her. He told Mr. James that they were taking her to the apartment to try and repair her.

**25**  Mr. Collins had tears on his face, he was shaky and visibly upset. He had blood on the front of his sweater, pants and shoes. Collins said that it did not look good for him, but the blood on him was from trying to help the lady. Collins told Mr. James that when he woke up the woman was dead. He wanted to handle this. He appeared a little woozy and said that he had been drinking. James said that Collins appeared to be suffering from the effects of alcohol.

**26**  Collins waited, and when the police arrived, told Constable Pelley that they had been drinking with a girl who had been beaten up, that they had called a cab, and that she is dead now. Then he said that she might still be alive and that he would take the police officer to the apartment where she was. Constable Pelley described Collins as being shaky and nervous, that he had blood on his sweater and was wearing dark, nylon pants. Collins was detained and remained in the police car while Constable Pelley and another officer entered the apartment. They found Ms. Pete lying on the floor in a hallway at the top of the stairs. They found French laying asleep on a foamy in the living room. French did not awake when the officer yelled at him that the police were there, and to show his hands. He did not awake until Constable Pelley handcuffed him. Constable Pelley described French as a bit groggy and having unstable balance, and an odour of liquor.

**27**  Constable Tremblay, who attended with Constable Pelley, also confirmed that French appeared groggy. She also noted some blood on the top of his left ear and on his hairline. She detected an odour of liquor and that he was very groggy in response to her questioning, and groggy in the police vehicle. She said this was consistent with being intoxicated or being very intoxicated the night before.

***FINDINGS OF FACT***

**28**  It is clear that Ms. Pete was struck approximately twenty-five times on the head with a blunt object, and that this occurred sometime after 4:30 p.m., and shortly before 6:00 p.m. on December 2, 2004.

**29**  Collins met her sometime between 6:00 and 6:30 p.m. French was in their company after approximately 6:30 p.m., when he purchased the sherry at the liquor store. It was dark in the alcove and French was not aware that Ms. Pete was injured until shortly before 10:00 p.m., when she was moved out into the lit parking area. The manager of a pizza store was going to call 911 because someone had told him a person was lying in the school ground. The manager did not call 911 when he saw the people leaving in the taxi cab. Ms. Pete would have received medical assistance at approximately 10:00 p.m. had she not been moved to the apartment by French and Collins. It is unlikely she would have been discovered until the next day if she had been left in the stairwell by the school. It was a cold night.

**30**  Ms. Pete was incapacitated and unconscious at least for some time at the school, and certainly later when she was moved to the apartment. There is no evidence that she was able to go anywhere under her own power. It is not particularly clear whether Collins knew that Ms. Pete had been beaten when he first met her, or only when she was moved out into the light. His statement is that they were drinking with a woman who had been beaten, but it does not confirm when he first learned that she was beaten. Ms. Pete was conscious at the school long enough to have a couple of drinks, but was either sleeping or unconscious the balance of the time. Although she may have been making some noises and moving her arms and legs, she did not regain consciousness again. There is evidence of her DNA on a green wine bottle at the apartment. It did indicate that Ms. Pete had consumed wine from that bottle. This would have occurred at the school. The autopsy revealed that Ms. Pete had 200 milligrams of alcohol per 100 millilitres of blood in her system. Collins and French had also been consuming alcohol; perhaps as much as a bottle of sherry each.

**31**  The blood which was pooled around Ms. Pete's head would have accumulated while she was still alive. Blood loss after death is negligible.

**32**  The time of death can only be fixed by an approximation. The pathologist, Dr. Stephen, attended at 2:45 p.m. - 3:00 p.m. on December 3, 2004. He estimated her time of death at 2:00 a.m. (thirteen hours earlier), but said it could vary approximately twenty to twenty-five percent in either direction. Therefore, it could have been as early as midnight or as late as 4:00 a.m. The range could potentially have been greater. The science is not exact and it is simply the best approximation he can give.

***THE ESSENTIAL INGREDIENTS OF THE OFFENCE***

**33**  There is no issue with regard to identity, time or place. Collins and French both concede that Ms. Pete was a person under their charge unable by reason of her injuries to withdraw herself from that charge, and unable to provide necessaries of life for herself. The necessaries of life in this case would be medical treatment. They concede that they failed in the legal duty in this instance.

**34**  French argues that in all of the circumstances, however, the Crown has not proven that he had a wanton or reckless disregard for the life or safety of Ms. Pete. He denies that he was criminally negligent. The circumstances French refers to are that of people used to drinking on the streets and becoming involved in altercations and sustaining some form of injury. He argues all of the circumstances must be considered in determining whether or not there was any foreseeable risk of harm to Ms. Pete if she was not provided with medical attention. French also relies on the evidence of the taxi driver who said that Ms. Pete did not look any different to him than other people who had been intoxicated and in fights. The taxi driver also said it did not appear to him that she required immediate medical attention, or that she might die if she did not receive it.

**35**  The Crown responds and relies on ***R. v. Creighton*** [*(1993), 83 C.C.C. (3d) 346*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M392-00000-00&context=). The accused had injected a companion with cocaine and the companion died. The accused was convicted of manslaughter on the basis of the unlawful act of trafficking or through criminal ***negligence***.

**36**  The Supreme Court of Canada confirmed that there must be objective foreseeability of bodily harm, but not death. The court also said that the principle that the morally innocent not be convicted does not require consideration of the personal factors in applying the objective test, except as they may establish an incapacity to appreciate the risk. The court said there was a minimum uniform standard of care on all persons engaged in an activity regardless of their background, education or psychological disposition. The court did say that the nature of the activity in the circumstances surrounding the accused's failure to take the requisite care were factors to be considered. The question is what a reasonably prudent person would have done in all of the circumstances.

**37**  French referred to ***R. v. DeSousa***, [*[1992] 2 S.C.R. 944*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-6089-00000-00&context=). The offence was unlawfully causing bodily harm. The court found that the meaning of "unlawful" in that context required that it be at least objectively dangerous. The harm must be more than merely trivial or transitory. In interpreting what constitutes an objectively dangerous act, the court should strive to avoid attaching penal sanctions to mere inadvertence. (paragraph 28).

**38**  The offence of criminal ***negligence*** requires, by the terms of the section itself, wanton or reckless behaviour. This would be more than mere inadvertence.

**39**  French also referred to ***R. v. Tutton***, [*[1989] 1 S.C.R. 1392*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-650G-00000-00&context=). The charge was criminal ***negligence*** arising from a failure of parents to provide medical care, or act on medical advice, regarding their diabetic son. Their defence was an honest but mistaken belief that he had been healed by a faith healer. The court pointed out that an objective test is applied to criminal ***negligence***, but not in a vacuum. The framework in which events and actions occur must be considered as well as the accused's perception of those facts. The accused's conduct or view of his perception of facts must be reasonable.

**40**  The majority decision in ***Creighton***, however, makes it clear that objective foreseeability of the risk of bodily harm that is neither trivial nor transitory in the context of the act is the test, not a subjective foreseeability test. The test for criminal fault is a marked departure from the standard of a reasonable person. Manslaughter predicated on criminal ***negligence*** does not require foreseeability of death. (paragraph 74). Madam Justice McLachlin, in the majority decision, confirmed that the standard in criminal ***negligence*** was an objective one. The mental fault lies:

... in failure to direct the mind to a risk which the reasonable person would have appreciated. Objective mens rea is not concerned with what was actually in the accused's mind, but with what should have been there, had the accused proceeded reasonably. (paragraph 111)

**41**  Behaviour must also be:

... a "marked departure" from the standard of the reasonable person. (paragraph 114)

**42**  All of the circumstances are to be considered, but the personal traits of the accused, short of incapacity, are not considered.

**43**  The court in ***Creighton*** did confirm the comments in ***Tutton*** that the legal duty is:

... particularized in application by the nature of the activity and the circumstances surrounding the accused's failure to take the requisite care. (paragraph 138)

**44**  The circumstances in this case are that all three individuals were drinking in an area where it was common for people to be consuming alcohol on the street, and being injured as a result of altercations or simple accidents contributed to by the consumption of alcohol. I accept that Collins and French moved Ms. Pete from the entrance of the school to get her out of the cold, and placed her on her side on the floor so that she would not choke. However, a reasonable person, even in those circumstances, would have recognized that Ms. Pete should have medical attention. This is particularly so given the evidence that her ear was torn, or in French's words "almost ripped off." In addition, the blood from her hair that got on the walls as they moved her into the residence should have alerted him to the fact that she needed some attention. According to his statement, he did turn his mind to this when he asked Collins if she needed an ambulance or medical attention, and he said she would be alright. He may have proceeded on the basis that Collins was responsible for her, but in fact, they were both responsible for her. It should have been apparent to him that she was in need of attention. His failure to obtain medical attention for her was, in my opinion, a marked departure from the standard that would be expected of a reasonable person and amounts to wantonness.

**45**  French and Collins may not have sought assistance for Ms. Pete in part due to their intoxication, or simply their lifestyle and experience. It may not be unusual in their experience for people to be extremely intoxicated or injured resulting in bleeding and then simply sleeping it off. However, these subjective circumstances are not an answer to a charge of criminal ***negligence***.

***CAUSATION***

**46**  The real issue in this case is causation.

**47**  Collins and French argue that the Crown has failed to prove beyond a reasonable doubt that the actions of the defendants caused the death of Ms. Pete in fact or in the legal sense. The defence argues that the Crown must prove beyond a reasonable doubt that Ms. Pete would have lived but for the actions of the defendants.

**48**  The Crown argues that all the Crown must prove is that the actions of the defendants were a significant contributing factor in the death of Ms. Pete.

***THE LAW***

**49**  The Crown referred to two Supreme Court of Canada decisions on the issue of causation. The first, ***Smithers v. The Queen***, [*34 C.C.C. (2d) 427*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-24XG-00000-00&context=). In ***Smithers***, the accused kicked the deceased in the stomach. The deceased died several minutes later. The deceased died from asphyxia resulting from aspiration of his own vomit due to the malfunction of his epiglottis at the critical time. The vomiting was probably caused by the kick, but could also have been as a result of panic or fear. The issue was whether the Crown must prove that the kick caused the vomiting. The court held that the jury could consider the expert medical evidence as well as the lay evidence in determining whether the vomiting and aspiration was caused by the kick, rather than panic or fear. Causation was a question of fact for the jury and not the experts, and the jury could consider all of the evidence. The court held the Crown was only obliged to prove that the kick was a significant contributing cause, more than a trivial cause.

**50**  The court noted that the doctors were not inclined to speak in absolute terms. One of the doctors said it was very possible or very probable that the kick caused the vomiting, that it is a rare condition, but the kick would have made it more likely to aspirate. One doctor said that fear itself could cause vomiting and that the kick combined with that simply would have a greater affect.

**51**  The court said at p. 7-8 (Quicklaw):

It is important in considering the issue of causation in homicide to distinguish between causation as a question of fact and causation as a question of law. The factual determination is whether A caused B. The answer to the factual question can only come from the evidence of witnesses. It has nothing to do with intention, foresight or risk. In certain types of homicide jurors need little help from medical experts. Thus, if D shoots P or stabs him and death follows within moments, there being no intervening cause, jurors would have little difficulty in resolving the issue of causality from their own experience and knowledge.

Expert evidence is admissible, of course, to establish factual cause. The work of expert witnesses in an issue of this sort, as Granville Williams has pointed out ("Causation in Homicide", [1957] Crim. L.R. 429 at p. 431), is "purely diagnostic and does not involve them in metaphysical subtleties"; it does not require them to distinguish between what is a "cause", i.e., a real and contributing cause of death, and what is merely a "condition", i.e. part of the background of the death. Nor should they be expected to say, where two or more causes combine to produce a result, which of these causes contributes the more.

**52**  All counsel referred to ***R. v. Nette*** [*(2001), 158 C.C.C. (3d) 486*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M49H-00000-00&context=). The Supreme Court of Canada confirmed that the standard of causation in a homicide case, which includes manslaughter, is the "substantial and contributing cause". This has also been described as a contributing cause beyond *de minimis* range. In ***Nette***, the deceased was 95 years old. The accused had broken into her home and hog-tied her hands and feet with wire. They had wrapped clothing around her head and left her laying on a bed. Subsequently, she fell off the bed, her dentures came loose and the clothing around her head became tightly wrapped around her neck. She died of asphyxiation twenty-four to forty-eight hours after the accused left the house.

**53**  The medical evidence could not isolate one factor among the circumstances and state that it alone had caused her death. There were a number of factors which contributed, including her hog-tied position, the ligature around the neck, her age and lack of muscle tone, congestive heart failure and asthma which may have sped up the process. Paragraph 44 to and including paragraph 49 are worth repeating here:

Paragraph 44 In determining whether a person can be held responsible for causing a particular result, in this case death, it must be determined whether the person caused that result both in fact and in law. Factual causation, as the term implies, is concerned with an inquiry about how the victim came to his or her death, in a medical, mechanical, or physical sense, and with the contribution of the accused to that result. Where factual causation is established, the remaining issue is legal causation.

**Paragraph** 45 Legal causation, which is also referred to as imputable causation, is concerned with the question of whether the accused person should be held responsible in law for the death that occurred. It is informed by legal considerations such as the wording of the section creating the offence and principles of interpretation. These legal considerations, in turn, reflect fundamental principles of criminal justice such as the principle that the morally innocent should not be punished: see Re B.C. Motor Vehicle Act, [*[1985] 2 S.C.R. 486*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-238F-00000-00&context=) at p. 513, [*23 C.C.C. (3d) 289*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-238F-00000-00&context=), [*24 D.L.R. (4th) 536*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-238F-00000-00&context=); R. v. Vaillancourt, [*[1987] 2 S.C.R. 636*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23GG-00000-00&context=) at p. 652-53, [*39 C.C.C. (3d) 118*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23GG-00000-00&context=), [*47 D.L.R. (4th) 399*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23GG-00000-00&context=); R. v. Stinchcombe, [*[1991] 3 S.C.R. 326*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-604N-00000-00&context=) at p. 336, [*68 C.C.C. (3d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-604N-00000-00&context=); R. v. Creighton, [*[1993] 3 S.C.R. 3*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M392-00000-00&context=) at pp. 22-23, [*83 C.C.C. (3d) 346*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M392-00000-00&context=), [*105 D.L.R. (4th) 632*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M392-00000-00&context=); Cribbin, supra, at p. 568. In determining whether legal causation is established, the inquiry is directed at the question of whether the accused person should be held criminally responsible for the consequences that occurred. The nature of the inquiry at the stage of determining legal causation is expressed by G. Williams as follows in his *Textbook of Criminal Law* (2nd ed. 1983), at pp. 381-82, quoted in Cribbin at p. 568:When one has settled the question of but-for causation, the further test to be applied to the but-for cause in order to qualify it for legal recognition is not a test of causation but a moral reaction. The question is whether the result can fairly be said to be imputable to the defendant . . . If the term "cause" must be used, it can best be distinguished in this meaning as the "imputable" or ***[page 506]*** "responsible" or "blamable" cause, to indicate the value-judgment involved. The word "imputable" is here chosen as best representing the idea. Whereas the but-for cause can generally be demonstrated scientifically, no experiment can be devised to show that one of a number of concurring but-for causes is more substantial or important than another, or that one person who is involved in the causal chain is more blameworthy than another.

**Paragraph** 46 In a given case, the jury does not engage in a two-part analysis of whether both factual and legal causation have been established. Rather, in the charge to the jury, the trial judge seeks to convey the requisite degree of factual and legal causation that must be found before the accused can be held criminally responsible for the victim's death.

**Paragraph** 47 While causation is a distinct issue from mens rea, the proper standard of causation expresses an element of fault that is in law sufficient, in addition to the requisite mental element, to base criminal responsibility. The starting point in the chain of causation which seeks to attribute the prohibited consequences to an act of the accused is usually an unlawful act in itself. When that unlawful act is combined with the requisite mental element for the offence charged, causation is generally not an issue. For example, in the case of murder, where an accused intends to kill a person and performs an act which causes or contributes to that person's death, it is rare for an issue to arise as to whether the accused caused the victim's death. As I discussed in Cribbin, supra, where the jury is faced with a charge of murder and is satisfied that the accused intended to kill or intended to cause bodily harm that he knew was likely to cause death and was reckless as to whether death occurred, it will rarely be necessary for the trial judge to charge the jury on the standard of causation. In such a case, the mens rea requirement generally resolves any concerns about causation. It would be rare in a murder case where the intention to kill or to cause bodily harm likely to cause death is proven for the accused to be able to raise a doubt that, while he intended the result that occurred, he did not cause the intended result. Where it is established that the accused had the subjective foresight of death or serious bodily harm likely to cause death required to sustain a murder conviction, as opposed to the lower manslaughter requirement of objective foreseeability of serious bodily harm, it would be unusual for an issue of causation to arise. Assuming a case arose where intention was established but causation was not proven, a proper verdict might be attempted murder: Cribbin, at p. 564. ***[page 507]***

**Paragraph** 48 The law of causation is in large part judicially developed, but is also expressed, directly or indirectly, in provisions of the Criminal Code. For example, s. 225 of the Code provides that where a person causes bodily injury that is in itself dangerous and from which death results, that person causes the death notwithstanding that the immediate cause of death is proper or improper treatment. Similarly, ss. 222(5)(c) and 222(5)(d) provide that a person commits culpable homicide where he causes the death of a person by causing that person, by threats, fear of violence or by deception, to do anything that causes his death or by wilfully frightening a child or sick person. These statutory provisions and others like them in the Code preempt any speculation as to whether the act of the accused would be seen as too remote to have caused the result alleged, or whether the triggering of a chain of events was then interrupted by an intervening cause which serves to distance and exonerate the accused from any responsibility for the consequences. Where the factual situation does not fall within one of the statutory rules of causation in the Code, the common law general principles of criminal law apply to resolve any causation issues that may arise.

**Paragraph** 49 In light of the statutory rules mentioned above, and in light of general principles of criminal responsibility, the civil law of causation is of limited assistance. The criminal law does not recognize contributory ***negligence***, nor does it have any mechanism to apportion responsibility for the harm occasioned by criminal conduct, except as part of sentencing after sufficient causation has been found. In the same way it provides for the possibility of attributing responsibility through the law of attempt, which has no equivalent in the civil context. As a result, I do not find the appellant's submissions relating to the civil standard of causation to be helpful in elucidating the applicable criminal standard.

**54**  The thrust of the defendants' argument comes from the reference in paragraph 45 to G. Williams *The Textbook of Criminal Law* (2nd ed. 1983) and the words "when one has settled the question of but-for causation, the further test to be applied to the but-for cause in order to qualify for legal recognition is not a test of causation but a moral reaction". The defence argues that the Crown must prove beyond a reasonable doubt that Ms. Pete would have lived but-for the actions or inactions of the accused.

**55**  The court in ***Nette*** points out that in a given case the jury does not engage in a two-part analysis of whether both factual and legal causation has been established (paragraph 46). The court speaks in paragraph 46 of the "... degree of factual and legal causation that must be found before the accused can be held criminally responsible ...". This does not mean that causation in fact does not need to be proven.

**56**  The court confirms in paragraph 48 that "Where the factual situation does not fall within one of the statutory rules of causation in the Code, the common law general principles of criminal law apply to resolve any causation issues that may arise". The court also points out that the civil law of causation is of limited assistance.

**57**  The court discusses the way in which the standard of causation should be explained to the jury or how "... the trial judge seeks to convey the requisite degree of factual and legal causation that must be found ..." (paragraph 46).

**58**  The court confirms that there is only one standard of causation for all homicide offences, whether manslaughter or murder. (paragraph 66). The majority confirmed the ***Smithers*** test, but felt that it should be expressed in positive terms rather than in a negative, such as "not a trivial cause" or "not insignificant". (paragraph 72). The standard of causation is "significant contributing cause". The court cited ***R. v. Cheshire***, [1991] 3 All E.R. 670 (C.A.) at p. 677 as follows:

It is not the function of the jury to evaluate competing causes or to choose which is dominant provided they are satisfied that the accused's acts can fairly be said to have made a significant contribution to the victim's death. We think the word "significant" conveys the necessary substance of a contribution made to the death which is more than negligible.

**59**  In ***Nette***, the court considered the issue of causation on the facts of that case. The court pointed out that causation issues arise more frequently in manslaughter cases where the fault arises from an unlawful act or criminal ***negligence***. The issue also arises where there are multiple parties, thin skulled victims or intervening events, or some combination of those. In ***Nette***, the accused argued that it was a case of multiple causation. (paragraph 76). The court found in ***Nette*** it did not involve truly multiple independent causes. (paragraph 78). The court stated at paragraph 77:

**paragraph** 77 The difficulty in establishing a single, conclusive medical cause of death does not lead to the legal conclusion that there were multiple operative causes of death. In a homicide trial, the question is not what caused the death or who caused the death of the victim but rather did the accused cause the victim's death. The fact that other persons or factors may have contributed to the result may or may not be legally significant in the trial of the one accused charged with the offence. It will be significant, and exculpatory, if independent factors, occurring before or after the acts or omissions of the accused, legally sever the link that ties him to the prohibited result.

**60**  The court in ***Nette*** did point out in paragraph 80 that:

... there was no evidence to indicate that Mrs. Loski's death would have occurred without the actions of the appellant and his accomplice.

**61**  The court also pointed out in paragraph 80:

The various potential causes of death that are advanced by the appellant in the present case would all be caught by the statutory or common law principles that preclude an interruption of the chain of causation such as to eliminate the criminal responsibility of the accused.

**62**  ***Smithers*** and ***Nette*** both recognize that causation consists of a question of fact and a question of law. This distinction is also the subject of discussion in a number of the texts on criminal law. The *Textbook of Criminal Law* (2nd ed. 1983) G. Williams was referred to in ***Nette***. Williams distinguishes between factual issues of causation and legal issues of causation. He refers to imputable causation. The factual issue of causation is sometimes referred to as the "but-for" causation. In other words, "but-for the occurrence of the antecedent factor the event would not have happened". In some instances, the factual causation is obvious. The example given by Williams is that D shoots V and V drops dead. In those instances, the factual causation is not often discussed, although medical evidence may be called to prove it. Williams refers to the example of where D administers poison to V who dies shortly afterwards. However, the actual cause of death was heart disease, not the poison. There would be medical evidence to support this allegation that V would have died as and when they did in any event, and that the poison did not contribute to this. The evidence may raise a reasonable doubt about whether or not D caused V's death. Williams points out that where this "but-for" causation is alleged to be absent, it is a question of fact for the jury to decide on ordinary experience and often with the assistance of expert evidence. However, the burden remains on the Crown to prove the "but-for" cause.

**63**  The present case is a case of multiple independent actors. Ms. Pete was beaten by a person or persons unknown, and clearly this beating caused her death. The medical evidence is that she died as a result of the head injuries she sustained. Her injuries were treatable and, if treated promptly, it was more likely than not that she would have survived. Ms. Pete was beaten sometime after 4:30 p.m. and before 6:00 p.m. on December 2, 2004. The accused were aware, that she had been beaten and was injured, at approximately 10:00 p.m. They failed to provide her with medical attention or obtain assistance for her after they took her into their charge. The issue is whether this failure was a significant contributing cause to her death. Was there the requisite degree of factual and legal causation to find the accused criminally responsible in her death?

**64**  The answer to this question involves a careful consideration of all of the evidence available, including the medical evidence and the evidence of the loss of blood, both at the probable scene of her assault, the entrance to the old school, and at the apartment building.

**65**  How did Ms. Pete die? The medical evidence confirms that she had approximately twenty-five lacerations to her head, including some on her face and her ear. Her left ear was split. She did not receive any fractures as a result of the blows to her skull. There was evidence that she had previous neurosurgery on the right side of her head. Most of the blows were struck to the left side of her head. The blows did cause bruising to her brain with some contusion and some leaking of blood into the brain. The cause of death was the multiple blunt force injuries to the head. These set in motion a chain of events that led to her death. The physiological process included the fact that she would be rendered unconscious, that she would have an impaired mental state and this could affect the other regulatory functions of the brain, including regulation of the heart and lungs. The twenty-five lacerations would cause significant blood loss if not controlled. This could cause a loss of blood pressure and shock which can be fatal. The position of her body would cause her problems breathing and unconscious she could not protect her airways. The medical evidence is that medical intervention could arrest these things. The bleeding could be stopped and fluids replenished, and her airways protected. Medications could be used to control the pressures in the brain if they developed. Medical evidence is that these injuries were potentially survivable wounds. The doctor could not say for certain that Ms. Pete would have survived with medical treatment, but it was more likely than not if the medical treatment was prompt. The more time that passed between the initial assault and the treatment, the less chance Ms. Pete had of surviving her injuries.

**66**  ***Smithers*** is an example where the jury was entitled to use the medical evidence, the evidence of lay witnesses, and its own experience in determining the issue of causation. Another example is ***R. v. Knight***, [*[2003] 1 S.C.R. 156*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4FR-00000-00&context=), [*2003 SCC 15*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4FR-00000-00&context=). In ***Knight***, the victim had died from a subdural hematoma. The issue was whether the appellants had contributed to the hematoma. The deceased had been assaulted twice in a twenty-four hour period preceding his death. The appellants had nothing to do with the first assault. Subsequently, the appellants were involved in assaulting the deceased. The deceased was rendered unconscious. The assaults included blows to the head. Somehow the deceased's clothing was removed and was left on the ground overnight. He was found the next morning and taken to the hospital suffering from hypothermia. The actual cause of death, however, was the subdural hematoma. The trial judge recognized that there was a possibility that the deceased had suffered the subdural hematoma before the events occurred. However, the trial judge also concluded that "but-for" the assaults by the appellants, the deceased would not have died when he did. The trial judge found that the assaults caused the subdural hematoma, or alternatively, the remote possibility that it existed before these assaults, that the assaults accelerated the hematoma and the deceased's death. The majority of the Court of Appeal found that the trial judge had misapprehended the medical evidence. The dissenting judge, however, held that the trial judge was entitled, on the totality of the evidence, to conclude that the subdural hematoma did not exist prior to the assaults by the appellants.

**67**  The Supreme Court of Canada agreed with the dissenting decision of Paperny J.A. that it was open to the trial judge to conclude the assaults caused the death of the victim. The Supreme Court of Canada did not find it necessary to reach any conclusion as to whether leaving the victim unconscious and unclothed was a contributing cause of death.

**68**  Another example in which the trial judge was entitled to find that a physical assault was the cause of death, and was not restricted to medical opinions was ***R. v. Shanks***, [*[1996] O.J. No. 4386*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCY1-FJTD-G4BP-00000-00&context=). ***Shanks*** was a young man who got into a confrontation with the deceased at approximately 9:30 p.m. The deceased was an older man who was obese and suffering from diabetes, high blood pressure, a history of strokes and one previous heart attack; he was very sick. The deceased became emotionally upset during the confrontation and entered into a physical encounter with the accused. This occurred after the deceased had run approximately sixty-five feet to the sidewalk. The deceased was put down or thrown to the ground. The deceased died of an acute heart attack approximately two hours later. The cause of the heart attack was an "acute plaque rupture which led to a blockage of blood in the heart and death". Emotional or physical stress, or a combination, may have triggered this rupture, and it was difficult to isolate the specific triggering event. The Court of Appeal said the Crown must show that the unlawful act was at least a contributing cause of death outside the *de minimus* range. The trial judge found that the physical assault was a contributing cause of death outside the *de minimus* range. It was arguable that the medical evidence did not support that conclusion because the doctor said that he did not think that the actual fall had much bearing on the matter. The doctor felt there was an 80% to 90% probability that the rupture would have occurred without the fall. The court said at paragraph 11:

It would remain a medical fact that the continuing of events from the initial threats by the appellant to his throwing of the deceased to the ground was, as a matter of certainty, the cause of death. In these circumstances, any analysis of the medical evidence directed to establishing that death was virtually inevitable at a given point in the continuum is academic and unhelpful to the determination of whether the unlawful conduct of the appellant was the proximate cause of death.

**69**  Williams points out that it is possible for two sufficient causes to be present at the same time. For instance, two fatal wounds given independently and at the same time. In this case, both accused would be guilty of causing death. (p. 381).

**70**  Williams also talks about the issue of causation and ***negligence***, and at p. 384 points out that "... the ***negligence*** proved against the defendant must be ***negligence*** in a relevant respect." In other words, that the accident or death would not have happened if the accused had not been negligent. There has to be a causal connection between the ***negligence*** and the event. In other words, if there had been no ***negligence***, would the event have occurred anyway? He refers to the English case ***Dalloway*** (1847), 2 COX 273. In ***Dalloway***, the driver of a horse and cart was negligent. However, it was determined that even if he had not been negligent the death of the child would have occurred anyway.

**71**  The Canadian Criminal Law by Don Stewart, 4th Ed. 2001 also has a discussion of causation in homicide cases. Stewart discusses the ***Smithers*** test, and when dealing with issues of causation refers to ***R. v. Cribbin***, [*(1994), 89 C.C.C. (3d) 67*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-F22N-X21G-00000-00&context=), [*28 C.R. (4th) 137*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-F22N-X21G-00000-00&context=) (Ont. C.A.). In ***Cribbin***, the accused had punched and kicked the victim, and this was immediately followed by a vicious attack by one of the accused's companions. The victim would have survived the injuries, but was abandoned unconscious and drowned on his own blood. The court found that the accused's actions were a significant contributing cause to the death of the victim and rejected the notion that the two assaults were independent. Stewart refers to factual cause at p. 141 and the "but-for" test referred to in the Williams textbook. He states:

The most common test for factual cause in the literature is the *sine qua non* or but-for test. This is a convenient way of deciding whether a cause is "contributing" (in the *Smithers* language). The test is, "has there been proof beyond a reasonable doubt that the consequence would not have followed but-for the act of the accused?" If the answer is "yes" the accused's act was a factual cause of the consequence.

**72**  He said the issue rarely arises of whether the accused's conduct was a but-for or a contributing cause. He points to an example where it did arise in the British Columbia case ***Fisher*** [*(1992), 13 C.R. (4th) 222*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F5KY-B11W-00000-00&context=) (B.C.C.A.). This was a case where the accused was charged with impaired driving causing bodily harm. The court found that the impairment *per se* was not enough to satisfy the ***Smithers*** test. There was no indication that the impairment contributed to the collision.

**73**  Stewart gives us some examples to demonstrate the difficulty of the mechanical application of the "but-for" test:

Situation 1

D1 and D2 fired at exactly the same time at V thinking he was a moose, the bullets entered V's heart at the same time and either could have caused V's death.

Situation 2

The same as situation 1, except that D1's bullet entered the heart first.

Situation 3

The same as situation 1, except that D2's bullet entered the victim's lung. The victim would have died within an hour from D2's shot, had he not died immediately from a shot through the heart by D1.

Situation 4

The same as situation 1, except that the evidence is that the bullets may not have been fired simultaneously and only resulted in death as a cumulative effect, neither one alone would have resulted in death.

Situation 5

Any of the above situations in which there is no proof beyond a reasonable doubt as to attributing the cause of death to D1 or D2 or both together.

A mechanical application of the but-for test would result in the acquittals of both D1 and D2 in every situation but the fourth where each would be convicted. Acquittals in the first three situations seem ludicrous. A court would surely find a way to hold D1 and D2 criminally responsible for causing the death and situation ... and at least D1 in situation 2 and 3. Arguably D2 should not be held criminally responsible for causing death in situations 2 or 3, although he might well be convicted of a crime relating to the causing of an injury.

**74**  Dealing with the issue of imputable cause or causation as a question of law, Stewart argues that this issue is " ... more descriptive of the true nature of inquiry that arises after the but-for test has sifted out cases in which there has been no preliminary proof of causation". The question is then "given that the accused's conduct was at least the cause of the consequence, is he criminally responsible for causing it?" This is not a scientific inquiry, but rather one of fixing moral blame similar to, but distinguishable from, the moral inquiry involving the requirement of fault." (p. 143).

**75**  The authors of *Mewett & Manning on Criminal Law,* 3rd Ed., 1994, discuss the issue of causation and gives the following examples:

If two people separately and independently feed a quantity of arsenic to a victim, neither dose being in itself sufficient to cause death, and the victim dies as a combination of both doses, it cannot be a defence for one to say that the other caused the death, since in that case neither could be convicted.

For example, if A stabs B and leaves him lying wounded but not dead, and C comes along and seeing B, decides to take the opportunity to kill him and shoots him, and if he dies solely as the result of the shooting, A is not liable for murder since his act does not "result" in death. He may, of course, be liable for attempted murder, since the fact that his causing the death remained unfulfilled because of someone else does not relieve of that liability. But if B dies because of a combination of both the stabbing and the shooting, then both A and C may be guilty of murder. (pp. 710 - 711).

**76**  Of course, in the first example above, the victim would have lived "but-for" the actions of each of the accused. This is an example of contributing causes, both of which are significant.

**77**  A decision ***R. v. Trotta***, [*2004 190 C.C.C. (3d) 199*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDN1-JNCK-21M1-00000-00&context=) (Ont. C.A.) is an example where the court referred to the "but-for" test. A mother and father were charged in the death of their child. The father had abused or assaulted the child and the mother had not intervened. The court said the question that the jury had to ask was whether the child would have died if the father had not assaulted him. A jury could convict only if they were satisfied beyond a reasonable doubt that the father assaulted the child, and the child would not have died if he had not been assaulted. The cause of death was very much an issue in that case. The Court of Appeal stated at paragraph 30:

The Crown is not required to establish a medical cause of death in a homicide case, although it almost inevitably does so. Nor is the Crown required to demonstrate that a specific act or event caused the death, although the Crown usually attempts to do so. The Crown must prove that the death was caused by an unlawful act and that the accused is legally responsible for that act. *R. v. Nette* [*(2002), 158 C.C.C. (3d) 486*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M49H-00000-00&context=) (S.C.C.) at para. 77.

**78**  In reviewing the trial judge's instructions, the Court of Appeal said at paragraph 59:

I read this instruction as an indication to the jury that it must find a "but-for" causal link between an assault on Paolo by Marco and Paolo's death, but it need not identify the nature of the assault beyond concluding that it was "assaultive conduct." I think this is a correct instruction in the circumstances of this case.

**79**  At paragraph 60, the court said:

... I am satisfied, however, that by the end of the charge the jury knew that it could convict on the murder charge only if satisfied beyond a reasonable doubt both that Marco had assaulted Paolo, and that Paolo would not have died had he not been assaulted by Marco. On the evidence in this case, those findings would clearly satisfy the causation requirement for murder.

**80**  I find that the Crown does not have to prove the exact cause of death, but must prove beyond a reasonable doubt that the actions or inactions of the accused were a significant contributing factor to the death. In other words, although Ms. Pete may have been dying, if the actions or inactions of the accused were a significant contributing cause in her death, then a necessary level of causation has been proved.

**81**  The defence is right, however, that if the actions or inactions of the defendants were unrelated to her death, or played no part in it, or if there is a reasonable doubt as to whether their actions played any part in her death, then the Crown has failed to prove causation.

**82**  The defence described this as a "but-for" test, and argued that the Crown must prove that Mr. Pete would have lived "but-for" the actions or inactions of the accused. The argument is really that their actions or inactions played no significant part in her death because she would have died even if they had fulfilled any duty they owed to her, or had not been criminally negligent. This is consistent with the court's statement in ***Nette*** at paragraph 80, where the court said there was no evidence to indicate that the deceased would have died without the actions of the accused and his accomplice.

**83**  The question rather than being asked, would she have lived "but-for" the actions of the accused, could perhaps more correctly be asked, would she have died even without the ***negligence*** or the actions of the accused? In other words, did the accused's actions or omissions significantly contribute to her death? Whether at the point that the accused should have gotten help for her, would it have made any difference?

**84**  The defence acknowledges that the Crown does not have to prove to a certainty that Ms. Pete would have lived had she received aide when the accused should have known she needed it, or shortly after they took her into their charge.

**85**  The circumstances in this case are somewhat similar to, but not exactly the same as the situation as someone who does something which could contribute to the death of another individual. That is by adding to the original injury, such as A stabs V, who is now dying. B comes along separately and stabs V. V subsequently dies. So long as B's action was a significant contributing factor, it does not matter that V would have died anyway. In other words, the Crown does not have to prove that V would have lived "but-for" B's actions. The issue of factual causation does not often arise where the results, for instance the death of an individual, are what the accused actually intended. In cases of omissions, the Crown does have to prove beyond a reasonable doubt that if the accused had fulfilled their duty, it would have made a difference. In other words that their failure to fulfill their duty was a significant contributing cause to the outcome; that is her death.

**86**  The actions of an accused may be one in a chain of causation, but of little significance perhaps because they are too remote. They may be of little significance because in the overall series of events that lead to the eventual harm, they are trivial or contribute very little.

**87**  In situations where there is more than one cause the question is not whether the event would have occurred "but-for" any one of those causes, but whether or not the particular cause in question significantly contributed to the event. It does not have to be the sole cause.

**88**  In the present case, the question is whether the actions or inactions of these accused can be found to be a significant contributing cause to Ms. Pete's death. In other words, did they make a difference in a significant way? If Ms. Pete's death was inevitable whether they fulfilled their obligations to her or not, and their actions did not contribute to her death in a significant way, they did not cause her death.

**89**  The answer requires careful consideration of all of the evidence, including the medical evidence, keeping in mind the burden remains on the Crown.

EVIDENCE ON CAUSATION

**90**  The present case is a case of multiple independent actors. Ms. Pete was beaten by a person or persons unknown, and clearly this beating caused her death. The question is whether the accused's failure to obtain medical attention for her was a significant contributing cause as well. Was there the requisite degree of factual and legal causation to find the accused criminally responsible in her death?

**91**  In deciding whether the Crown has proven causation in this case, I have to consider all of the evidence, including the medical evidence from Dr. Stephen. Dr. Stephen gave evidence as an expert in pathology and his qualifications were admitted. He estimated the time of death at 2:00 a.m., but agrees that is only a guideline and he could be out by twenty to twenty-five percent. Therefore, the time of death could be between 1:00 a.m. and 3:00 a.m. It is possible, but less likely, between 12 midnight and 4:00 a.m., and possible, but even less likely, between 11:00 p.m. and 5:00 a.m..

**92**  His opinion is that she died from her head injuries which included twenty-five lacerations, but no fractures. She did sustain bruising of the brain and some leakage of blood in the brain. The injuries set in motion a chain of events that resulted in her death. A number of the blows to her head were of significant enough force that they could have caused immediate unconsciousness, although it is certainly reasonable to accept that she may have regained some form of consciousness or lucidity afterwards. The injuries to her brain would have impaired her mental state and could have an affect on the regulation of body functions, including heart and breathing. The brain may have suffered from edema or swelling of the brain. He said that loss of blood is significant, and could result in loss of blood pressure and shock. The body was found face-down and the lividity on the front of the body indicated that it was the position of the body after death. If she were face-down at the time of her death that could have interfered with her breathing. His evidence was that although she may have had lucid periods, as the effects of the injuries accumulated, she may have become semi-conscious or become comatose.

**93**  Ms. Pete's injuries could have been treated with prompt medical treatment, and the medical treatment would include steps to stop the bleeding, replace fluids, control pressure or swelling of the brain, protect the airways, and control the bleeding of the brain. The doctors may have also induced a coma in order to relieve the burden on the brain. Dr. Stephen said that had the blood loss been controlled and stopped that her injuries were potentially survivable. The injuries were not extremely life-threatening in the sense that there were no blood clots in the brain itself. I take it from this that he means that there was no risk of immediate death. Ms. Pete's injuries were potentially survivable if she had received prompt medical treatment. He confirmed that the more time that passed from the time of her injury to treatment, the less chance she had of surviving. Dr. Stephen viewed the photographs of the blood at the entrance of the old school and in the apartment. He could not estimate the quantity of blood, but the most he could say that it was a moderate amount.

**94**  In cross-examination, he confirmed that he could not say that any one blow caused her death, but that death was due to the totality of the number and the extent of the injuries. He confirmed that blood loss from a scalp wound is not often fatal, but in an extreme case it may be and that twenty-five lacerations were a lot. When cross-examined about Ms. Pete's chances of surviving her injuries, he could only say that the more quickly she was treated the better her chances of survival. He could not give any opinion as to her chances of survival as time passed from one hour to two hours or four hours and so on. He did confirm that the amount of alcohol in her system increased the chances of her death as a result of her head injury. He could not be more specific about the mechanism of her death.

**95**  He was cross-examined about his evidence at the preliminary hearing, and confirmed that the evidence he gave there was accurate. His evidence was that a lot of her injuries were significant and extended down to the surface of the skull. He confirmed that her cerebral damage was significant, and that her blood loss may have complicated her survivability or increased her mortality. He also confirmed, however, that the brain, after being injured like this, may begin to swell. He confirmed that the blood loss may have been one of the factors involved in her death, but the underlying cause was the initial head injury. He confirmed it was difficult to quantify the edema or brain swelling. He confirmed that there are a number of mechanisms that could have caused death and sometimes there are a number of them at play, including edema, cerebral contusions, collections of blood alcohol in the system influencing cerebral depression, and depression of the vital centres that control breathing. He confirmed that you cannot determine histologically certain injuries such as diffuse axonal injury, so it is hard to be specific about which of the mechanisms accounted for death in this case. He confirmed that the injuries may have accounted for death in and of themselves without the blood loss, but he is not able to separate the two.

**96**  His pathology report confirmed that the cause of death was the head injury due to blunt force injury. He noted in his summary that blood loss and the resulting hypotension and shock may have been compounded by the affects of the cerebral injury as a result of multiple blows to the head.

**97**  The evidence indicates that Ms. Pete suffered these injuries sometime between 4:30 p.m. and 6:00 p.m. She had consumed a considerable amount of alcohol based on the level of alcohol in her blood stream confirmed by the autopsy. The photographs of the school indicate that there was a significant amount of blood loss at the school. The blood stain pattern analyst called as an expert by the Crown confirmed that the blood had puddled on one of the steps, and had been of sufficient quantity to flow over that step and down the riser. When the accused moved Ms. Pete from the school entrance, she was unconscious, or at best, semi-conscious. She had been suffering the effects of her injuries for as much as four hours or more by the time they got her to the taxi and the apartment. The photographs at the apartment indicate that blood was smeared, probably from her head or clothing, in the entry way and along the walls, and up the stairs in some places. There was also a smear of blood on the carpet in the living room and the adjoining tiled surface. This had been cleaned up in part by Mr. French. It is difficult to tell from looking at the photographs, but it does not look like a large amount of blood was on the floor in the living room or the carpet. French wiped this up with a sock, and the photographs of the sock do not suggest a large quantity of blood. This confirms Mr. French's statement to the police that he thought the blood in the living room was coming off her clothing and it did not appear to be puddling in any sense. Clearly, she did have blood on her hair and her clothing.

**98**  The largest amount of blood in the apartment appears to be where Ms. Pete was actually found. Dr. Stephen said the floor in the hallway is noticeably slanted, and the blood flowed to the edge of the hall. None of the witnesses could estimate the quantity of the blood, and given the fact that it is smeared by either Ms. Pete moving, or somebody moving her, the photographs may make it look worse than it was.

**99**  Ms. Pete's DNA is on one of the wine bottles that were found in the apartment, but it is not clear whether it is bottle that she may have had a drink from while at the old school. Mr. French, in his statement, indicates that Ms. Pete was moaning and moving her arms and legs while she was at the apartment, but does not indicate that she was conscious. The effects of her injuries had certainly progressed significantly from the time of her injury to the time she was taken to the apartment.

**100**  Dr. Stephen was careful in giving his evidence. I find, based on his evidence and of the balance of the evidence that supports the conclusion, that had Ms. Pete received treatment immediately after she received the injuries, she would have survived. The real difficulty is determining whether the Crown has proven beyond a reasonable doubt that had she received treatment shortly after 10:00 p.m., or when she reached the apartment, that it would have made a difference to her survivability. In other words, whether or not the fact that she did not receive treatment at that time contributed in a significant way to her death.

**101**  Considering all of the evidence and the circumstances, I am satisfied that on the balance of probabilities, the fact that she did not receive treatment at that time contributed to her death in the sense that her chances of survival were reduced. However, proof beyond a reasonable doubt is much closer to certainty than it is to the balance of probabilities. The Crown is not required to prove to a certainty that receipt of medical treatment would have made a significant difference to Ms. Pete. However, on all of the evidence, especially considering the amount of blood loss at the school itself and the length of time which had passed from the time of her injury and her semi-comatose state which would appear to have been caused by the progression of her injuries, I am unable to say that I am sure it would have made a significant difference to her, after 10:00 p.m., when their ***negligence*** occurred.

**102**  Therefore, I find that the Crown has failed to prove this essential element of the offence; that is, that the defendants' failure in their duty to Ms. Pete was a significant contributing cause to her death.

**103**  Therefore, I find the Crown has failed to prove the essential element of causation in this case and find the accused not guilty.

POWERS J.

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[***R. v. L.W.C., [2013] B.C.J. No. 232***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JC5P-G29N-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Prince George, British Columbia

W.G. Parrett J.

Heard: January 14-18, 21 and 22, 2013.

Oral judgment: February 8, 2013.

Docket: 29875

Registry: Prince George

**[2013] B.C.J. No. 232** | 2013 BCSC 210

Between Regina, and L.W.C.

(91 paras.)

**Case Summary**

**Criminal law — Criminal Code offences — Sexual offences, public morals, disorderly conduct and nuisance — Nuisance — Interfering with a dead human body or human remains — Offences against person and reputation — Criminal *negligence* — Causing death by criminal *negligence* — Homicide — Manslaughter — Kidnapping, hostage taking and abduction — Forcible confinement — Trial of L.W.C. who was charged with manslaughter, criminal *negligence* causing death, unlawful confinement, and interfering with human remains — Accused convicted of unlawful confinement and interfering with human remains — Accused and mother of victim tied victim up then found him in distress — When unable to resuscitate him, hid and buried body — No factual or legal causation to prove manslaughter charge — Crown failed to prove elements of offence on criminal *negligence* charge — No lawful authority existed for tying up victim and leaving him so restrained — Defence admitted interfering with human remains charge effectively proved — Criminal Code, s. 182(b).**

**Criminal law — Evidence — Witnesses — Credibility — Trial of L.W.C. who was charged with manslaughter, criminal *negligence* causing death, unlawful confinement, and interfering with human remains — Accused convicted of unlawful confinement and interfering with human remains — Accused and mother of victim tied victim up then found him in distress — When unable to resuscitate him, hid and buried body — No factual or legal causation to prove manslaughter charge — Crown failed to prove elements of offence on criminal *negligence* charge — No lawful authority existed for tying up victim and leaving him so restrained — Defence admitted interfering with human remains charge effectively proved — Criminal Code, s. 182(b).**

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| Trial of L.W.C. who was charged with manslaughter, criminal ***negligence*** causing death, unlawful confinement, and improperly or indecently interfering with or offering an indignity to a dead human body or human remains. The following was undisputed. L.W.C. lived with the 13-year-old victim's mother and acted in capacity of a parent to him. The parents believed the victim was molesting his brother and decided to tie up his hands and feet. After two or three days of his being secured in this way, the family came in from outside to find him making gurgling sounds and in distress. L.W.C. attempted CPR but the eventually advised the mother that the victim was gone. They hid the body wrapped in a blanket in the trunk of the car where it stayed for several weeks to a month while they drove around. Eventually they placed the body in a shallow grave in a wooded area by the river. They moved to avoid Social Services and on several occasions told untrue stories about what happened to the victim. The mother reported the death to the RCMP over four years later. The mother pled guilty to a charge of improperly or indecently interfering with or offering an indignity to a dead human body or human remains and was sentenced to a two-year conditional sentence. The only evidence of what happened at the relevant times was from the mother and statements made by L.W.C. to a crime boss in the final scenario of a year-long RCMP undercover operation.  HELD: Accused convicted of unlawful confinement and interfering with human remains.  The court found that femurs located near the burial site were part of the remains of the victim. The mother was a terrible historian but there was some consistency between the evidence she gave and L.W.C.'s statement given to the crime boss. Her evidence was repetitive, self-serving, unreliable in many respects and entirely lacking in detail and credibility. Her single repeated answer for her actions was that she was afraid of L.W.C. but she could not and never did articulate a basis for that, except for an admission on cross-examination that while he slapped her once, he never struck the children. The court rejected her evidence that L.W.C. would stop administering CPR and tell her to leave and not call 911. To constitute manslaughter, the failure to provide necessaries must be proven to have been the cause of death from both a factual and a legal perspective. The Crown's case failed on factual causation as there was no medical, mechanical, or physical explanation for the death let alone one linking L.W.C. to that result. The Crown's case failed on legal causation because it would be unreasonable to impose an obligation on a person attempting CPR to preserve a life to discontinue those efforts to make a telephone call, particularly when there was another person bound by the same duty who could have made the call. The Crown wholly failed to prove the following elements of the offence of criminal ***negligence*** causing death: that L.W.C.'s act or omission caused the death of the victim; that L.W.C.'s conduct was a marked and substantial departure from the standard of care of a reasonable person in the circumstances, and; that the accused's conduct or omission showed a wanton or reckless disregard for the life or safety of the victim. The defence presented no submissions to challenge the counts of unlawful confinement and interfering with human remains and effectively conceded that the latter count was proven. The court was satisfied that the necessary elements of unlawful confinement were established and that no lawful authority existed for tying up the victim as they did and leaving him so restrained. The court commented that while the Ministry of Children and Family Development made some inquiries, no timely and effective action was ever taken which led inevitably to the evidentiary morass. A social worker attended the home upon the victim's absences from school and was told he was moving, but took no steps to locate or speak to him. The victim had died five days before her attendance within the month in which the Ministry did nothing. |

**Statutes, Regulations and Rules Cited:**

Criminal Code, [*R.S.C. 1985, c. C-46, s. 182*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5X64-9P21-DYV0-G487-00000-00&context=)(b)

**Counsel**

Counsel for the Crown: L. Vizsolyi and L. Phipps.

Counsel for the Accused: S.D. Taylor.

[Editor's note: The note "[Text deleted by LexisNexis Canada]" indicates the removal of information which may identify individuals protected under LexisNexis Canada's Guidelines for the Protection of Identities.]

**Oral Reasons for Judgment**

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| **W.G. PARRETT J. (orally)** |

**INTRODUCTION**

**1**  On January 7, 2000, A.S.W., also known as A.S.D., died at [Text deleted by LexisNexis Canada] Drive in the City of Prince George, Province of British Columbia.

**2**  A.S.W. was born on September 2, 1986 and at the time of his death was 13 years, 4 months and 5 days old.

**3**  The trailer in which A.S.W. was living was occupied by his mother, J.W., her common-law partner, L.W.C., the accused, and A.S.W.'s brother B. who was born on August 22, 1992 and was 7 years old at the time.

**4**  The accused and J.W. had met in 1998 and their relationship began the following year.

**5**  A.S.W.'s death was first reported to the RCMP over four years later when J.W. left the trailer she occupied with Mr. L.W.C. on his brother's property near Oliver and got a ride to the RCMP detachment in Oliver.

**BACKGROUND**

**6**  It is impossible to separate the facts of this case from the troubled history of the family which gave rise to those facts.

**7**  The circumstances of A.S.W.'s death eventually resulted in charges against both the present accused and the mother, J.W.

**8**  In the present trial the accused, L.W.C., is charged on a four count indictment with:

1. manslaughter;
2. criminal ***negligence*** causing death;
3. unlawful confinement; and
4. "improperly or indecently interfering with or offering an indignity to a dead human body or human remains".

**9**  On March 7, 2012, J.W. pled guilty to a charge of improperly or indecently interfering with or offering an indignity to a dead human body or human remains. This offence, under s. 182(b) of the *Criminal Code*, can carry a maximum penalty of five years in prison. Ms. J.W. was sentenced to serve a two year conditional sentence.

**10**  Despite the fact that the Crown called evidence from fifteen witnesses during the course of this trial the only evidence of what happened at the time A.S.W. died and the days immediately preceding that death are found in the evidence of J.W. who was the principal Crown witness and in the statements made by the accused to the "Crime Boss" in the final scenario of a year long RCMP undercover operation.

**11**  The other fourteen Crown witnesses included four RCMP officers involved in the undercover operation, three RCMP officers involved in the search for and location of A.S.W.'s remains, a forensic anthropologist, a DNA expert and two social workers.

**12**  The remaining three witnesses included A.S.W.'s brother B., his natural father W.D., and J.W.'s cousin.

**13**  In Late October 2004, after J.W. was returned to Prince George from the southern Okanagan, she accompanied members of the RCMP in a search for the area where the remains of her son A.S.W. had been concealed.

**14**  After directing the police officers to a series of locations to the west of Prince George, generally north of the Nechako River, she apparently directed them to what was described as the "best" location.

**15**  On October 30, 2004 Sgt. Fiedler, an RCMP dog master, located what appeared to be a shallow grave in an isolated wooded area approximately 8 kilometers from the end of pavement on the North Nechako Road. At the site of the shallow grave there was located a number of fragments of fabric around a shallow depression with branches and twigs laid across it. The fabric was described as appearing to be weathered remnants of a blanket with bluish markings.

**16**  Twenty to twenty-two meters from the depression, two femurs were located in close proximity to each other.

**17**  Dr. Lazenby, a biological anthropologist, examined the bones and found evidence of animal activity. Dr. Lazenby found the femurs to be approximately 200 mm long compared to the 400 mm of an average adult. He concluded the femurs were from what he characterized as a "sub-adult" of approximately 10 to 15 years.

**18**  Although nuclear DNA testing failed in this case, Dr. Staub was able to extract a mitochondrial DNA result which he compared to a database maintained by the F.B.I. It was on the basis of these results that he concluded that J.W. or one of her maternal relatives could not be excluded as a match.

**19**  The likelihood ratio he found to be 1 out of 4,839 individuals shared the same sequence.

**20**  I have no hesitation in concluding on the whole of the evidence that the femurs located near the burial site were part of the remains of A.S.W. and that these remains had been scattered by animal activity.

**21**  Certain basic facts are undisputed in this case -

1. J.W. and L.W.C. were living together and had been for about a year at the time of A.S.W.'s death;
2. J.W. was the natural mother of the boys A.S.W. and B. and L.C. acted in the capacity of a parent in relation to them;
3. In the days immediately before A.S.W.'s death, J.W. and L.C. became aware of allegations that A.S.W. was touching and molesting B. and they believed those allegations;
4. Having attempted without success to secure A.S.W. in his bedroom by tying the door handle closed, the two discussed their options and agreed that to keep A.S.W. away from B. they would tie him up;
5. A.S.W. was secured for the most part, and at the material time, by tying his hands in front of him and tying his feet with electrical extension cords;
6. There is no evidence whatsoever of a gag or anything like it being used;
7. A.S.W., at all times, had one or the other or both of the parents in the residence or in the immediate vicinity;
8. After two or perhaps three days of his being secured in this way the family came in from outside where they were playing to find A.S.W. making gurgling sounds and in distress;
9. L.C. immediately untied A.S.W.'s hands and J.W. untied his feet. C. carried A.S.W. to the bathroom and laid him on the floor and immediately began performing CPR on him and, eventually, mouth to mouth;
10. Some five to ten minutes later C. advised W. that A.S.W. "was gone";
11. Neither of them called 9-1-1 or reported the matter to the police or anyone else until Ms. J.W. did so in Oliver in October 2004, nearly five years later;
12. With the assistance of W., C. carried the body, wrapped in a blanket, to the car where it was placed in the trunk;
13. For the next several weeks to perhaps a month the body remained in the trunk while they drove around the Prince George area;
14. Eventually C. accompanied by W. travelled to the wooded area along the Nechako River where C. placed A.S.W.'s body in a shallow grave;
15. Shortly after W. and C. left the trailer in which they were living and began residing with family members to avoid contact with Social Services;
16. In January of 2001 W. and C. left Prince George and travelled to Oliver where they "hid out" in a camper on C.'s brother G.'s property;
17. It was only after C. had moved on to another girlfriend that W. went to the police;
18. On several occasions at least both W. and C. gave untrue stories about where A.S.W. was and what had become of him.

**SUBMISSIONS**

**The Crown**

**22**  Although the Crown concedes that Ms. J.W.' evidence must be approached with caution and that "she is clearly not a great historian" they submit that she is "unsophisticated and incapable of invention".

**23**  The Crown submits that Ms. J.W. went voluntarily to the police and that she led them to the spot where A.S.W.'s remains were located.

**24**  The Crown further submits that B. denied giving any pills to A.S.W. or that he was ever sexually assaulted.

**25**  With respect to manslaughter, the Crown submits that this case falls within the parameters of unlawful act manslaughter by failing to provide the necessities of life and in particular by failing to call 9-1-1 or to summon medical assistance. The Crown submits that this failure was a significant factor in the death and should result in a finding of guilty of manslaughter.

**26**  In terms of the count of criminal ***negligence*** causing death, the Crown submits that either unlawful confinement or failure to provide necessities or the combination of the two could result in a guilty finding on this count.

**DISCUSSION**

**27**  I do not accept the general proposition that Ms. W. is unsophisticated and incapable of invention. Although there is no doubt that she is a terrible historian I do not accept that the difficulties with Ms. J.W.' evidence can be so sweepingly defined.

**28**  Firstly, there is a consistency between the evidence of events with A.S.W. in Ms. J.W.' evidence and the accused's statement concerning it given to the "crime boss".

**29**  Secondly, the major discrepancy between her evidence and the accused's statement can be found in events after A.S.W. was carried to the bathroom. Ms. J.W.' evidence is that the accused told her to leave and go to the living room. She went on to testify that the accused also told her not to call 9-1-1 and that she didn't because she was afraid of him.

**30**  This evidence is a vivid contrast to the accused's statement in which he says she was there in the bathroom throughout.

**31**  The other aspect of this evidence is that if accepted the mother of A.S.W. absented herself from attempts to resuscitate him and effectively testified that she never again saw her son until she helped carry his dead body, wrapped in a blanket, to the car and place it in the trunk.

**32**  I am painfully aware of the frailty of attempting to apply logic or aspects of normal behaviour to this family based on the limited evidence of their behaviour. It seems clear that norms as they exist in this family are not the norms one would ordinarily expect.

**33**  There is however, in my view, a pattern in the behaviour and evidence of Ms. J.W. That evidence is both repetitive and self-serving. It is entirely lacking in detail and credibility. Over and over in her evidence Ms. J.W. offered a single answer for her actions to difficult questions. That answer was the bare statement that she was afraid of L.W.C. Even the Crown acknowledged that Ms. J.W. could not and never did articulate a basis or a reason for that fear; this, despite a detailed and respectful cross-examination that canvassed the area in detail and gave her every opportunity to express the basis for the fear.

**34**  What emerged from that cross-examination was Ms. W.' admissions that beyond one incident in which she was slapped Mr. L.W.C. had never struck her or the two boys.

**35**  I have always understood it to be the court's obligation to act responsibly on the evidence not on a whim or speculation. The Crown's submission, at its root, invites the court to ignore both the evidence and the burden of proof and to accept Ms. J.W.' statement on blind faith ignoring the evidence that emerged.

**36**  I do not accept that, in the existing circumstances which Ms. J.W. herself acknowledges, a young man is in distress, and L.C., attempting to assist him by administering CPR, would stop those efforts, tell her to leave and instruct her *not* to call 9-1-1.

**37**  I also reject her evidence that she did leave or on a more general level her evidence that she repeatedly acted in fear of L.C. as she suggests.

**38**  It is clear on the evidence that on several occasions Ms. J.W., without C. present, told completely false stories about A.S.W.'s whereabouts.

**39**  It is equally clear that in her cross-examination Ms. J.W. accepted the proposition put to her by defence counsel that she did not call 9-1-1 or the police because she knew they would take B. away if she did.

**40**  It is an unspeakable tragedy that at this trial some twelve years after his death, we know almost nothing about what really happened.

**41**  At the very least the evidence of Ms. J.W. is in many respects unreliable and, in particular, self-serving.

**42**  I have reviewed in detail each of the authorities referred to by the Crown. I have found particularly helpful the review of legal principles by Molloy J. in *R. v. Alexander*, [*2011 ONSC 980*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFG1-JF75-M2H0-00000-00&context=), at paras. 2-12.

**MANSLAUGHTER**

**43**  At para. 12 of the reasons in *R. v. Alexander*, Moloy J. sets out the elements the Crown must prove to establish the offence of manslaughter. Paraphrasing those elements in terms applicable to the present case, the Crown must prove the following elements beyond a reasonable doubt:

1. Mr. L.W.C. was under a legal duty to provide the necessaries of life to A.S.W.;
2. Mr. L.W.C. knew that A.S.W. was in distress and in need of medical attention;
3. Mr. L.W.C.'s failure to get medical care for A.S.W. was a significant contributing cause in his death; and
4. Mr. L.W.C.'s failure to get medical care for A.S.W. was a marked departure from what can be expected of a reasonably prudent parent in the same circumstances and inherently dangerous to the life or health of A.S.W.

**44**  The law with respect to culpable homicide recognizes that, in some circumstances, it can be committed by a failure to do something.

**45**  As Watt J. (as he then was) found in *R. v. B.(E.),* [*[2006] O.J. No. 1864*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDT1-JJYN-B39W-00000-00&context=) at paras. 28-29:

As a matter of general principle, a crime may be committed by an act or omission, *provided* the omission is by one and in circumstances in which the law imposes a duty to act. There can be *no* culpable omission in the absence of a legal duty to act. See *Williams, Textbook of Criminal Law*, (2d Ed.) para. 7.3 Omissions, at pp. 148-9; and *Stuart, Canadian Criminal Law*, (4th Ed.) at pp. 91-2.

It would seem beyond controversy that a person may commit homicide, an essential component of culpable homicide and accordingly of manslaughter and murder, by omission. See, *Smith and Hogan, Criminal Law* (10th Ed.) at pp. 61 and 383. There is nothing in the expansive phrase "by any means", for that matter "causes the death" that would limit the external circumstances to acts. And besides, it is not always easy to distinguish between what constitutes an act and what is an omission.

**46**  To constitute manslaughter the failure to provide necessaries must be proven to have been the cause of death from both a factual and a legal perspective.

**47**  The Supreme Court of Canada described the approach in *R. v. Nette*, [*[2001] 3 S.C.R. 488*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M49H-00000-00&context=) at paras. 44 and 45:

In determining whether a person can be held responsible for causing a particular result, in this case death, it must be determined whether the person caused that result both in fact and in law. Factual causation, as the term implies, is concerned with an inquiry about how the victim came to his or her death, in a medical, mechanical, or physical sense, and with the contribution of the accused to that result. Where factual causation is established, the remaining issue is legal causation.

Legal causation, which is also referred to as imputable causation, is concerned with the question of whether the accused person should be held responsible in law for the death that occurred. It is informed by legal considerations such as the wording of the section creating the offence and principles of interpretation. These legal considerations, in turn, reflect fundamental principles of criminal justice such as the principle that the morally innocent should not be punished ...

**48**  On these points the Crown's case in regards to manslaughter must fail.

**49**  When factual causation is considered, what was described as the gaping hole in the Crown's case becomes apparent. There is no medical, mechanical or physical explanation for the death let alone one linking the accused to that result.

**50**  The evidence here, such as it is, establishes that A.S.W. was in distress and that the accused immediately took steps by administering CPR. While engaged in those efforts it was Ms. J.W. who stood by and did nothing.

**51**  Turning to legal causation, even if factual causation is met in the circumstances of this case, it would, in my view, be unreasonable to impose an obligation on a person attempting CPR to preserve a life to discontinue those efforts to make a telephone call, particularly when there is another person bound by the same duty with every ability necessary to make that telephone call.

**52**  In my view the Crown has failed to prove that the accused caused the death either factually or legally.

**53**  In reaching this conclusion I am well aware that other contributing causes may or may not be legally significant. The difficulty in the present case is that we do not, on the evidence, know the cause.

**54**  I accept that Mr. L.W.C. was under a legal duty, that he knew A.S.W. was in distress and needed immediate assistance or attention. I do not accept that in choosing to attempt CPR rather than placing a telephone call his action or omission was a significant cause in his death.

**55**  I do not accept that his failure to make the call in the circumstances was a marked departure from the norm.

**CRIMINAL *NEGLIGENCE* CAUSING DEATH**

**56**  In order to prove the offence of criminal ***negligence*** causing death the Crown must prove beyond a reasonable doubt -

1. the identity of the accused as the offender;
2. the time and place of the offence as set out in the indictment;
3. that the accused's act or omission caused the death of A.S.W.;
4. that the accused's conduct was a marked and substantial departure from the standard of care of a reasonable person in the circumstances; and
5. that the accused's conduct or omission showed a wanton or reckless disregard for the life or safety of A.S.W.

**57**  The Crown, for the reasons above, has wholly failed to prove elements 3, 4 and 5.

**58**  The defence presented no submissions that challenged either counts 3 or 4 and went so far as to effectively concede that count 4 has been proven.

**59**  I am equally satisfied that the necessary elements of count 3 have been established and that no lawful authority exists for tying up the deceased as they did and leaving him so restrained for two to three days.

**60**  Whatever their reasons, other reasonable steps were readily available and restraint of this kind is not authorized by law nor can it be condoned.

**MINISTRY OF CHILDREN AND FAMILY DEVELOPMENT**

**61**  I cannot conclude this matter without saying something about the Ministry of Children and Family Development and their role in these tragic events.

**62**  The first of the Ministry employees called as a witness in this case was Sarah Lloyd. At the time of A.S.W.'s death on January 7, 2000 she had been working as a social worker for some six years and was employed by the Ministry as an intake and investigation officer in the Child Protection Branch.

**63**  In December 1999 the Ministry had received at least one child protection complaint with respect to this family and A.S.W. and B. in particular.

**64**  Ms. Lloyd obviously concluded that some action was necessary and that it was serious enough that she arranged a joint interview with members of the RCMP for December 17, 1999. When Ms. J.W. did not appear, Ms. Lloyd contacted her and was told a lawyer had advised her not to meet with her.

**65**  Despite the apparent concerns and the power given to the Ministry by their legislation, it appears that nothing else was done.

**66**  On January 12, 2000, nearly a month later, Ms. Lloyd drove to the family residence in the evening in an attempt to catch them at home. There is no evidence of any other action being taken over that month.

**67**  Ms. Lloyd testified that in preparation for her meeting on December 17, 1999 she had spoken to school authorities, a therapist involved with the family and to members of the RCMP.

**68**  School records placed in evidence at this trial (Exhibit #1, Tabs U and V) show that A.S.W. was a student at Kelly Road and that after attending school on January 3, 2000 he was absent from school until January 12, 2000 when J.W. withdrew him from school on the basis "he was moving".

**69**  I note in passing that Ms. J.W. had withdrawn A.S.W. from school the very day on which Ms. Lloyd attended their residence and spoke to her.

**70**  Although Ms. Lloyd was denied access initially, she was admitted and spoke to them. A.S.W. was not present and she was told he was living in Prince George at a residence on [Text deleted by LexisNexis Canada].

**71**  It is blindingly obvious that Ms. Lloyd made no effort to locate or speak to A.S.W. She apparently obtained no actual address on [Text deleted by LexisNexis Canada], no telephone number and no names of the people with whom he was allegedly living.

**72**  For some inexplicable reason Ms. Lloyd apparently concluded it was okay to leave B. in the home and left having arranged another meeting for January 17, 2000.

**73**  When Ms. J.W. again failed to attend that meeting, Ms. Lloyd took what she apparently viewed as extreme measures, entering a child protection alert into her computer.

**74**  Unknown to Ms. Lloyd, when she parked behind the family car at the trailer on the Hart Highway A.S.W.'s dead body lay in the trunk of that car a few feet from her bumper.

**75**  A.S.W. had died five days before her attendance within the month in which the Ministry did nothing.

**76**  There is no evidence the Ministry took any other steps. Ms. Lloyd testified she did not report A.S.W. as missing although she did speak to the police about her concerns.

**77**  A year later, in January 2001, in response to an inquiry, J.W. told the Ministry that A.S.W. was living in Oliver.

**78**  For this fine body of work Ms. Lloyd was promoted and made a supervisor.

**79**  The second Ministry employee to testify was Karen Johnson from their office in Oliver. She encountered J.W. and L.C. in January 2002 when concerns arose about a newborn baby born to Ms. J.W.

**80**  Ms. Johnson attended the hospital on January 15, 2002 and spoke to Ms. J.W. about A.S.W. Ms. J.W. refused to tell here where A.S.W. was but advised her "he was in a safe place".

**81**  Ms. Johnson followed this meeting up on January 17, 2002 having determined that the Ministry would apprehend the newborn child with a meeting with both J.W. and L.C. At this meeting Ms. J.W. stated that she had been advised by a lawyer not to disclose his whereabouts.

**82**  Ms. Johnson remained concerned. She contacted local RCMP, the Ministry of Human Resources and Social Welfare rolls. She could find no claim or information on A.S.W.'s whereabouts. Her inquiries of various school districts found no evidence of A.S.W. being registered.

**83**  Her inquiries of family relatives found that those who lived in the north believed A.S.W. was living in the south, and those living in the south believed he was living in the north.

**84**  Ms. Johnson prepared a court application and on February 15, 2002 was granted an order compelling Ms. J.W. to disclose A.S.W.'s whereabouts. When served with the order Ms. J.W. again refused to disclose his whereabouts.

**85**  On March 15, 2002 on the basis of that refusal the court issued a warrant for her arrest.

**86**  The evidence in this case discloses no further information or actions taken by the Ministry until Ms. J.W. went to the RCMP two and a half years later, in October of 2004, at which time the warrant was executed.

**87**  The additional tragedy of these events lies in the fact that no timely and effective action was ever taken which led inevitably to the evidentiary morass in which we find ourselves today.

**88**  I am at a loss to understand how it is that case after case similar to this has surfaced in this region over the years.

**89**  The cathecism of the approach it seems is always the same. At first there is sound and fury at least partly fueled by the media. This is followed by the announcement either of an investigation or that the problems have been fixed or are being addressed, usually by some high level official. Silence then returns until the next incident demonstrates yet again that nothing has changed.

**90**  I apologize to Mr. L.W.C. and counsel for that diversion which is, in my view, necessary.

**91**  In terms of the charges against Mr. L.W.C.

On Count 1 - Manslaughter

I find him not guilty.

On Count 2 - Criminal ***Negligence*** Causing Death I find him not guilty.

On Count 3 - Unlawful Confinement I find him guilty as charged.

On Count 4 - the count of interfering with human remains I find him guilty as charged.

W.G. PARRETT J.

**End of Document**

[***Salgado v. Toth, [2009] B.C.J. No. 2230***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B2B4-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

G.D. Burnyeat J.

Heard: May 25-29, 2009.

Judgment: November 9, 2009.

Docket: S073646

Registry: Vancouver

**[2009] B.C.J. No. 2230** | 2009 BCSC 1515 | 72 C.C.L.T. (3d) 130 | 2009 CarswellBC 3020 | 182 A.C.W.S. (3d) 211

Between Manuel Ignacio Salgado and Nora Gabriela Calcaneo, Plaintiffs, and Imre Toth and 659279 B.C. Ltd. doing business as HomePro Inspections, Grahame Harold Shannon, Shirley Yap Shannon, the District of North Vancouver and Cesar Parayno, Defendants

(83 paras.)

**Case Summary**

**Contracts — Terms — Express terms — Exclusion clauses — Action by owners against property inspector for damages for *negligence* allowed and owners awarded damages of $192,920 — Owners retained inspector and his company to prepare inspection report for property prior to purchase — Inspector negligent in his inspection of beams on both sides of house, in failing to inspect some beams, and in not recommending geotechnical review of property — While inspector's repair estimate was woefully inadequate, damages were not available to owners as a result of this negligent misrepresentation because owners did not rely on this misrepresentation to their detriment.**

**Contracts — Interpretation — General principles — Construction against originator or contra proferentem rule — Action by owners against property inspector for damages for *negligence* allowed and owners awarded damages of $192,920 — Owners retained inspector and his company to prepare inspection report for property prior to purchase — Inspector negligent in his inspection of beams on both sides of house, in failing to inspect some beams, and in not recommending geotechnical review of property — While inspector's repair estimate was woefully inadequate, damages were not available to owners as a result of this negligent misrepresentation because owners did not rely on this misrepresentation to their detriment.**

**Tort law — *Negligence* — Duty and standard of care — Duty of care — Action by owners against property inspector for damages for *negligence* allowed and owners awarded damages of $192,920 — Owners retained inspector and his company to prepare inspection report for property prior to purchase — Inspector negligent in his inspection of beams on both sides of house, in failing to inspect some beams, and in not recommending geotechnical review of property.**

**Tort law — Fraud and misrepresentation — Negligent misrepresentation (Hedley Byrne principle — Particular relationships — Sale of land — Action by owners against property inspector for damages for *negligence* allowed and owners awarded damages of $192,920 — Owners retained inspector and his company to prepare inspection report for property prior to purchase — Inspector negligent in his inspection of beams on both sides of house, in failing to inspect some beams, and in not recommending geotechnical review of property — While inspector's repair estimate was woefully inadequate, damages were not available to owners as a result of this negligent misrepresentation because owners did not rely on this misrepresentation to their detriment.**

|  |
| --- |
| Action by the owners, Salgado and Calcaneo, against Toth for damages for negligent misrepresentation and ***negligence***. The owners purchased a house consisting of an A-frame structure built during the early 1960s and an addition that was constructed in the late 1980s. The house was on a steep sloping lot. They agreed to pay $1,095,000 for the property, and the agreement was "subject to an inspection report and bank approval to the Buyers' satisfaction on or before five week days after acceptance." The owners retained Toth and his company, HomePro Inspections, to prepare an inspection report for the property. Toth inspected the house and provided both a written and a verbal report to the owners. He received $450 for his services. The owners alleged that Toth breached his duty of care by failing to inspect all of the A-frame beams for rot and moisture, by failing to fully advise them regarding the extent of the structural problems relating to the house, and by failing to advise the owners to retain a structural engineer. They further alleged that Toth made various statements regarding the cost of correcting the problems that he found ($20,000), and that the statements amounted to negligent misrepresentation. Toth denied the allegations, and relied on his contract with the owners to limit his liability. Salgado did not read the contract before signing it. The parties agreed that the cost of the work to remedy the problems with the house totalled $192,920.  HELD: Action in ***negligence*** allowed and owners awarded damages of $192,920.  Toth was negligent in his inspection of the horizontal and vertical beams on both sides of the house. He also was negligent in not inspecting the east side beams, and in his inspection of the west side beams by either inspecting only two and not advising the owners that he had only done so, or by not drawing to their attention that the rot was much more widespread than he indicated to them. His breaches of duty of care caused the owners to suffer damages. But for the negligent act and/or the omission, the damages would not have occurred as the owners would not have purchased the property if the full extent of the rot on the east and west side beams of the house had been known and brought to their attention. Toth was negligent in not recommending a geotechnical review of the property and by not clearly presenting the significance of the problems he observed. Toth owed the owners a duty of care, and this duty was not met because he did not recommend to the owners that they should consult a geotechnical engineer prior to deciding whether to proceed with the purchase of the property. The owners relied upon the advice received from Toth before deciding whether they would remove the subject clauses contained within the contract and proceed to purchase the property. As a result of the owners' reliance on the advice received from Toth regarding the stability of the house, the owners proceeded to purchase the property and suffered damages as a result of that purchase. Toth's repair estimate was woefully inadequate. While damages were not available to the owners as a result of this negligent misrepresentation of the likely cost of the structural changes that were required in order to provide stability for the house because the owners did not rely on this misrepresentation to their detriment, the estimate gave considerable solace to the owners that the structural expenditures would not be excessive and, therefore, the structural problems were not significant. The owners were entitled to the actual cost of the structural changes which were required, including engineering costs, less the estimate provided by Toth. It was incumbent upon Toth to draw to the attention of Salgado the exclusion and waiver clauses in the contract and to take reasonable steps to apprise Salgado of the onerous terms and to ensure that he read and understood them. The doctrine of contra proferentem applied and any "guarantee or warranty, express or implied" related to the adequacy, performance or condition of any inspected structure, item or system at the time of the inspection was not excluded by the limitation of liability paragraph. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 37(b)

***Negligence*** Act, *RSBC 1996, CHAPTER 333*,

**Counsel**

Counsel for Plaintiffs: F.R. Eadie.

Counsel for Defendants Imre Toth and 659279 B.C. Ltd., dba HomePro Inspections: G.S. Miller and C. Tham.

**Reasons for Judgment**

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| **G.D. BURNYEAT J.** |

**1**   The Plaintiffs purchased a property in North Vancouver having a building lot that had a steep slope along the southern perimeter of the lot ("Property") and a house consisting of an A-frame structure built during the early 1960s and an addition that was constructed in the late 1980s ("House").

**2**  The former owners listed the Property for sale during the summer of 2006 at a listing price of $1,195,000.00. By a September 15, 2006 contract of purchase and sale ("Agreement"), the Plaintiffs agreed to pay $1,095,000.00 for the Property with the purchase to complete on October 27, 2006. The Agreement was "subject to an inspection report and bank approval to the Buyers' satisfaction on or before 5 week days after acceptance".

**3**  At the recommendation of their real estate agent, the Plaintiffs retained the Defendants, Imre Toth and 659279 B.C. Ltd. doing business as HomePro Inspections ("Mr. Toth") to prepare an inspection report for the Property. Mr. Toth came to the Property, inspected the House, and provided both a written and a verbal report to the Plaintiffs. Mr. Toth received $450.50 for his services.

**4**  The Plaintiffs allege that Mr. Toth made certain statements about the cost of repairing the Property and that those representations constitute negligent misrepresentations that were relied upon by the Plaintiffs. At the same time, the Plaintiffs allege that Mr. Toth conducted the inspection of the Property in a negligent manner and failed to identify and warn the Plaintiffs of a number of material defects. Mr. Toth denies those allegations, and, in any event, relies on his contract with the Plaintiffs to limit any liability that he might have.

**5**  The Plaintiffs have settled with the Defendants, Grahame Harold Shannon and Shirley Yap Shannon, who were the former owners, have discontinued their action against Alfredo Lavaggi and Sussex Realty Corporation, carrying on business as Prudential Sussex Realty and the said Sussex Realty Corporation, and have discontinued their action against the District of North Vancouver and Cesar Parayno, an engineer. Accordingly, the Plaintiffs do not seek from the Defendants any damages or other relief for any portion of the loss, damage or expense alleged which may be attributed to the fault of those Defendants and expressly waive any right in this Action to recover from the Defendants, Imre Toth and 659279 B.C. Ltd., any amount which the other Defendants would be liable to indemnify Imre Toth and 659279 B.C. Ltd. in third party proceedings.

**6**  By agreement, the parties accept that the cost of remedial work to remedy certain problems with the House totals $192,920.45, made up as follows: (a) "A" Frame Beams -- west side of the House ($35,000.00); (b) "A" Frame Beams -- east side of the House ($18,800.00); (c) Stabilization of House ($56,800.00); (d) Engineering ($26,269.00, comprised of costs incurred to date of $16,269.00, and estimated future costs of $10,000.00); (e) West side deck removal ($9,360.00); (f) replacement of the west deck ($24,100.00); and (g) a shoring up of the east deck ($11,500.00).

**7**  With G.S.T. of $9,091.45, and a contingency of $22,000.00, the total cost of the required remedial work is $212,920.45. From that amount, the Plaintiffs subtract the $20,000.00 that Mr. Toth estimated the remedial work would cost and claim $192,920.45, as well as pre-judgment interest and Scale "B" costs.

**BACKGROUND**

**8**  Alfredo Lavaggi was a realtor who was contacted by the Plaintiffs. Mr. Lavaggi introduced the Property to the Plaintiffs and acted as their agent with respect to the purchase of the Property.

**9**  At the recommendation of Mr. Lavaggi, Mr. Toth was requested to prepare a home inspection report. Mr. Toth inspected the Property and House on September 21, 2006. In accordance with his testimony at Trial, I find that Mr. Toth took about 30 minutes to inspect the roof and the "rest of the exterior of the House". I make no conclusions about how long Mr. Toth spent to inspect the interior of the House.

**10**  After completing his inspection, Mr. Toth met with the Plaintiffs, discussed what was in the written part of his report, discussed other matters about the Property and the House with the Plaintiffs, and received payment from the Plaintiffs for providing his services. Sometime during that meeting, a contract with the Defendant, 659279 BC Ltd. doing business as HomePro Inspections, was signed by Mr. Salgado ("Contract"). Ms. Calcaneo did not sign the Contract. While the Contract defines "659279 BC Ltd. dba HomePro Inspections" as the "Inspector", the Contract is signed by Mr. Toth in a space above the words: "INSPECTOR IMRE TOTH 659279 BC LTD. HOMEPRO INSPECTIONS".

**11**  After receiving the written and verbal report of Mr. Toth, Mr. Salgado phoned Mr. Lavaggi to discuss what he had been told. At his March 12, 2008 Examination for Discovery, Mr. Lavaggi was asked the following questions and gave the following answers:

1. But he [Mr. Salgado] might have said there's a reference here to a structural problem?
2. He did mention, as I said to you before, that he was told there was structural and foundation problems.
3. Did he indicate to you what the extent of those problems were? Other than --
4. He talked about it and that they were major, that they were significant.
5. Did he say what the dollar value of the problem was?
6. I don't recall.

**12**  The Plaintiffs removed the subject clauses on the Agreement, the purchase in the name of both Plaintiffs completed on schedule, and the Plaintiffs took possession of the Property.

**THE CONTRACT**

**13**  The Contract signed by Mr. Salgado on September 21, 2006 contained a number of provisions, including the following (capitalization and bold print as set out in the Contract):

1. The INSPECTOR will perform a VISUAL INSPECTION of the readily accessible and visible areas of the major systems and components of the Primary Residence on the Property and certain built-in equipment and improvements. The inspection and report are not intended to reflect on the market value of the Property nor to make any recommendation as to the advisability of purchase.
2. The condition of certain systems, components and equipment will be randomly sampled by the inspector. Examples of such systems, components and equipment are window/door operation and hardware, electrical receptacles, switches and lights, cabinet/countertop mounts and functions, insulation depth, mortar, masonry, paint and caulking integrity and roof covering materials. Furniture, rugs, appliances, stored items, etc. will not be moved for the inspection.
3. The INSPECTOR will give a professional opinion on whether those items inspected are performing their intended function at the time of the inspection or are in need of immediate repair. The inspection and report are based upon observations of conditions that exist at the time the inspection was performed.
4. Cost estimates, if provided, are "ballpark" estimates only and are not intended to be relied upon by any person for accuracy. The CLIENT should obtain written bids from qualified licensed contractors in order to determine the possible cost of repairs.
5. This inspection is performed in accordance with the **Code of Ethics and Standards of Practice of the Canadian Association of Home and Property Inspectors (CAHPI), a copy of which is attached to this report.**
6. The Client is encouraged to participate in the visual inspection process and accepts responsibility for the consequences of electing not to do so, i.e. incomplete information being available to the Inspector. This Client's participation shall be at the Client's own risk for injuries, falls, property damage, etc;

**9. THE INSPECTION AND REPORT ARE NOT INTENDED NOR ARE TO BE USED AS A GUARANTEE OR WARRANTY, EXPRESSED OR IMPLIED, REGARDING THE FUTURE ADEQUACY, PERFORMANCE OR CONDITION OF ANY INSPECTED STRUCTURE, ITEM OR SYSTEM. THE INSPECTOR IS NOT AN INSURER OF ANY INSPECTED CONDITIONS.**

1. It is understood and agreed that should the INSPECTOR be found liable for any loss or damages resulting from a failure to perform any obligations, including but not limited to ***negligence***, breach of contract, or otherwise, then the liability of the INSPECTOR shall be limited to a sum equal to the amount of the fee paid by the CLIENT for the Inspection and Report.
2. In the event that the CLIENT claims damages against the INSPECTOR and does not prove those damages, the CLIENT shall pay all legal fees, arbitrator/mediator fees, legal expenses and costs by the INSPECTOR in defence of the claim.
3. By signing the Property Inspection Contract, the CLIENT acknowledges, covenants and agrees that:
4. The CLIENT understands and agrees to be bound by each and every provision of this contract;
5. The INSPECTOR has not made any representations or warranties other than those contained in the Contract;
6. The TOTAL fee payable at the time of the visual inspection of the Subject Property shall be $450.50.
7. The CLIENT shall pay the fees described above to the inspector without set-off or deduction.

**14**  At Trial, Mr. Toth stated that he understood that the Plaintiffs would be available at 12:00 noon on the 21st so that he could provide them with his "presentation" regarding the inspection. The Plaintiffs did not arrive as Mr. Toth anticipated:

I cannot recall exactly the time when they arrived. And I believe I expressed my frustration, because we agreed upon a time, and I felt ignored and disrespectfully treated, so I was having quite a ... [frustrating] time. I expressed them I have other things to do than waiting for people, and I scheduled this, as I told, my presentation between 12:00 and 1:00, and I have other things to do. And that was what I said, and then I started discussing the report.

**15**  At his December 26, 2008, Examination for Discovery, Mr. Salgado stated that he arrived at the Property at about 12:30. I conclude that the presentation of Mr. Toth took between 30 and 45 minutes, and, in addition to the written and verbal report provided by Mr. Toth, Mr. Toth and the Plaintiffs visited some of the areas within the House during that time. At Trial, Mr. Toth was asked how long he spent after the presentation of the written and verbal report going through the House with the Plaintiffs and he stated: "15, 20 or more minutes after the structural presentation."

**16**  At Trial, Mr. Toth stated that his contract would usually be signed by both parties at the beginning of the inspection if all parties were present but, if not present, then at the time before the inspection was discussed. At Trial, Mr. Toth stated that it was his "usual practice" that approximately 99% of his written report was "fully blank until the presentation with my client starts", but that, if the client was not present, then "for time management and killing the empty time", he would fill in most if not all of the written portion of his report prior to the client being present. Mr. Toth stated that the Contract was signed before any kind of presentation on September 21, 2006. I find that the Contract was signed after virtually all of the written portion of the report was added to the report.

**17**  At his October 17, 2007 Examination for Discovery, Mr. Toth stated that he completed the report, invited the Plaintiffs to sit down, and then "... introduced this inspection report system". At Trial, Mr. Toth stated that, after Mr. Salgado filled in his name and address on the Contract, he then said to Mr. Salgado:

This is the property inspection contract. Opening the book, showing the contract, I told, in Canada, every home inspection conducted by a member of the national association has to have this written agreement signed. I did my part. I'm asking him to review it and fill the top part and sign it at the bottom. He reviewed it and then signed it, filled it and signed it.

Since I'm not sure my clients how much they understanding or reading from my contract, this is my standard practice, to briefly point out three major elements. I'm calling them three major elements. Is the number 1 is inspection -- this regarding to the scope of inspection, sentences 1 to 4. I briefly summarizing those section as the nature of my inspection is visual inspection. ...

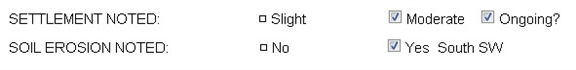
And then second cornerstone or significant information is I'm following the standard of practice and code of ethics ... and that was the 5 and 6. And I called the so-called sentence number 9 printed in bold capital lettering, I named it as a third major information, it telling inspection is not an insurance policy, not a warranty or assuring or one of the -- any conditions. This is a standard no matter how much time my clients spending reading or not reading, I'm pointing always out these three areas.

**WRITTEN REPORT**

**18**  The written report prepared by Mr. Toth started with a "The Big Picture/Summary" page. The form of report was prepared by Mr. Toth after consulting with a lawyer and after incorporating the recommended contract form of the Canadian Association of Home and Property Inspectors of B.C. ("CAHPI (BC)"). The "Big Picture/Summary" page set out eight separate areas of the inspection, rating each of the eight sections as average, above average or below average, as well as setting out "major points of concern", setting out "significant qualities", and setting out whether "major/minor repairs" were "recommended".

**19**  The rating for "**STRUCTURE**" was half-way between "average" and "below", and all of the words "Major/Minor Repairs Recommended" were underlined. The **ELECTRIC**, **PLUMBING**, **KITCHEN** and **EXTERIOR** are all rated as "Average". The "**HEATING/VENTILATION/AC**" and the "**INTERIOR**" were rated as between average and above average. The "**UNDER HOUSE SPACE**" was also rated as between above average and average. Minor repairs were recommended for the "**ELECTRIC**" and "minor repairs and maintenance" were "Recommended" for the **PLUMBING** and **ELECTRIC** components. Maintenance was recommended for the **HEATING/VENTILATION/AC COMPONENT**. The "**SIGNIFICANT QUALITIES**" were noted as being "200 A service", "Newer furnace", and "Well maintained clean interior". The "**MAJOR POINTS OF CONCERN**" for the "**STRUCTURE**" were described as follows: "To fix-up structural deficiencies". The comments under the headings "**MAJOR POINTS OF CONCERN**" and "**SIGNIFICANT QUALITIES**" were handwritten onto the report form. The next part of the written report dealt with each of the eight components and comprised two pages for each of the eight components.

**20**  On the first page for the component "**STRUCTURE**", the following was noted:



**21**  The only marks or words that were not on the printed form were the question mark after the word "ongoing" and the words "South SW" after the word "Yes". There was a check mark beside the printed words: "check with professional engineering/pest control contractor or \_\_\_\_\_\_\_\_\_ for complete information".

**22**  The printed heading on the next page dealing with **STRUCTURE**, was: "**SIGNIFICANT STRUCTURAL DEFICIENCIES**". On this page, there were number of printed "Descriptions". There was a column where a tick mark could be placed to indicate that a particular description applied, a second column to write in the "Location" where the description applied, and two columns to allow tick marks to be added to indicate whether "Repair" or "Upgrade" or both were suggested. The following printed descriptions had tick marks beside them, with the Location, Repair and/or Upgrade columns as noted:

1. Unstable soil conditions/erosions (location being "S, SW", and "repairs" and "upgrade" ticked);
2. Solitary foundation movements (location being "S side, deck, SW (?), and "repairs" ticked;
3. Floor sag (location being SW living rm (bsmt) settled to South", but without "repair" or "upgrade" ticked); and
4. Wood deck unstable, lateral support missing (with both "repair" and "upgrade" ticked).

**23**  In addition to those descriptions that were printed on the form, the following additional comments were handwritten in by Mr. Toth:

1. "Wood decks 6x6 posts have no bracing in any directions, new braces must be added. N side framing (posts and beam) moved, doesn't support the deck any more. Raise the top of beam to support joists."
2. "SW deck structure solitary foundations have major settlements, post base soil connection structure has no proper connection to house. To lift-up, and reinforce foundation & posts. "
3. "Two West side timber rafters near foundations are decayed, water damaged. "
4. "SE corner of garage conc. structure cracked. "

For each of (a), (b) and (c), the "repair" column was ticked but the "upgrade" column was not.

**24**  The other seven areas of inspection contained somewhat unimportant notations on the two printed pages for each of the seven separate areas of the inspection:

1. "**UNDER HOUSE SPACE**" - "mouse droppings in furnace rm." (with the "**SIGNIFICANT UNDER HOUSE DEFICIENCIES**" being noted as "Occasional seepage possible, to drain backyard!" and "Property grading pooling water against house -- N. side (backyard)", with both noting a suggested "Upgrade");
2. "**ELECTRICAL**" with the "**SIGNIFICANT ELECTRICAL DEFICIENCIES**" notations "Wires/boxes uncovered/loose -- Furnace rm, Exterior E" and "Tree branches/vines interfering with cable", with both noted as requiring "Repair";
3. "**PLUMBING**" -- a number of repairs were recommended, but nothing of a particularly significant nature;
4. "**HEATING/VENTILATION/AIR CONDITIONING**" (with the only "**SIGNIFICANT H/V/AC DEFICIENCIES**" being "Fireplace damper warped, not closing -- Family rm");
5. "**KITCHEN**" had two matters noted: "Refrigerator handle loose" and "Countertops have swollen joints";
6. "**INTERIOR**" was a notation "Mouse droppings in furnace room". There were a number of "**SIGNIFICANT INTERIOR DEFICIENCIES**" noted but none that bear on the questions between the parties involving this litigation;
7. "**EXTERIOR**", the "**SIGNIFICANT EXTERIOR DEFICIENCIES**" were noted as: "Retaining wall has no weep holes, add new, drill drains in conc. wall along stair", "Finished grading high, lowering 6" below siding required -- NE, E", "Yard has no proper drainage pooling rain water -- N patio area", "Debris to remove from E side", and "50% of garage roof, 100% of N overhang roof, 90% of walkway roof, ponding water, new drainage recommended at low points". Upgrades were recommended for all those "deficiencies".

**25**  After the first significant rainfall, the Plaintiffs noted leakage from the roof above the area that had been established as a family room. As a result, repairs were made to the roof. The Plaintiffs had discussions with a contractor who provided them with estimates of what it would cost to undertake the repairs of the areas in the report of Mr. Toth that required attention. The Plaintiffs also had William E. Clayton undertake an inspection of the Property.

**REPORT OF WILLIAM E. CLAYTON**

**26**  Mr. Clayton went to the Property in mid-December 2006 and undertook a cursory inspection. That involved taking no notes but taking photographs which are in evidence. The photographs taken in December 2006 clearly show well-established rot in a number of the A-frame members. While the written report of Mr. Toth had indicated: "Two West side timber rafters near foundation are decayed, water damaged" and while Mr. Toth did not inspect the structural members on the east side of the A-frame part of the House as he did not attempt to access a room which housed the east side structural members, Mr. Clayton found substantial problems with almost all of the A-frame beams.

**27**  At Trial, Mr. Clayton was qualified to provide an expert opinion regarding home inspections and the responsibility of home inspectors. His May 13, 2009 opinion was in evidence. In that opinion, he was asked the following questions and provided the following answers:

A-frame Beams

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|  | Q1. |  | Please advise if there is any material difference in the state of the structure since your inspection of the structure in November or December of 2006." |  |
|  | A1. |  | Since my inspection on 17 December 2006, the rot conditions in all visible portions of the A-frame members appear to have progressed and are more extensive. At the time of my 2006 inspection, the rot appeared to be well established. |  |
|  | Q2. |  | "Please examine the balance of the exposed A-frame rafters on the west side of the house and advise whether or not they are also in need of repair." |  |
|  | A2. |  | I examined all the exposed A-frame members on the west side of the house May 5th and advise that, in my opinion, all of the members, except the first one at the northwest corner, need extensive repairs and replacement of the majority of the exposed exterior portions. |  |
|  | Q3. |  | "Please examine that portion of the structure [the horizontal beam at the south end of the A-frame structure] and advise as whether or not it is need of repair." |  |
|  | A3. |  | I inspected the southernmost beam in the crawlspace. It is in an advanced state of rot. My knife easily penetrated 3" into the members. Water was weeping out of the wood. There were numerous fungal organisms growing on the wood members. In my opinion, these members will need to be replaced as they cannot be repaired. |  |
|  | Q4. |  | "Please describe the state of the A-frame rafter on the East side and advise whether or not they are in need of repair." |  |
|  | A4. |  | Examination of the east side, southernmost A-frame reveals extensive rot immediately above the deck. It appears that an attempt has been made in the past to cover-up the condition or hide the condition - possibly before the last time the house was painted. In my opinion, repairs are required. |  |

1. "Once the house inspector determined that two of the rafters were rotten, what steps should the house inspector have taken, what should the house inspector have reported to the client and what recommendations should the house inspector have made to the client."
2. In my opinion, a prudent inspector in this market place at that time, would have checked the condition of all of the similar structural members and reported the condition in writing and in discussion with the client and would most likely have physically shown the client the condition. A prudent inspector would have recommended that a (structural) engineer, experienced in heavy timber construction be engaged to review the condition and make further recommendations with respect to repair and costs for repairs.
3. "In order to be consistent with the standards in the industry, what steps would a house inspector take with respect to the inspection of the A-frame rafters on the East side of the A-frame structure, particularly given the fact that he had identified two of the rafters on the West side of the structure as being rotten."
4. The standards used by Mr. Toth and referred to in his Property Inspection Contract are the Canadian Association of Home and Property Inspectors (CAHPI) Standards of Practice. Those Standards only require that the inspector inspect and probe "... a representative number of structural components where deterioration is suspected or where clear indications of possible deterioration exist."

In spite of the conditions imposed by the Standards, and as explained in A5(a) above, I believe that a prudent inspector would have inspected and reported on all of the A-frame members, not just some of them as required by the Standards.

Stability of House

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| --- | --- | --- | --- | --- |
|  | Q2. |  | "Given those observations, in order to be consistent with the standards in the industry, what steps would a house inspector take and what would be reported to the client and recommended to the client? In this regard, please make whatever comments you deem appropriate with respect to the reference in the house inspection report prepared by Mr. Toth to settlement and advise whether or not you believe those comments are consistent with the standards in the industry give the conditions observed." |  |
|  | A2. |  | The CAHPI Standards of Practice require that an inspector report "on those systems and components inspected which, in the professional opinion of the inspector, are significantly deficient or are near the end of their service life." |  |

In my opinion, the condition of the A-frame members were significantly deficient at the time of the inspection and should have been reported as such. Also in my opinion, the location of the foundations very close to the juncture between the house construction site and the steep slope, regardless of their condition, should have caused a prudent inspector to recommend that his clients consult a geotechnical engineer prior to completing their purchase decision.

In his report Mr. Toth indicates on The Big Picture/Summary page that the structure is below average, and that the MAJOR POINTS OF CONCERN: are "To fix-up structural deficiencies"

Further in the report in the Structure page, Mr. Toth notes 1) Moderate settlement and suggests that it may be ongoing 2) soil erosion a [sic] the south -- SW and 3) a check mark beside "Check with professional Engineer/pest control contractor" but does not specifically indicate the exact concern.

On the Significant Structural Deficiencies page, Mr. Toth indicates that there are "Unstable soil conditions/erosion" at the S, SW which require repair & upgrading and that "solitary foundation movements at the S side dec, SW (?)" need repair, and that "floor sag SW living rm (bsmt) settled to South" without any recommendation;

and that "wood deck unstable, lateral supports missing" and in need of repair and upgrading;

and that "wood deck's 6x6 posts have no bracing in any directions, new braces must be added. N side framing (posts and beam) moved, doesn't support the deck any more. Raise the top of the beam to support joists." Repair needed;

and that "SW deck structure, solitary foundations have major settlements, post bases have soil connections, structure has no proper connection to house. To lift-up and reinforce foundations & posts" Repairs needed;

and that "two West side timber rafters near foundations are decayed, water damaged." Repairs needed.

Mr. Toth has reported many of the structural deficiencies and recommended that his client should "check with professional engineer". In this respect, the report appears to meet the intentions of the Standards of Practice. but, in my opinion, Mr. Toth's report is deficient in as much as it does not make any recommendation to have a geotechnical review of the Property and that the report does not clearly present the significance of the problems observed.

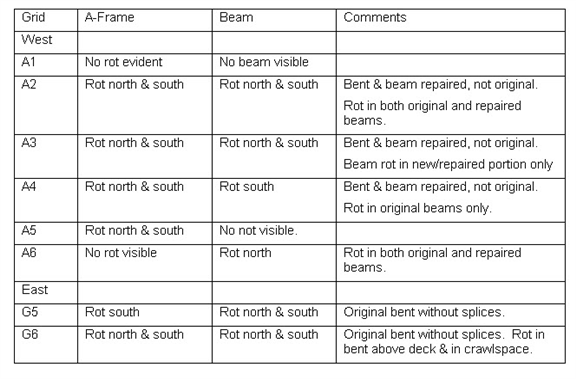
|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q3. |  | Assuming that Mr. Toth verbally advised that the slope stability Issue or settlement issue related to the supports for the decks on the south side of the A-frame portion of the structure and that the cost of repair would be in the order of $15,000, was Mr. Toth's advice consistent with the standards of the industry. If not, why not? |  |
|  | A3. |  | The Standards of Practice are silent on the provision of repair estimates. |  |

Mr. Toth's contract states that "4. Cost estimates, if provided are "ball-park" estimates only and are not intended to be relied upon by any person for accuracy. The CLIENT should obtain written bids from qualified licensed contractors in order to determine the possible cost of repairs."

There are no repair costs provided in Mr. Toth's written report, therefore any cost estimates provided must have been verbal. Some inspectors provide order-of-magnitude estimates verbally to their clients, and in this respect, Mr. Toth appears to be consistent with industry practices although the provision of such estimates are beyond the requirements of the Standards of Practice.

If Mr. Toth did provide a repair estimate of $15,000, it would appear to be insufficient, based on the significance of the deteriorated condition of the structure and decks that were evident at the time of his inspection. Given the limited time that Mr. Toth spent on site and the time required to adequately inspect and report on this somewhat complex structure, there was little time available for Mr. Toth to consider and provide a "ball-park" estimate that would be a reasonable reflection of the conditions noted in the house.

**28**  Mr. Clayton summarized his findings regarding the beams of the House as follows:



**DISCUSSION AND CASE AUTHORITIES**

**29**  In order for ***negligence*** to be established, the Plaintiffs must establish on a balance of probabilities that the Defendants owed the Plaintiffs a duty of care, the standard of care required of a home inspector, that the Defendants breached the duty of care owed to the Plaintiffs by failing to meet the requisite standard of care, and that the breach of the duty of care caused the Plaintiffs to suffer damages.

**30**  In order to establish the tort of negligent misrepresentation, it is necessary to prove that there was a duty of care based on a special relationship between the parties, a representation was made by one party to the other, that representation was false, inaccurate or misleading, that misrepresentation was made negligently, the person to whom the representation was made must have reasonably relied on the representation, and the reliance must have been detrimental to that person with the consequence of the person suffering damages: *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=).

**31**  The Plaintiffs allege that the Defendants breached their duty of care by failing to inspect all of the A-frame beams for rot and moisture, by failing to fully advise the Plaintiffs regarding the extent of the structural problems relating to the House, by failing to advise the Plaintiffs that a structural engineer should be retained by them, and that Mr. Toth made various statements regarding the cost of correcting the problems that he found, and that the statements amounted to negligent misrepresentation.

**32**  It is not disputed by the Defendants that the Defendants owed the Plaintiffs a duty to conduct the home inspection and prepare the report in a competent manner. The Defendants submit that this duty was subject to the terms of the Contract which specified that the standard against which their competence would be measured would be the Standards of Practice set out by the Canadian Association of Property and Home Inspectors.

**33**  CAHPI publishes a Code of Ethics and Standards of Practice ("Standards") for its members. Mr. Toth is a member of CAHPI. Mr. Toth is also a member of the British Columbia Association. The Standards of the national organization includes the following statement: "The Standards are a set of guidelines for home inspectors to following the performance of their inspections. They are the most widely-accepted home inspection guidelines in use, and include all the home's major systems and components."

**34**  The Standards provide in part:

**2. PURPOSE AND SCOPE**

2.1 The purpose of these Standards of Practice is to establish a minimum and uniform standard for private, fee-paid home inspectors who are members of one of the provincial/regional organizations of CAHPI. Home *inspections* performed to these Standards of Practice are intended to provide the client with information regarding the condition of the *systems* and *components* of the home as inspected at the time of the Home *Inspection*.

2.2 The Inspector shall:

*A. Inspect:*

1. *readily accessible systems* and *components* of homes listed in these Standards of Practice.
2. *installed* *systems* and *components* of homes listed in these Standards of Practice.

*B. report:*

1. on those systems and components inspected which, in the professional opinion of the *inspector*, are *significantly deficient* or are near the end of their service lives.
2. a reason why, if not self-evident, the *system* or *component* is *significantly deficient* or near the end of its service life.
3. the inspector's recommendations to correct or monitor the reported deficiency.
4. on any systems and components designated for inspection in these Standards of Practice which were present at the time of the *Home Inspection* but were not inspected and a reason they were not inspected.

**3. STRUCTURAL SYSTEM**

3.1 The *inspector* shall:

*A. Inspect:*

1. the *structural components* including foundation and framing.
2. by probing a *representative number* of structural components where deterioration is suspected or where clear indications of possible deterioration exist. Probing is NOT required when probing would damage any finished surface or where no deterioration is visible.

*B. describe:*

1. the foundation and report the methods used to inspect the *under-floor* *crawl space*.
2. the floor structure.
3. the wall structure.
4. the ceiling structure.
5. the roof structure and *report* the methods used to *inspect* the attic.

3.2 The inspector is NOT required to:

1. provide any engineering service or architectural service.

B. offer an opinion as to the adequacy of any *structural system* or *component*.

**4. EXTERIOR**

4.1 The *inspector* shall:

A. *Inspect*:

1. the exterior wall covering, flashing and trim.
2. all exterior doors.
3. attached decks, balconies, stoops, steps, porches, and their associated railings.
4. the eaves, soffits, and fascias where accessible from the ground level.
5. the vegetation, grading, surface drainage, and retaining walls on the property when any of these are likely to adversely affect the building.
6. walkways, patios, and driveways leading to dwelling entrances.

B. *describe* the exterior wall covering.

**35**  While paragraph 5 of the Contract states that the CAHPI "Code of Ethics and Standards of Practice" are attached to the Contract, there is nothing in evidence which would allow me to conclude that this was the case. Accordingly, I cannot conclude that it was agreed between the parties that the inspection would be performed in accordance with the CAHPI "Code of Ethics and Standards of Practice". Even if I am wrong in this regard and, in any event, I am satisfied that the Standards are only guidelines, and that a determination that the inspection had been undertaken in accordance with the Standards would not preclude a finding that the inspection was carried out negligently. In this regard, Mr. Toth at Trial stated:

Standard of Practice sets minimum expectations for the home inspectors, what they have to render during and after the inspection. I believe this is the standard, like the Bible, of every home inspector as a minimum requirement. Some inspectors try to exceed it. Some others never target to exceed it. I feel myself whatever time circumstances exist, I try to go even beyond that.

**CLAIM OF THE PLAINTIFFS RELATING TO THE STRUCTURAL MEMBERS**

**36**  The first part of the claim of the Plaintiffs relates to rotten A-beam structural members. The older A-frame portion of the House is supported by horizontal and vertical beams. The Plaintiffs submit that the ends of most of those beams were rotten at the time of the inspection by Mr. Toth, Mr. Toth did not identify all of the rotten horizontal and vertical beams, Mr. Toth did not advise them that he had not inspected all of the horizontal and vertical beams, and Mr. Toth underestimated the cost of repair of the two beams that he did identify as rotten when stating that the cost of repair would be in the neighbourhood of $4,000.00. It is now apparent that the estimated cost of replacing all of the rotten beams is in the neighbourhood of $90,000.00, and that the cost of repairing the two beams that he did identify as rotten is the neighbourhood of $35,000.00.

***(a) Beams on the East Side of the House***

**37**  I find that Mr. Toth made no inspection of the vertical beams on the east side of the House. I find that an inspection of two of those beams would have been easily accessible through an unlocked door off the lower balcony. This door led into a room that was otherwise inaccessible from inside the House. I find that even a cursory examination of the two beams in this area would have revealed to Mr. Toth that they were rotten.

**38**  At his October 17, 2007 Examination for Discovery, Mr. Toth could only state that he could not recall if: "... that room was or was not available for inspection." At Trial, Mr. Toth was asked whether he had tested any of the beams on the east side of the house, and stated: "Unfortunately not ... I cannot exactly recall why ... ever since, it is kind of a mystery for myself. I have no proper explanation why. I just simply don't remember." I accept the evidence that the door to the room could not be locked from the outside so that there was no impediment to Mr. Toth entering the area and discovering that there was considerable rot in two of the east side beams.

**39**  Under cross-examination, Mr. Toth described the area as a "crawl space" but I find that is not accurate. From the photographs in evidence, it is clear it is just a room off the exterior of the House. As to why he did not attempt to go through the door, Mr. Toth stated under cross-examination:

I make effort to open every solid door, but I cannot easily identify where they lead to, and then I supposed to open that door. I cannot recall which way I find it, closed, which way I find it even sticked to the frame or for any way it's not opening. It appeared not to opening, and that's what I expect, and that's what I -- my statement about. ...

That was a typical door of a house, and that was not marked as a crawl space door, and once I cannot or I appeared couldn't go through, I legitimately expected to be access the same room from the inside, which unfortunately never happened.

If the door is not opening, it's not readily accessible.

... because I don't remember what kind of way I used to push the door, bang the door or tried to gently open. One way or the other, the door didn't open and I didn't go in. It was not readily accessible. ...

If I would be aware that room has no interior connection and that has no other access way, then I would ask -- I would try to make effort.

**40**  Mr. Toth stated that it was his usual practice to go clockwise when inspecting a house and, regarding any doors that he finds, he would attempt to enter the door:

... I find the doorway which is not clear where it goes, I try to go through or clarify the door, where it goes.

So in our case, we have a solid door on that so-called crawl space, exactly the same looking and full-size door than the door beside of it, or other doors. So I assume, but I cannot hundred percent recall it, that information. I may find it locked or not opening at some point, for any reason not opening, and then I assume there will be another inside room, another room, but I will approach from the inside of the building. Which unfortunately never happened.

**41**  Even if Mr. Toth concluded that he could not have outside access to what was behind the door, he should have come back to that space when he determined in his later inspection of interior adjacent space that the space could not be accessed from inside the House. At Trial, Mr. Toth confirmed that he did not ask anyone to gain access to this room.

**42**  I find it was necessary for Mr. Toth to inspect this room and the two east side beams in order to perform his inspection appropriately. Mr. Toth is liable either in ***negligence*** or in breach of contract because he did not perform the inspection in accordance with paragraph 1 of the Contract because he did not perform a "VISUAL INSPECTION" of the "readily accessible and visible areas" of the House. At the same time, the Standards relied upon by Mr. Toth also include a requirement that such an inspection take place. If I am wrong in coming to those conclusions, I also find that Mr. Toth was negligent in not drawing to the attention of the Plaintiffs that he had not had an opportunity to inspect the two east side beams because he could not or did not access the space. Pursuant to the agreement reached between the parties, I find that the cost of repairing or replacing east side frame beams is $18,800.00.

***(b) Beams on the West Side of the House***

**43**  Regarding the horizontal and vertical beams on the west side of the House, Mr. Toth stated at his October 17, 2007 Examination for Discovery that two members were "... showing not very extensive but visible damages and wood rot", that he "... inspected with a probe all of those [all of the A-frames]", and that "The rest had no wood rot". At his Examination for Discovery, Mr. Toth repeated that he had advised the Plaintiffs that he had inspected all of the beams on the west side of the House when he was asked the following questions and gave the following answers:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And did you tell them that you'd inspected the other ones on the west side and they appeared to be fine? Did you say that to them? |  |

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

**44**  I find this testimony inconsistent with other testimony of Mr. Toth. At his Examination for Discovery and at Trial, Mr. Toth stated that he inspected all of the beams and found only two to have rot. At Trial, Mr. Toth stated it was only his obligation to provide the Plaintiffs with a representative number of deficiencies. In this regard, Mr. Toth stated:

Which means my duty is to give a representative number of deficiencies and explain them, and I believe I did it, even if that could be my best, despite of my best effort, I still missed one or two small location somewhere.

When I inspected it in September 2006, I find I detected wood rot on the two structure piece, and I believed that was sufficient representation of the west side A-frames.

**45**  At Trial, Mr. Toth stated that he only examined two of the west side beams, as that was the representative sample that was required of him. He was also asked the following question and gave the following answer:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Once you found the two beams to be rotten, didn't you think that you were going to have to go and take extra steps, unusual steps to make sure that the rest of the beams were sound? Isn't that just common sense, now that you -- you found two that are rotten, wouldn't you -- you be on sort of a high alert to make sure that the rest are -- are sound? |  |
|  | A |  | It was high alert enough and referring to engineering services, that will take care of the rest. |  |

**46**  According to the opinion of Mr. Clayton who was called as a witness for the Plaintiffs and who was qualified as an expert to provide an opinion regarding house inspection standards, the Standards set out by CAHPI only require a home inspector to inspect and probe: "... a representative number of structural components where deterioration is suspected, or where clear indications of possible deterioration exist". However, Mr. Clayton also provided the opinion that, despite the standards set by CAHPI, a prudent inspector would have inspected and reported on all of the A-frame members and not just some of them as required by the Standards. I agree. To fail to do so was negligent after Mr. Toth found what he did with the two beams he said he did examine.

**47**  Mr. Toth gave various excuses as to why it was not possible to examine all of the west side beams. Regarding the horizontal beams, Mr. Toth stated at Trial they were in "quite high". When asked whether or not he had gone up to probe the horizontal beams, Mr. Toth stated: "I just don't remember what part, but that was obvious without probing the wood ... the wood rot". He said that the wood rot on the A6 beam was visible. From the photographs taken by Mr. Clayton, it is clear that the horizontal beams on the two A-frame beams found by Mr. Toth to have rot are quite high off the ground but that the other beams are not. I reject the testimony of Mr. Toth that all of the horizontal beams were high and could not be easily inspected.

**48**  Mr. Toth stated at Trial that he was not in a position to inspect all of the west side horizontal and vertical beams as some of them were covered with grass so as to make them inaccessible. As to why he did not clear away the grass to make sure that he could thoroughly check the A 4 beam, Mr. Toth stated: "I am not clearing grass." "That's not part of my job." Mr. Toth appears to have forgotten that the Standards provide that an inspector is to inspect "the vegetation ... on the Property when any of these are likely to adversely affect the building".

**49**  A photograph taken in December 2006 regarding beam A4 indicates a "tiny clump of grass" at the bottom of the beam. At Trial, Mr. Toth was asked whether the grass was "thigh high at the time" he made the inspection, and he stated: "That's my recollection, that's correct." He also stated: "In between that was a clear-out of the whole area." However, the possibility that there had been a clearing of the vegetation in the whole area between the time when Mr. Toth conducted his inspection and December 2006 was not put to the Plaintiffs under cross-examination. Mr. Toth makes no mention of there being high grass in his written report even though the report does note in the "**EXTERIOR**" section, that: "Debris to remove from E side". As well, it was drawn to the attention of Mr. Toth that his report form contained a provision that he had to draw to the attention of the parties what was not inspected and the reason it was not inspected. Mr. Toth confirmed that he did not do that and did not report to the Plaintiffs that something had not been inspected.

**50**  Regarding the photographs taken by Mr. Clayton, Mr. Toth testified at Trial that "It's possible" that the rot had occurred between September, 2006 when he inspected that beam and December, 2006 when the photograph was taken: "It's obviously that deteriorated from September to December". At Trial, Mr. Toth stated that the rot which was evident had occurred in the two and a half years since he inspected the Property and, at the time of his inspection, the rot "wasn't there". I have no hesitation in rejecting this testimony. It is inconceivable that the rot that is shown in the photographs taken by Mr. Clayton in December 2006 could have occurred between September and December 2006. Mr. Toth was also incorrect in stating that all of Mr. Clayton's photographs were taken 2-1/2 years after his inspection of the Property. This is simply not the case.

**51**  I accept the evidence of Mr. Clayton. From the photographs that he took in December 2006 and from his May 13, 2009 opinion, I find that rot was well established on four of the A-frame beams and four of the horizontal beams at the time of the inspection by Mr. Toth. I conclude that the photographs which were taken by Mr. Clayton in December 2006 fairly represent the conditions that would have been found by Mr. Toth on September 21, 2006. In particular, the December 17, 2006 photograph taken by Mr. Clayton does not show any vegetation which would make it impossible for a full inspection of at least four of the horizontal and vertical beams to take place. Mr. Toth owed the plaintiffs a duty to inspect all west side beams after he ascertained that there was rot in two of the beams. I conclude that he did not do so.

**52**  I also find that Mr. Toth was negligent in not drawing to the attention of the Plaintiffs the extent of the rot in the beams. If he had actually examined all of the beams on the west side of the House, he could not have come to the conclusion that only two of the beams were rotten. If, on the other hand, he only examined two of the beams, he was negligent in not drawing to the attention of the Plaintiffs that he had only examined two of the beams and had not examined the others. I find that the examination of only two of the beams was not in accordance with the obligations that Mr. Toth owed to the Plaintiffs. Mr. Toth was also negligent when he described the "**MAJOR POINTS OF CONCERN**" for the "**STRUCTURE**" as being to "fix-up structural deficiencies". This is hardly a sufficient description of what needed to be done to correct the "deficiencies". I find that the use of the word "fix-up" lulled the Plaintiffs into assuming that minor or cosmetic changes could be made in order to meet the "**MAJOR POINTS OF CONCERN**".

**53**  I also find Mr. Toth negligent in his failure to advise the Plaintiffs that they should have structural engineers examine the beams. Mr. Toth was asked whether he told the Plaintiffs that they needed engineers to go and probe the rest of the beams and he answered: "no". I accept the opinion of Mr. Clayton that: "A prudent inspector would have recommended that a (structural) engineering, experienced in heavy timber construction, be engaged to review the condition and make further recommendations with respect to repair and costs of repairs." The failure of Mr. Toth to provide this advice to the Plaintiffs amounts to ***negligence***.

**54**  Regarding the costs of repairing the two rotten west side beams, I accept the evidence of the Plaintiffs that they were provided with a repair estimate in the neighbourhood of $4,000.00 by Mr. Toth. By agreement between the parties, the actual cost of replacing the west side beams is $35,000.00.

**55**  Despite paragraph 4 of the Contract which provides that, if cost estimates are provided, they are "ballpark" estimates only, Mr. Toth was adamant that he would generally never provide such estimates. At Trial, Mr. Toth stated that he gave them a "ballpark rough estimate" but that "I asked him to obtain quotes from contractor, and he should expect somewhere around this ballpark figure for that particular carpentry job." [to repair the two A-frame members]. Mr. Toth stated that he was not expected to give any ballpark figures but, because Mr. Salgado insisted, he did give them a ballpark estimate: "My best honest guess." When asked whether it was normal and a standard practice to provide estimates to clients, Mr. Toth stated: "No", as it was "not the home inspector's job to do. We don't have a enough information for current market conditions."

**56**  Paragraph 4 of his standard form of contract contemplated that "ballpark" estimates might be provided. Accordingly, I cannot accept his evidence that it was not his normal and standard practice to provide such estimates to clients who requested his advice. I find that the repair estimate of $4,000 relating to the west side beams was provided to the Plaintiffs by Mr. Toth. I find that this estimate of $4,000 was woefully inaccurate. While I cannot conclude that the Plaintiffs relied upon this estimate provided by Mr. Toth, I do find that the estimate of $4,000.00 lulled the Plaintiffs into assuming that the rot was of no particular importance, and that it could be inexpensively corrected.

**57**  I find that Mr. Toth was negligent in his inspection of the horizontal and vertical beams on both sides of the House. Mr. Toth was negligent in not inspecting the east side beams, and was negligent in his inspection of the west side beams by either inspecting only two and not advising the Plaintiffs that he had only done so or by not drawing to their attention that the rot was much more widespread than he indicated to them. His breaches of duty of care caused the Plaintiffs to suffer damages. But for the negligent act and/or the omission, the damages would not have occurred as the purchase of the Property would not have occurred. I find that the Plaintiffs would not have purchased the Property if the full extent of the rot on the east and west side beams of the House had been known and brought to their attention. In the circumstances, the Plaintiffs are entitled to damages of $35,000.00 plus $18,800.00 less the $4,000.00 estimate provided by Mr. Toth.

**CLAIM OF THE PLAINTIFFS RELATING TO THE STABILITY OF THE HOUSE**

**58**  The second part of the claim of the Plaintiffs relates to the stability of the House. The south portion of the House sits on fill that was not properly compacted at the time of construction, the House is being undermined, this settlement results in stress on the structural members of the House, and, in order to stabilize the structure, the geotechnical and structural engineers who have been retained by the Plaintiffs have recommended that extensive remedial work be undertaken. The Plaintiffs submit that Mr. Toth failed to properly warn them of the extent of the problem and that he stated to them that the problem could be dealt with by way of remedial work costing less than $16,000.00, whereas the estimated cost is now in excess of $75,000.00.

**59**  In his written report, Mr. Toth indicated that the "settlement" was "Moderate" and that it might be "Ongoing" as he had a question mark beside that word on the printed form for the component "**STRUCTURE**". He also indicated that the rating for "**STRUCTURE**" was half way between "average" and "below".

**60**  At his October 17, 2007 Examination for Discovery, Mr. Toth was asked the following questions and gave the following answers:

1. So just so I can summarize your evidence on this point, the evidence that you saw of either settlement in the past or ongoing settlement was by looking at the cement abutments at the base of the A-frame beams on the west side --
2. Yes.
3. -- and by looking at the foundations supporting the deck, that is where the post met the cement footings, correct?
4. Yes.
5. And then I think you mentioned earlier in your testimony in the ceiling of the deck or towards -- I think it's over towards where the hot tub is, some of the joists appeared to be -- have pulled away from the roof above?
6. Yes.
7. So those were the three aspects of the residence that indicated to you that there was settlement or perhaps ongoing settlement; is that correct?
8. It's not containing the fourth one which we marked here, the basement floor and associated strip foundation which were noticed and reported to being settled. So that's four different kind of settlements.
9. Well, or at least symptoms of settlement?
10. Symptoms, that's correct.
11. So just so I understand the fourth one, I understand your point about that the floor of the basement in the A-frame has a slope to it which you observed, correct, without measuring the slope?
12. The A-frame and the basement floor has no connection.

**61**  At his October 17, 2007 Examination for Discovery, Mr. Toth stated that he did not give: "... any figures as to the possible costs of remedying the perceived problem or potential problem with the settlement aspect of the matter". I find that testimony to be inconsistent with what Mr. Toth stated at Trial when he testified:

So I said I don't know. I don't know how much. And it's not simple to answer this question at all. I could tell them the carpentry work to fix up the deck and fix up the rafter, reported rafter, it would be somewhere in the neighbourhood of [$15,000.00 to] $20,000.00, but they should obtain a general contractor or specific contractor to obtain. This is just should be treated as a very ballpark guess. ...

I mentioned to plaintiff the engineer, based on his information, may well specify retaining walls, piling, or any other engineering solution for the problem. And I have no idea how much that would cost, that what kind of work that would be. I mentioned this -- this possibilities, and I gave absolutely no financial -- not even ballpark figure. This mention of [$4,000.00 to] $5,000.00, I never heard about that.

**62**  At the Trial, Mr. Toth stated that he told the Plaintiffs that the "unstable soil conditions/erosions" "... along the whole south line from the east corner to the west corner, and specifically the southwest area turning to the west side, soil erosion and was noted. Soil erosion was noted on all foundation areas." Regarding the check mark beside the statement "settlement moderate", Mr. Toth at Trial stated that he reviewed that with the Plaintiffs and, after he presented what was written in the report, he stated:

... these are those visual clues of structural movements deterioration. I cannot tell in a short visual inspection with my -- my limitation whether this movements are still ongoing or they not ongoing. ...

I did not see any inside or outside major visual clues to tell the sequence how this movement -- this movements developed.

There are no reportable clues. The only thing we can do and they can do a further geotechnical engineering evaluation, because even an engineer cannot tell on a short visual observation if that's ongoing or not ongoing. And I not only told my client, only engineering and geotechnical firm can give the answer, but I also recommended, during that discussion, I would recommend a geotechnical firm who is familiar with North Vancouver geographic area.

**63**  During his cross-examination at Trial, Mr. Toth was asked whether the Plaintiffs could deduce from the question mark beside whether "settlement" was "Ongoing", that this was a "very, very important piece of advice", and that "this house may settle down this slope". Mr. Toth stated that it was sufficient combined with "the verbal explanation". In response to whether the written part of his report was to contain all of the salient information, Mr. Toth stated that this is why he had checked the need for an engineer and verbally explained: "the geotechnical survey, geotechnical report or examination needed".

**64**  However, Mr. Toth also made this statement at Trial regarding the checkmark beside "check with professional engineer":

I don't remember if I pointed out the check mark itself. The discussion was not pointing on the check mark. Discussion was pointing what to do. And what to do is included the recommendation what I said. ...

My intent was to check with professional engineer for complete information. I admit I probably was better to cross the pest control word at that time.

**65**  I accept the opinion of Mr. Clayton that there should have been a recommendation that the Plaintiffs consult a geotechnical engineer prior to deciding whether they would remove the subject clause in the Agreement. In dealing with "**STRUCTURE**", Mr. Toth indicates that the rating was between "average" and "below", but he does not set out whether the repairs that are recommended by him are either "Major" or "Minor". He only describes the "settlement" as being "Moderate", and he questions whether it is "ongoing". While there is a checkmark beside the printed words "CHECK WITH PROFESSIONAL ENGINEERING/PEST CONTROL CONTRACTOR OR \_\_\_\_\_ FOR COMPLETE INFORMATION", the specific concern regarding why a professional engineer should be consulted is not set out. As well, it is not clear whether this is only an indication that a "pest control contractor" should be consulted.

**66**  While Mr. Clayton was of the opinion that the part of the report of Mr. Toth dealing with "**STRUCTURE**" met the Standards set out by the CAHPI, I also accept the opinion of Mr. Clayton and I find that Mr. Toth was negligent in not recommending a geotechnical review of the Property and by not clearly presenting the significance of the problems observed. I find that Mr. Toth owed the Plaintiffs a duty of care, and that this duty was not met because he did not recommend to the Plaintiffs that they should consult a geotechnical engineer prior to deciding whether to proceed with the purchase of the Property. I have no hesitation in concluding that the Plaintiffs relied upon the advice received from Mr. Toth before deciding whether they would remove the subject clauses contained within the Contract and proceed to purchase the Property. As a result of the reliance of the Plaintiffs on the advice received from Mr. Toth regarding the stability of the House, the Plaintiffs proceeded to purchase the Property and have suffered damages as a result of that purchase. But for the ***negligence*** of Mr. Toth, the damages suffered by the Plaintiffs would not have been incurred.

**67**  I accept the evidence presented on behalf of the Plaintiffs that Mr. Toth gave them a repair estimate of $15,000.00 for structural work relating to the stability of the House. That estimate was woefully inadequate. While I find that damages are not available to the Plaintiffs as a result of this negligent misrepresentation of the likely cost of the structural changes that were required in order to provide stability for the House because I cannot come to the conclusion that the Plaintiffs relied on this misrepresentation to their detriment, I find that the estimate that was provided gave considerable solace to the Plaintiffs that the structural expenditures would not be excessive and, therefore, the structural problems were not significant. I find that the Plaintiffs are entitled to the actual cost of the structural changes which are required, including engineering costs, being $56,800.00, $26,269.00, $9,360.00, $24,100.00 and $11,500.00, less the $15,000.00 estimate provided by Mr. Toth.

**68**  I have no hesitation in coming to the conclusion that the Plaintiffs relied upon the report received by Mr. Toth to decide whether they would purchase the Property. At his December 16, 2008 Examination for Discovery, Mr. Salgado was asked what expectations he had regarding the inspection that would be performed by Mr. Toth, and he stated: "Well, that he would determine if the subject would be removed." Mr. Salgado was also asked the following questions, and gave the following answers:

1. So you were looking to him for advice as to whether you should buy or not buy; is that fair to say?
2. I would think so, yes. ... And then I basically asked him if the house -- if I should go through with the deal; you know, if there was anything that he had noticed that would impede me from buying the house.
3. Yes. And what did he say?
4. He said no. ... Then I ask again, and then he said you can go ahead, there's no problem.
5. Okay. So a moment ago you told me that he simply said no, now you're saying that he said you can go ahead, there's no problem.
6. A moment ago I told you that I asked him about three times.

**69**  I find it significant that Mr. Toth was not in a position to deny that the Plaintiffs had asked him whether or not they should proceed to purchase the House. At Trial, Mr. Toth was asked the following question and gave the following answer:

1. Mr. Toth, did the plaintiffs ask you a question, something to the effect of whether or not they should purchase the house?
2. I cannot recall.

**70**  The purpose of obtaining an inspection is to provide a lay purchaser with expert advice about any substantial deficiencies or, as is set out in the Standards, any "significantly deficient" problem relating to systems or components that can be discerned upon a visual inspection - deficiencies of the type or magnitude that reasonably can be expected to have some bearing upon the decision-making process of a purchaser regarding whether they will purchase the property or upon which they will renegotiate the price. An inspector invites reliance by the very nature of the advice that is given. Plainly, if prospective home purchasers did not believe that they could secure meaningful and reliable advice about the home they were considering purchasing, there would be no reason for them to retain an inspector to inspect that home. In the case, reliance is obvious.

**EFFECT OF THE LIMITATION OF LIABILITY CLAUSE**

**71**  The Defendants submit that any liability found on the part of the Defendants will be limited by the limitation of liability clauses set out in paragraphs 1, 4, 13 and 16(b) of the Contract. I cannot reach that conclusion.

**72**  Paragraph 1 of the Contract provides that: "The inspection and report are not intended to reflect on the market value of the Property nor to make any recommendation as to the advisability of purchase." I am satisfied that this part of paragraph 1 does not exclude any liability on behalf of the Defendants. There are no words which attempt to limit liability and, in any event, while it may not have been intended that there be any recommendation regarding the advisability of purchase, the Plaintiffs were entitled to rely on any recommendations as to the advisability of purchase if such recommendations were made. I find that such recommendations were made and relied upon.

**73**  I find that the Plaintiffs did not read the terms of the Contract prior to Mr. Salgado signing it. I accept the evidence of the Plaintiffs that they felt rushed because of the schedule of Mr. Toth. However, I also find the Plaintiffs were intelligent, university-educated people and that they had entered into contracts previously and knew that placing their signature upon a contract had legal implications. The Defendants submit that, in the absence of fraud or misrepresentations, a person is bound by an agreement signed by them whether or not the person has read its contents and that the failure to read a contract before signing it is not a legally acceptable reason for refusing to be bound by its terms: *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.*, [*(1997), 148 D.L.R. (4th) 496*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-F5KY-B445-00000-00&context=) (Ont. C.A.) at paras. 30-31).

**74**  The Defendants also submit that it was not necessary for them to draw to the attention of the Plaintiffs any onerous terms or to ensure that the Plaintiffs had read and understood those terms and that the only exception is where the circumstances are such that they would realize that the Plaintiffs were not consenting to those terms. In *Karoll v. Silver Star Mountain Resorts Ltd.* [*(1988), 33 B.C.L.R. (2d) 160*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JTNR-M4B7-00000-00&context=) (B.C.S.C.), McLachlin C.J.S.C., as she then was, stated:

Many factors may be relevant to whether the duty to take reasonable steps to advise of an exclusion clause or waiver arises. The effect of the exclusion clause in relation to the nature of the contract is important because if it runs contrary to the party's normal expectations it is fair to assume that he does not intend to be bound by the term. The length and format of the contract and the time available for reading and understanding it also bear on whether a reasonable person should know that the other party did not in fact intend to sign what he was signing. This list is not exhaustive. Other considerations may be important, depending on the facts of the particular case.

(at p. 166)

**75**  Here, the Plaintiffs were given little time to read the Contract and understand what the Defendants intended to be the effect of the Contract. As well, the primary purpose of the meeting between Mr. Toth and the Plaintiffs was to advise them regarding the results of this inspection. I find that very little time was available for the Plaintiffs to read and understand what was in the Contract. By the very nature of the relationship, the ability to rely on what was being said was critical and, if there was any suggestion that the Plaintiffs could not rely upon what was being said by Mr. Toth and what was set out in his report, I find that Mr. Salgado would not have signed the Contract. In the circumstances, it was incumbent upon Mr. Toth to draw to the attention of Mr. Salgado the exclusion and waiver clauses and to take reasonable steps to apprise Mr. Salgado of the onerous terms and to ensure that he read and understood them.

**76**  As well, exclusion clauses must be drafted with complete clarity and the principle of *contra proferentum* should be applied. In *Bauer v. Bank of Montreal* [*(1990), 110 D.L.R. (3d) 424*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M1VY-00000-00&context=) (S.C.C.), McIntyre J., on behalf of the Court, stated:

In construing such a clause, the Court shall see that the clause is expressed clearly and that it is limited in its effect to the narrow meaning of the words employed and it must clearly cover the exact circumstances which have arisen in order to afford protection to the party claiming benefit. It is generally to be construed against the party benefiting from the exemption and this is particularly true where the clause is found in a standard printed form of contract, frequently termed a contract of adhesion, which is presented by one party to the other as the basis of their transaction. (at p. 428)

**77**  In reviewing the "Property Inspection Contract", it must be noted that the Contract is separate from the 17-page Report which starts with the heading "The Big Picture/Summary". There is nothing in the Contract which incorporates the subsequent reporting pages into the Contract. Regarding paragraph 16(b) of the Contract, there are no "representations or warranties" in the Contract. While it may have been the intent of paragraph 16(b) to exclude representations or warranties that arose outside the Contract, it could not have been in the contemplation of the parties that a reference to a document containing no representations or warranties would exclude representations or warranties that were made to induce the Plaintiffs to enter into the Contract or which were contained in the oral or written report subsequently provided by Mr. Toth.

**78**  Under the Contract, the "Inspector" is defined as being "659279 B.C. Ltd. dba HomePro Inspections". Accordingly, I am satisfied that the attempt to limit liability by paragraph 13 of the Contract relates only to the "Inspector" and not to Mr. Toth personally. It was Mr. Toth who was the inspector. It is Mr. Toth who is the member of the CAHPI (B.C.). In this regard, the cover page indicates "This report prepared by: Imre Toth, B.Arch., RHI, Member of the Canadian Association of Home and Property Inspectors (B.C.)." I am satisfied that the ambiguity regarding whether the provisions of paragraph 13 of the Contract were also to apply to any failure by Mr. Toth to perform any obligations should be resolved against Mr. Toth in favour of a reasonable and fair interpretation.

**79**  Regarding paragraph 9 of the Contract, it is important to note that it purports to exclude any "**GUARANTEE OR WARRANTY, EXPRESS OR IMPLIED" RELATING TO: ... THE FUTURE ADEQUACY, PERFORMANCE OR CONDITION OF ANY INSPECTED STRUCTURE, ITEM OR SYSTEM**." (bold type and capitalization in the original). I find that paragraph 9 is not broad enough to exclude a "guarantee or warranty, express or implied" regarding the present adequacy, performance or condition of any inspected structure, item or system. That is the very nature of the inspection that was undertaken. Again, I am satisfied that the doctrine of *contra proferentum* applies and that any "guarantee or warranty, express or implied" relate to the adequacy, performance or condition of any inspected structure, item or system at the time of the inspection would not be excluded by paragraph 9. While I make no findings that Mr. Toth guaranteed or warranted anything to the Plaintiffs, I make this finding regarding this paragraph of the Contract in the context of the consistent failure to exclude liability.

**80**  I find that the Defendants are not in a position to rely on paragraphs 1, 9, 13 and 16 of the Contract to exclude liability for the damages which I find were suffered by the Plaintiffs as a result of the oral and written report provided by Mr. Toth.

**SHOULD THERE BE APPORTIONMENT?**

**81**  The Defendants submit that, if the Court finds liability on the part of the Defendants, this liability should be apportioned between them and the former Defendants, Mr. and Ms. Shannon. In the Statement of Claim, the Plaintiffs alleged that the Shannons made negligent representations, including that "the residence was a solid house" and "the settlement observed by the Plaintiffs had been there forever, and was not ongoing". It is submitted by the Defendants that, if the Plaintiffs reasonably relied upon any representations, it must be that they relied upon those of Mr. and Ms. Shannon, and liability should be apportioned. The Defendants submit that, as there is no apparent means to determine the apportionment, a 50-50 apportionment between the Defendants and Mr. and Ms. Shannon is mandated by the ***Negligence*** *Act*.

**82**  There is nothing before me which would allow me to conclude that the Plaintiffs relied upon any representations made by Mr. and Ms. Shannon prior to the Plaintiffs entering into the September 15, 2006 Agreement. Rather, I am satisfied that the Plaintiffs relied only on the statements made by Mr. Toth in his oral and written report. The Plaintiffs relied on what was provided by Mr. Toth and arranged for his inspection in order to have a neutral party provide them with an assessment of the Property and the House. I reject the argument that there should be an apportionment between the Defendants and Mr. and Ms. Shannon of the damages that I find payable by the Defendants.

**CONCLUSION**

**83**  The Plaintiffs will be entitled to Judgment against the Defendants in the amount of $192,920.45. As the parties advise that the provisions of Rule 37(b) of the *Rules of Court* apply, the parties will be at liberty to speak to the question of costs in due course.

G.D. BURNYEAT J.

**End of Document**

[***Summit Staging Ltd. v. 596373 B.C. Ltd. (c.o.b. Re/Max Westcoast), [2008] B.C.J. No. 262***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JWR6-S1MB-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

E. Rice J.

Heard: January 14-18 and 24, 2008.

Judgment: February 20, 2008.

Docket: S067751

Registry: Vancouver

**[2008] B.C.J. No. 262** | 2008 BCSC 198 | 68 R.P.R. (4th) 280 | 2008 CarswellBC 313 | 165 A.C.W.S. (3d) 769

Between Summit Staging Ltd., Plaintiff, and 596373 B.C. Ltd. doing business as "Re/Max Westcoast" and Salinder Burmy, Defendants

(104 paras.)

**Case Summary**

**Professional responsibility — Professional duties — Duties of care and *negligence* — Standard of care — Fiduciary duties — Action by the purchaser Summit Staging against the defendant realtor Re/Max Westcoast for *negligence*, breach of fiduciary duty and breach of contract dismissed — The vendors listed with the agent and accepted a $1 million offer on a development property — The vendors claimed the property was worth $1.4 million — *Negligence* had not been established — There was no evidence of a breach of fiduciary duty — The agent had not failed to disclose material facts which would have affected the sale.**

**Professional responsibility — Professions — Other — Real estate agents — Action by the purchaser Summit Staging against the defendant realtor Re/Max Westcoast for *negligence*, breach of fiduciary duty and breach of contract dismissed — The vendors listed with the agent and accepted a $1 million offer on a development property — The vendors claimed the property was worth $1.4 million — *Negligence* had not been established — There was no evidence of a breach of fiduciary duty — The agent had not failed to disclose material facts which would have affected the sale.**

**Real property law — Real estate agents and brokers — Liability — Action by the purchaser Summit Staging against the defendant realtor Re/Max Westcoast for *negligence*, breach of fiduciary duty and breach of contract dismissed — The vendors listed with the agent and accepted a $1 million offer on a development property — The vendors claimed the property was worth $1.4 million — *Negligence* had not been established — There was no evidence of a breach of fiduciary duty — The agent had not failed to disclose material facts which would have affected the sale.**

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| --- |
| Action by the vendor Summit Staging against the defendant realtor Re/Max Westcoast for ***negligence***, breach of fiduciary duty and breach of contract -- The purchaser bought an undeveloped investment property in Maple Ridge in 2003 for $420,000 -- In late October, 2005, the defendant real estate agent, Burmy, contacted the vendor about listing the property -- The parties met to discuss the matter; the realtor claimed that the vendor was interested in listing if there were potential purchasers; he claimed that a price range of $800,000 was discussed -- An offer was made by a potential buyer for $800,000, which the vendors rejected -- When the buyer increased the offer to $1 million, they decided to accept the offer and sell -- Subsequently, the vendors objected to the 10 per cent commission charged by the agent on the sale -- They claimed that they thought the $1 million was in pocket, or above any fees and commissions -- The vendors also claimed that the property was sold for far less than its fair market value of $1.4 million -- they claimed that the agent failed to appraise the value of the property, failed to inform them of the unusual commission, and breached his fiduciary duty -- HELD: Action dismissed -- The vendors had not established that the agent owed them a standard of care before the acceptance of the offer -- Even so, ***negligence*** had not been established as on the balance of evidence the agent had met a standard of care -- There was no evidence of a breach of fiduciary duty -- The agent had not failed to disclose material facts which would have affected the sale -- He had also made adequate disclosure of his rate of commission on the sale -- In any event, the evidence did not establish that the property was worth more than $1 million at the time of sale. |

**Counsel**

Counsel for Plaintiff: S. Antle and M. Sherkat.

Counsel for Defendants: K.A. Murray.

**Reasons for Judgment**

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

**INTRODUCTION**

**1**  This is an action for damages against a realtor for ***negligence***, breach of fiduciary duty and breach of contract on the sale of 9.32 acres of undeveloped land at 25695 - 102nd Avenue, Maple Ridge, B.C. The plaintiff submits that the realtor caused it to sell this property in November, 2005 for $1,000,000 which it claims was $400,000 under fair market value.

**2**  The plaintiff, Summit Staging Ltd., is a British Columbia company owned by John and Janet McLaughlin who live together in Maple Ridge, B.C. The property in question is not their residence, but an investment property located in the Thornhill area of Maple Ridge. It was purchased by Mr. McLaughlin, his father and another person in 1998 for about $320,000. In about 2003, they sold it to Summit for around $420,000. The intention of Mr. and Ms. McLaughlin before the sale was to hold the property through Summit as a long term investment for their two young sons.

**3**  In late October, 2005 the defendant, 596373 B.C. Ltd. doing business as Re/Max Westcoast, was and remains a real estate company with an office in the Maple Ridge area. The defendant, Salinder Burmy, was a realtor employed by Re/Max Westcoast since 1994 and licensed since 1991. Before 1994, he had worked as a realtor in the Richmond/Surrey area.

**FACTS**

**4**  In late October, 2005, Mr. Burmy contacted Mr. McLaughlin by telephone. Mr. McLaughlin was in Alberta at the time on some work assignment for his employer, Canadian Industrial Mill Services Ltd. ("CIMS"). Mr. Burmy identified himself and asked Mr. McLaughlin if he was interested in selling the subject property in Thornhill. Mr. McLaughlin testified Burmy told him that he had people who were interested in it. Mr. McLaughlin said that he told Mr. Burmy that the property was not listed and that he did not have a realtor. He suggested that he and Mr. Burmy meet somewhere mutually convenient to discuss the idea.

**5**  They met at the CIMS office in Richmond, B.C., on October 28, 2005. Mr. McLaughlin says that he advised Mr. Burmy he was not interested in selling the property, but being curious, he asked Mr. Burmy what he thought the property was worth. Mr. Burmy, according to Mr. McLaughlin, said that he knew of a recent sale of a nearby 7.275 acre parcel for $725,000 to $750,000. Mr. McLaughlin said he asked Mr. Burmy what he thought the subject property was worth bearing in mind that it was about two acres larger and Mr. Burmy replied that he thought he could get around $800,000 for it. Mr. McLaughlin said that they didn't discuss any other sale and the only document he saw that Mr. Burmy had was a map of the Thornhill area.

**6**  Mr. Burmy testified that Mr. McLaughlin said he would consider giving Mr. Burmy a listing of the property if Mr. Burmy had a buyer. He said that he discussed two recent sales in the area. One was an 8.5 acre parcel at 25909 - 102nd Avenue that had sold in August or September, 2005 for $738,000. The other was a 9.5 acre parcel. According to Mr. Burmy, Mr. McLaughlin said that there had been a previous unsolicited offer on the subject property of around $800,000. Mr. McLaughlin denied that there had ever been any such unsolicited offer or that he had said any such thing to Mr. Burmy.

**7**  According to Mr. Burmy, he asked Mr. McLaughlin what selling price he would like for the subject property and Mr. McLaughlin said that he would consider an offer in the range of $800,000. He said that he allowed Mr. McLaughlin to look at the documents he had brought with him, hoping it would give Mr. McLaughlin some idea as to the value of the property.

**8**  During the same conversation Mr. McLaughlin told Mr. Burmy that he also owned another property at 240th Street which he and Ms. McLaughlin wanted to sell, and he gave Mr. Burmy the telephone number of Horst Romani, a person dealing with the property on the McLaughlin's behalf.

**9**  Mr. Burmy testified that after the meeting with Mr. McLaughlin, he canvassed seven to ten potential buyers whom he knew, including one person, Avtar Johl. Mr. Johl testified that Mr. Burmy came to him and told him about the subject property, and said that the seller wanted $800,000 for it. Mr. Johl said that he would think about it and he conducted some computer searches of his own to get a feeling for the price. Subsequently, he contacted Mr. Burmy by telephone and asked him to write up an offer for him to buy the subject property for $800,000. The name of the purchaser was to be C.S. Seran, Mr. Johl's wife.

**10**  The versions of events diverge at about this point. Mr. McLaughlin testified that on November 1, 2005, Mr. Burmy telephoned him while he, (Mr. McLaughlin) was working in Lantzville, British Columbia, on Vancouver Island. Allegedly, Mr. Burmy told him that he had an offer for the property and had to see him about it. Mr. Burmy stated that it was on the subject property, at which Mr. McLaughlin reacted with surprise because he remembered telling Mr. Burmy that he was not interested in selling that property. According to Mr. McLaughlin, Mr. Burmy said, "I got you the $800,000. That's what you wanted." Mr. McLaughlin says that he replied, "No, that's not what I said I wanted. That's what you told me it was worth." Mr. McLaughlin told Mr. Burmy that he was very busy and asked him to fax the offer to his home. He said he also wanted to find out what his wife's reaction would be.

**11**  Mr. Burmy testified that on November 1, 2005, he told Mr. McLaughlin that he had an offer to purchase the property for $800,000. He said that he explained it as well as the proposed Exclusive Listing Contract that he had prepared with a commission for 10 percent. According to him, Mr. McLaughlin told Mr. Burmy to fax the documents to his home.

**12**  Mr. Burmy testified that he faxed an Exclusive Listing Contract, Limited Dual Agency Agreement and a brochure called "Working with a Realtor" to the McLaughlin's home. With those documents he also sent an offer by S. Seran to purchase the property for $800,000. It provided for a commission of 10 percent plus GST payable by the vendor.

**13**  Janet McLaughlin's evidence is that she received only part of a fax from Mr. Burmy on November 1. It was only the cover sheet and a piece of another page. After that their machine jammed and the rest never came through. On the contrary, Mr. Burmy testified that he telephoned John McLaughlin who confirmed with him that the documents had been received.

**14**  When Mr. McLaughlin returned home from Lantzville, on November 4, 2005, he and Mrs. McLaughlin discussed the $800,000 offer and agreed to reject it. They said they felt strongly about keeping the property for their two children, and they agreed that Mr. McLaughlin would seek to get rid of Mr. Burmy. Mr. McLaughlin accordingly faxed a note to Mr. Burmy saying politely that they, the McLaughlins, would be seeking an appraisal of their property, and then Mr. McLaughlin left home to drive to Kamloops again on business for CIMS.

**15**  In fact, the McLaughlins did not obtain any appraisal. Their reason, they said, was that they were not interested in selling the property in the first place.

**16**  Mr. McLaughlin testified that while he was on the Coquihalla Highway on November 5 driving to Kamloops, Mr. Burmy telephoned him to ask about the $800,000 offer. Mr. McLaughlin told Mr. Burmy that his wife was not interested in selling the property and that he was very busy with work, but he suggested that Mr. Burmy should contact Ms. McLaughlin if he wanted to continue discussions.

**17**  Mr. Burmy's evidence was that he also spoke by telephone with Mr. McLaughlin and was told by Mr. McLaughlin that they would get back to him in a few days.

**18**  Apparently the next step was Mr. Burmy calling Janet McLaughlin at home. They both admit the conversation occurred but their evidence on it differs. Ms. McLaughlin testified that Mr. Burmy first called her on November 5 or 6 saying that he wanted to talk about the $800,000 offer. She testified that she told him that they were not interested in selling the property. However, "Well, maybe if I get $1 million in my pocket, we can talk." She said she just pulled the number out of the air. She assumed that she would not hear from Mr. Burmy again.

**19**  Mr. Burmy's version was that he spoke to Ms. McLaughlin on November 6 regarding and asked if they had gotten an appraisal. She replied that she was getting an opinion and would not sell for under $900,000. He said she advised him that she would get back to him in a day or two.

**20**  Ms. McLaughlin testified that on November 7, 2005, Mr. Burmy telephoned her again to say that he had a $1 million offer, but that there was about to be a rush of offers on the property so she should decide and then not delay in signing the deal.

**21**  Ms. McLaughlin testified that Mr. Burmy never said anything to her about the value of the property or the appropriateness of $1 million as a sale price for it.

**22**  Mr. Burmy testified that when he talked to Ms. McLaughlin on November 7, she told him that she had an opinion on the property and she told him that they would accept $1 million, provided that the subject removal date was changed from December 16, 2005, to January 5, 2006, and the closing date was changed from July 31, 2006 to March 31, 2006. She added as well certain details regarding the tenant on the property.

**23**  Ms. McLaughlin expressly denied that she told Mr. Burmy any such thing about an opinion. She never obtained an opinion or appraisal. Neither, she testified, had she instructed Mr. Burmy to make a counter-offer on the $800,000 offer. She had never seen the $800,000 offer, and did not know what its terms were, so she could hardly be seeking to change dates.

**24**  Mr. Johl, the ultimate buyer, gave evidence that after Summit rejected the $800,000 offer by Ms. Seran, Mr. Burmy called him and said that the seller now wanted $1 million for the property. Mr. Johl said that he considered this and decided to counter offer at $1 million, and did so accordingly through Mr. Burmy.

**25**  There is no dispute that on November 7, 2005, the McLaughlins agreed that Summit would sell the property for $1 million. After speaking to Mr. Burmy, Ms. McLaughlin called Mr. McLaughlin and in a brief conversation they confirmed their agreement to sell. Mr. McLaughlin says that he told Ms. McLaughlin to have Mr. Burmy meet with her brother, Duncan McPherson, who was a director, president and secretary of Summit with signing authority for the company. Mr. McLaughlin said that he asked that Ms. McLaughlin and Mr. McPherson make sure that the documents were sent to Summit's lawyer, James Radelet, for review.

**26**  According to Mr. McLaughlin, the increase to $1 million is what persuaded them to sell. It seemed like a lot of money to them. They figured that they could re-invest some of it in another property for their sons as well as put some away for their sons' education.

**27**  Mr. McLaughlin testified that Mr. Burmy telephoned him to say that he netted the offer for the amount that Ms. McLaughlin had insisted upon. Mr. McLaughlin understood that to mean the $1 million "in her pocket". Mr. McLaughlin claimed that Mr. Burmy insisted that Summit would have to accept this offer quickly. Mr. McLaughlin told him to deal with Ms. McLaughlin as he was very busy dealing with a work crisis in Kamloops. Mr. Burmy did not deny that this telephone conversation took place.

**28**  On November 7, 2005, a meeting took place during which the documents to complete a $1 million offer were executed on behalf of Summit. They were identical in form to the $800,000 offer except for numbers and dates.

**29**  Mr. McLaughlin said he contacted Mr. McPherson to confirm that Mr. McPherson would attend to sign the documents for the sale of the property. Ms. McLaughlin arranged with Mr. Burmy to meet him at Maple Ridge Chrysler. They met there and Mr. Burmy produced the documents to be signed, including the Exclusive Listing Contract, the Limited Dual Agency Agreement, the "Working with a Realtor" document and the Contract of Purchase and Sale. Those documents, Ms. McLaughlin said, were foreign to her and Mr. McPherson.

**30**  Ms. McLaughlin testified that there were no other signatures on any of the documents at that time, and Mr. McPherson testified that he couldn't recall any other signatures. They said that Mr. Burmy did not draw their attention to any specific parts of the documents, nor did he explain anything in the documents to them. They said that the process of execution took no more than five minutes.

**31**  Mr. Burmy agreed that it was a short meeting, but he disagreed that the shortness was due to him. His testimony was that he took his briefcase out of his car when he met Ms. McLaughlin and Mr. McPherson and suggested that they go somewhere inside to sign the documents. His evidence was that Ms. McLaughlin disagreed, saying that she had already been through nearly all of the same provisions when she reviewed the $800,000 offer, and that all she wanted to check was the changes from that document. Mr. Burmy spread the documents out on the hood of his car while she looked through them, finding the places for signature and directing Mr. McPherson where to sign. Neither Ms. McLaughlin or Mr. McPherson carefully reviewed the documents, and this was obvious to Mr. Burmy.

**32**  According to Ms. McLaughlin, when the documents were signed, she said that she needed to take them to Mr. Radelet, the lawyer for Summit, to review them before they were signed by the other side. She said that Mr. Burmy volunteered to take care of this as she wished. Mr. McPherson said he recalled at the time hearing Ms. McLaughlin tell Mr. Burmy that she needed to send the documents to her lawyer.

**33**  Mr. Burmy denied that there was any such conversation. Remembering that he had been directed earlier to contact Mr. Radelet about details concerning Summit, he sent the documents to Mr. Radelet, but not until after he had had the purchasers sign up documents. He assumed that Mr. Radelet was going to act on the conveyance for Summit.

**34**  The following day, Mr. McLaughlin returned home from Kamloops where, for the first time, he perused copies of the executed documents. Apparently he spoke by telephone with Mr. Radelet about the agreement and Mr. Radelet called his attention to the 10 percent commission.

**35**  Displeased with the commission and the fact, he said, that Mr. Radelet had not been provided with the documents to review before the completion by the purchaser, Mr. McLaughlin went to see another lawyer. The other lawyer complained on Summit's behalf to Re/Max about the 10 percent commission. The evidence does not disclose, however, a complaint at that time of a failure by Mr. Burmy to deliver documents to Mr. Radelet for review.

**36**  On January 4, 2006, all subject conditions were removed from the Contract of Purchase and Sale and in due course Summit closed the sale of the property, received $1 million subject to the usual adjustments and paid Mr. Burmy the commission of $100,000 plus GST. In November, 2006, the McLaughlins, convinced that the property had been sold for significantly less than its fair market value as of November 7, 2005, commenced this action.

**THE CLAIMS**

**37**  The action against Re/Max Westcoast is based on a claim of vicarious liability, that Mr. Burmy acted at all times on behalf of Re/Max Westcoast, and Re/Max Westcoast admits that if the claims alleged against Mr. Burmy are proven, the vicarious liability is also proven.

**38**  In paragraph 20 of the statement of claim, Summit alleges ***negligence*** on the part of the defendants on grounds that the defendants owed Summit a duty of care and breached this duty by:

1. not knowing the value of Summit's property;
2. not taking all reasonable steps to learn the value of the property;
3. not advising Summit of the value of the property; and
4. not advising Summit that the proposed commissions were unusual.

**39**  In paragraph 21 of the statement of claim, Summit alleges that the defendants owed a fiduciary duty which they breached by:

1. not disclosing to Summit the relationship between Mr. Burmy and Ms. Seran;
2. acting in their own and Ms. Seran's interests, rather than in Summit's interest;
3. not advising Summit that the proposed purchase prices were inappropriate; and
4. not advising Summit that the proposed commissions were unusual.

**40**  Paragraph 22 of the statement of claim alleges breach of contract on the part of the defendants by:

1. being disloyal to Summit and not protecting its negotiating position;
2. not exercising a reasonable care and skill in performing their assigned duties, by not knowing, or taking all reasonable steps to learn, the value of the property;
3. not dealing with Summit and Ms. Seran impartially, but favouring Ms. Seran; and
4. not disclosing to Summit the relationship between Mr. Burmy and Ms. Seran, the value of the property, the inappropriateness of the proposed purchase prices and that the proposed commissions were unusual.

***NEGLIGENCE***

**41**  Real estate agents have a duty to "exercise reasonable care and skill in the performance of their undertakings": William F. Foster, ***Real Estate Agency Law in Canada***, 2nd ed. (Scarborough: Carswell, 1994) at 214-15; see also G.H.L. Fridman, ***The Law of Agency***, 7th ed., (Toronto: Butterworths, 1996) at 158. Counsel for Summit submits that the duty began when Mr. Burmy agreed to find a buyer (on or about October 28, 2005).

**42**  To prove ***negligence***, Summit must establish what standard of care was owed and that Mr. Burmy failed to meet this standard. The authorities show that the price, if it was accepted in reliance upon the advice of the agent, must be adequate and the transaction must be a righteous one: ***Re Crackle and/or Greyfriars Realty Ltd.*** [*(1983), 47 B.C.L.R. 256*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F8SS-62J1-00000-00&context=) (C.A.); ***Kingpin Investments Ltd. v. Melton Real Estate Ltd.,*** [*(1977), 7 A.R. 567*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-92W1-DXPM-S142-00000-00&context=), [*3 Alta. L.R. (2d) 324*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-92W1-DXPM-S142-00000-00&context=) (S.C. (T.D.)).

**43**  Counsel for Summit submits that it is implicit in the duty that the agent must know the value of the property or take all reasonable steps to learn it. Summit argues that expert evidence is not required to prove the standard of care. The trier of fact may determine standard of care based on common experience: ***Burbank v. B.(R.T.)*** [*2007 BCCA 215*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-244S-00000-00&context=), [*65 B.C.L.R. (4th) 290*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-244S-00000-00&context=) at para. 57.

**44**  With respect, the courts recognize that property evaluations and the methodology of the evaluations are not simple, and no one's evaluation is any more than an opinion. While it may be so in some cases that an expert is not required to assist the court in determining the standard of care, in others, it is necessary.

**45**  The evidence of Mr. Burmy was that prior to his first meeting with Mr. McLaughlin, he had conducted a tax search of the entire Thornhill area, perused municipal maps and ascertained that the property was within a zone known as "Urban Reserve". He testified that he also undertook multiple listing services searches of all recent listings in the area, and that he had found at least a couple of comparable properties that seemed to be helpful. Overall, there was a problem, however. The market included very few other sales or listings of properties nearly as large as the subject property within the Thornhill area and neighbouring areas. Extrapolation had to be made from the prices of smaller properties listed and sold. That, naturally, introduced uncertainty into the process, and a broader range of estimated value.

**46**  Counsel for Summit submits that Mr. Bury's research was incomplete in that he failed to do a market analysis. What that meant, and how much more meaningful it would have been than the results of Mr. Burmy's efforts, was not explained. In fact there was practically no evidence adduced as to what was customarily required of the agent: see ***Haag v. Marshall*** [*(1989), 39 B.C.L.R. (2d) 205*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-DY33-B036-00000-00&context=) (C.A.); ***Shaak v. McIntyre***, [*[1991] B.C.J. No. 2607*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-FJDY-X2WN-00000-00&context=) (QL) (S.C.); ***Phelan v. Realty World - Empire Realty Ltd.*** [*(1994), 38 R.P.R. (2d) 128*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F8D9-M15C-00000-00&context=), [*[1994] B.C.J. No. 752*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F8D9-M15C-00000-00&context=) (QL) (S.C.); ***Snijders v. Morgan*** (9 October 1996) Nelson No. 4747 (B.C.S.C.).

**47**  When the McLaughlins advised Mr. Burmy that they were going to seek an appraisal, it was reasonable for Mr. Burmy to conclude that they were not relying on him to do any more than bring an offer.

**48**  It is fair to say that Mr. Burmy's presentations of the two offers carried his endorsement that the offers were at a fair market value. It doesn't matter that in the first offer he may have been wrong, because the McLaughlins rejected it. In a way, however, it was a door opener, and arguably a softener for the $1 million dollar offer, but the evidence doesn't support any deliberate attempt on those lines.

**49**  Counsel for Summit pointed out that the $800,000 offer differed from the fair market value by 75 percent based on Summit's appraisal, and by 23 percent on the defendants' appraisal. The trouble with that analysis is that it depends on the court finding a fair market value in accordance with Summit's appraisal, and it does not allow for any margin of error.

**50**  Neither can it simply be said that Mr. Burmy was negligent because his market analysis led him to recommend a sale at substantially less than fair market value, although it would be a factor to consider. However wrong Mr. Burmy may have been, if he observed a proper standard of care, he was not negligent. At any rate it is for Summit to establish that standard of care, and in my view it has not been established. Therefore, it is not possible to find the degree, if any, to which Mr Burmy failed to meet a standard.

**51**  In my view, Mr. Burmy's actions did not reveal on a balance of probabilities insufficient knowledge of the value of the property or failure to take reasonable steps to learn about the value of the property. There was little evidence raised as to what more he ought reasonably to have known and did not know before bringing the two offers to the McLaughlins. His testimony as to the investigations he undertook and his experience as a realtor generally was not successfully contradicted.

**52**  In my view, Mr. Burmy did not take on any duty toward the McLaughlins until they confirmed their acceptance of the $1 million dollar offer. There was no agreement nor reliance until then, nor any relationship.

**53**  On the evidence of the McLaughlins, he brought the $800,000 offer to them cold. They rejected it and made no effort to engage him for anything further. It was when Mr. Burmy came back with the $1 million dollar offer that the McLaughlins confirmed their acceptance of it, and impliedly, their acceptance of the Limited Dual Agency Agreement.

**54**  I find that a duty arose then, or if I am wrong, earlier, to act for and in the best interests of Summit, but there was insufficient evidence adduced to establish the standard of care. In any event, in the absence of evidence to the contrary, I find that the efforts that Mr. Burmy took to make himself knowledgeable were not sub-standard on a balance of probabilities. Mr. Lathrope, the appraiser for the defendants, noted, incidentally that until he had completed his investigation, he, himself, saw that the properly as being worth somewhere closer to $800,000.

**FIDUCIARY RELATIONSHIP**

**55**  A fiduciary relationship arises where "one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power": ***Guerin v. The Queen***, [*[1984] 2 S.C.R. 335*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-233X-00000-00&context=) at 384.

**56**  The relationship of principal-agent is within the categories of relationships that are considered to be inherently or intrinsically fiduciary: ***Atlanta Industrial Sales Ltd. v. Emerald Management & Realty Ltd.***, [*2006 ABQB 255*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9381-JJSF-222V-00000-00&context=), [*399 A.R. 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9381-JJSF-222V-00000-00&context=) at para. 160. As La Forest stated 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=) at 409:

[C]ertain relationships ... have as their essence discretion, influence over interests, and an inherent vulnerability. In these types of relationships, there is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interests of the other party. Two obvious examples of this type of fiduciary relationship are trustee-beneficiary and agent-principal.

**57**  In ***Lee v. Royal Pacific Realty Corp. and Chan***, [*2003 BCSC 911*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JS0R-224W-00000-00&context=), the British Columbia Supreme Court stated at para. 30 that "[t]he usual relationship with a real estate agent is presumed to have as its essence discretion, influence over interests by the agent and inherent vulnerability of the principal. (***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 page 409)."

**58**  In G.H.L. Fridman, ***The Law of Agency***, 7th ed., (Toronto: Butterworths, 1996) the author states at 174-75:

[O]nce the relationship of principal and agent exists ... a complex of duties attaches to the agent. These duties are equitable in character, and may be lumped together under one general principle; namely, that the agent must not let his own personal interest conflict with the obligations he owes to his principal. This general idea is manifested in various ways.

[footnotes omitted]

**59**  An agent's fiduciary duties include the duty to make full disclosure to its principal: ***Atlanta Industrial***, *supra*, at para. 162; ***Re Crackle and/or Greyfriars Realty Ltd.*** [*(1983), 47 B.C.L.R. 256*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-F8SS-62J1-00000-00&context=) (C.A.) at 263. In ***Ocean City Realty Ltd. v. A&M Holdings Ltd.*** [*(1987), 36 D.L.R. (4th) 94*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-JXNB-62MK-00000-00&context=), [*44 R.P.R. 312*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-JXNB-62MK-00000-00&context=) (B.C.C.A.) the court stated at 98-99:

The obligation of the agent to make full disclosure ... includes "everything known to him respecting the subject-matter of the contract which would be likely to influence the conduct of his principal" *Canada Permanent Trust Co. v. Christie*, [*[1979] B.C.J. No. 1307*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-F2F4-G1N4-00000-00&context=), or, as expressed in 1 Hals., 3rd ed., p. 191, para. 443, everything which "... would be likely to operate upon the principal's judgment".

...

The test is an objective one to be determined by what a reasonable man in the position of the agent would consider, in the circumstances, would be likely to influence the conduct of his principal.

**60**  In F.M.B. Reynolds, ***Bowstead and Reynolds on Agency***, 18th ed. (London: Sweet & Maxwell, 2006), the author states at para. 6-063:

Where an agent enters into an contract or transaction with his principal, or with his principal's representative in interest, he must act with perfect good faith, and make full disclosure of all the material circumstances, and of everything known to him respecting the subject matter of the contract or transaction which would be likely to influence the conduct of the principal or his representative.

**61**  On the evidence in this case, there was a reasonable expectation of trust and reliance in Mr. Burmy to act in Summit's best interest. Nonetheless, and again, the duty imposed upon Mr. Burmy as a fiduciary was subject to the limitations created by the Limited Dual Agency Agreement. This Agreement particularly affected the duty to disclose everything known about the matter in question that might influence the decision of a principal to proceed with the transaction: ***Re Crackle,*** *supra* at 263.

**62**  The Limited Dual Agency Agreement, a standard form of the Real Estate Board of Greater Vancouver, differs from the usual single agency standard form in that it establishes the agent as agent for both parties. The Agreement specifically requires the agent to act impartially between the vendor and the buyer. The agent may not disclose whether the buyer is willing to pay a price or agree to terms other than those contain in the offer, nor may the agent disclose that the seller is willing to accept a price or terms other than those contained in the Listing. Nor may the agent disclose the motivation of either party to the other unless authorized in writing. Nor may the agent disclose personal information of one party to the other unless authorized in writing.

**63**  In the additional two-page document called "Working with a Realtor" there were the same terms as those just mentioned within the Limited Dual Agency Agreement. It also provided that the agent was obligated to protect and promote the interests of his principal as he would his own, and that the agent had a duty of undivided loyalty. It provided that the agent must protect the principal's negotiating position at all times and disclose all known facts which may affect or influence the principal's decision. It provided that the agent must obey all lawful instructions of the principal, keep the confidences of the principal, and exercise reasonable skill and care in performing all assigned duties. These, I am afraid, could suggest obligations in conflict with the Dual Agency Agreement. I take it as understood by both parties that the Dual Agency provisions were paramount.

**64**  Both parties, said the "Working With a Realtor" document, must carefully read all documents and understand what they are signing, and if special or expert advice is needed, they must seek the help of other professionals such as lawyers.

**65**  The onus rested with Mr. Burmy to show that he acted in accordance with his fiduciary duties in this sales transaction.

The burden of proof that the transaction was a righteous one rests upon the agent, who is bound to produce clear affirmative proof that the parties were at arm's length, that the principal had the fullest information upon all material facts, and that having this information he agreed to adopt what was done": ***Charles Baker Ltd. v. Baker***, [*[1954] O.R. 418*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJS1-JN6B-S3FK-00000-00&context=) at 432, [*[1954] 3 D.L.R. 432*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJS1-JN6B-S3FK-00000-00&context=) (C.A.); see also ***Re Crackle***, supra, at 262-63; ***Kingpin Investments;*** *supra,* at paras. 29-34.

**66**  I do not accept the allegation that Mr. Burmy failed to disclose the facts that could reasonably have affected the decision of Summit to enter into the transaction. Counsel for Summit emphasized that the standard of disclosure is whether information "could" have made a difference, not "would". That may be so, but again that obligation was curtailed by the limitations on disclosure in the Dual Agency Agreement. In fact, there was nothing hidden, there was nothing undisclosed that could have made a difference.

**67**  Mr. Johl purchased the property for the same reason that Summit had kept it which was for investment over the same lengthy period of time that the McLachlins previously intended to hold it. The fact that Mr. Johl was a developer could have made a difference, if there was some information that he knew about the development possibilities that the McLachlins didn't know. But there is no evidence of that. To say that simply knowing him to be a developer could have made a difference was not enough in this case. It was also personal and excluded from disclosure under the Dual Agency Agreement.

**68**  It was submitted on behalf of Summit that the McLauglins, being unsophisticated real estate investors, required much more guidance with respect to the transaction. The facts do not support that argument. Mr. McLaughlin, the directing mind of Summit, had been involved in approximately 12 real estate transactions over the years. Most of these involved residential properties, but they also included three development properties. Mr. McLaughlin was an experienced businessman. He had always acted through realtors on his property transactions. He admitted to familiarity with listing agreements and particularly with Dual Agency Agreements. Ms. McLaughlin was not as well versed in real estate transactions, but she had some experience and she appealed to me as an assertive, bright and fairly knowledgeable person. There is nothing about these transactions that either of them was incapable of understanding.

**69**  Mr. McPherson, on the other hand, a very good natured gentleman and self-employed landscaper, did not exhibit what I would call reasonable knowledge in real estate matters. However, it was well understood by him and the McLaughlins that his role was simply to sign the documents on behalf of Summit as the McLaughlins instructed. His inability to understand the documents is not material because, to repeat, the McLaughlins themselves took full responsibility on behalf of Summit for what was signed and delivered on Summit's behalf.

**70**  It is alleged that Mr. Burmy failed to act impartially. No evidence was adduced of that, however.

**71**  For all the foregoing reasons, I find that Mr. Burmy did not breach any fiduciary duty, including any duty of disclosure to Summit.

**TEN PERCENT COMMISSION**

**72**  It was submitted on behalf of Summit that Mr. Burmy owed a duty to disclose the fact that the commission was unusually high and that it was negotiable. It is undisputed that a commission of 10 percent is unusually high. The evidence indicated that the normal fee of a realtor on a transaction is 7 percent of the sale price up to $100,000 plus 1 1/2 percent to 2 1/2 percent of any amount above that. One or two witnesses suggested that a straight 3 percent or 4 percent commission was not unusual either. One witness testified that a commission of 10 percent, although rare, was not unheard of. Mr. Burmy admitted that 10 percent was unusually high. He offered no excuse. He admitted that he did not ever advise Summit that his proposed commission was unusually high or that it was negotiable. Ironically, he testified to being surprised when the McLaughlins did not complain or counter the proposal.

**73**  I agree that details of the commission might affect a party's decision to sell or buy, and that if the principal is unaware that it is unusually high, circumstances may dictate some form of disclosure of that fact.

**74**  Counsel for the defendants submits firstly, that the fact of the 10 percent commission was clearly communicated, and that is true. It is clearly set out in the documents that Mr. McPherson signed, and in the earlier $800,000 offer. Certainly, Mr. McLaughlin at least was knowledgeable enough to see readily that the commission was unusually high. There was no need to explain obvious. It seems to me that Mr. Burmy had every reason to expect that the McLaughlins had perused the earlier offer, and had discussed between themselves the terms of the second offer, and that if they signed the documents, they had agreed to accept ten percent as a commission.

**75**  There were signs, to be sure, that the McLaughlins were acting hastily and not taking the trouble to read the documents. The rush to sign at the end was one indication. The fact that Mr. McLaughlin did not ask to see the documents before they were signed is another. The fact that neither of them raised with Mr. Burmy the amount of the commission was yet another factor that indicated a possibility that they had overlooked the matter. Those are not, however, sufficient grounds for me to conclude that Mr. Burmy connived or breached a duty.

**76**  How much they were willing to pay was something within their power to decide. What Mr. Burmy offered was not hidden from them. It was not an amount that was illegal or unconscionable. It was generous. It was a matter of negotiation open to the McLaughlins. It was not anyone's responsibility but their own to read the documents and satisfy themselves on whether they would accept it. They did not take the proper care that they should have in perusing the documents. Mr. McLaughlin did not even ask to see the documents. He was content to rely on Ms. McLaughlin's perusal of the documents after discussing the terms with him, and to have her brother sign them. They knew that Mr. McPherson would not be of any help beyond that, although this was not told to Mr. Burmy.

**77**  The evidence does not establish that Mr. Burmy knew that the first offer was not received or that Mr. McLaughlin had not viewed any of the documents.

**78**  It is open to question whether they in fact overlooked it or whether they thought it was fair considering the very good bargain they believed that they were getting at a price of $1 million.

**79**  Counsel were unable to provide authorities on the question of what, if any, is the extent of a fiduciary's duty to assist the client in the process of negotiating the fiduciary's fees. The evidence persuades me that on a balance of probabilities Mr. Burmy made adequate disclosure on the question of his commission and owed no further duty to assist Summit in determining his estate agent's fees.

**REVIEW BY LAWYER**

**80**  Mr. and Ms. McLaughlin relied, in the alternative, upon Ms. McLaughlin's claim that she said she wanted to take the documents to her lawyer to peruse before the purchasers signed the documents. She says that Mr. Burmy volunteered to do that for her, and that she trusted him to do so. She was categorical on the point; however, Mr. Burmy was equally categorical in denying it.

**81**  The first time that the McLaughlins raised this issue was in materials submitted for application for summary trial in October, 2007. I have to consider that.

**82**  It was pointed out that Mr. McPherson who also submitted an affidavit for the summary trial in October, 2007 made no mention at that time of having heard Mr. McLaughlin give that instruction to Mr. Burmy on November 7, 2005.

**83**  Ms. McLaughlin in her cross-examination expressed herself to be unsure as to whether she actually told Mr. Burmy that the documents needed to go to Mr. Radelet before the buyers signed it. She conceded that she may have only said that she wanted copies sent to Summit's lawyer. She changed that evidence at the end of her testimony saying that she told Mr. Burmy that Mr. Radelet was going to review the documents. No evidence was adduced to confirm that Mr. Radelet had been notified in advance that he would be received these documents.

**84**  The process that ought to have prevailed on November 7, 2005, did not prevail. Instead of taking place in a calm, deliberate atmosphere it took place outside with documents spread out over the hood of a vehicle. It took five minutes or less with very little attention directed to the contents of the documents being signed. It is possible to criticize Mr. Burmy for allowing this to happen. At the same time, my impression from the evidence as a whole is that Ms. McLaughlin equally wanted to hurry through the execution of the documents. For lack of authority establishing such a duty on the agent's part, I hesitate to charge him with the strict responsibility to enforce discipline upon the Vendor.

**85**  On a balance of probabilities, I am unable also to accept that Ms. McLaughlin clearly directed Mr. Burmy to send the documents to Mr. Radelet for review before the purchasers signed. The corroborating evidence of Mr. McPherson I find unreliable because it was evidence that he could have raised before but didn't.

**86**  I am also mindful of the seriousness of an allegation that a real estate agent would countermand instructions of this nature from a client. Mr. Burmy was seemingly an experienced agent. As such he would have been aware of the risk to his career that such an act would present. He was forthright and clear in his denial of the allegation, and I cannot find a basis to prefer Ms. McLaughlin's testimony over his on this point. I find that the balance of probabilities weighs in his favour.

**87**  I find in conclusion that Mr. Burmy did not breach his fiduciary duty to Summit in relation to the transaction or in relation to his fee agreement.

**BREACH OF CONTRACT**

**88**  The contract document included the same documents mentioned earlier, the Exclusive Listing Contract, the Limited Dual Agency Agreement and the "Working with a Realtor" document.

**89**  The plaintiff submits that the contractual obligations to exercise reasonable care and skill, and to provide thorough competent service were indistinguishable from their duty of care generally. The plaintiff submits that contractual duties of undivided loyalty and disclosure were also indistinguishable from their fiduciary duty. As those claims have been dealt with earlier and dismissed, for the same reasons the claims of breach of contract are also dismissed.

**DAMAGES**

**90**  Summit bases its measure of damages on the value of the Property as appraised by their appraiser, Ms. Reilly. She appraised the property at $1.4 million.

**91**  To begin with, I have some concern about the independence of Ms. Reilly's report. This is due to the number of drafts that she sent to counsel, and the extensive consultation that went on between her and counsel before the delivery of her final report. There were letters from counsel including suggestions as to what she should emphasize.

**92**  Ms. Reilly's testimony as well calls into question her impartiality in that she revealed a practice of hers. It was to disclose as little about her adjustments as possible so as not to give the other side something to attack. To make that process more difficult by holding back on explanations placed a strain on the appearance of impartiality.

**93**  Addressing her opinion, Ms. Reilly was unable to explain her rationale for a great many of her adjustments. She valued the improvements on the comparable properties significantly below assessed value. This was without inspecting any of the improvements, without speaking to any of the realtors involved, and while admitting that the tax assessments of the improvements were generally below market value in a rising market.

**94**  Ms. Reilly used a number of much smaller properties as comparables. This was understandable given the few sales of properties as large or nearly as large as the subject property existing for comparison purposes.

**95**  Of particular concern was her use of one comparable, 25909 - 102nd Avenue, which was the closest comparable in size and location to the subject property. Ms. Reilly adjusted the property by increasing its value by $425,000 on grounds including that it looked like a "good deal". There was no reason for this other than her subjective impression. She did not speak to the listing realtor. The property was for sale with the multiple listing service for over a month and there was no evidence that the buyer or seller knew each other or that the buyer received any special terms to justify a lower price.

**96**  The defendants called G.E. Lathrop, an appraiser of ARC Appraisals Ltd. and submitted his appraisal report. Mr. Lathrop's appraisal valued the subject property at $980,000.

**97**  Mr. Lathrop also faced the difficulty of not being able to find enough properties of comparable size and type. Counsel for Summit challenged Mr. Lathrop on one comparable that was not within the urban reserve and out of the agricultural land reserve. Mr. Lathrop also did not adjust for time at the rate of 6 percent per month that is customary in comparison of sales. By the calculations of Summit's counsel, the failure to adjust for time and the decision to adjust for the lack of a view operated to reduce his valuation mistakenly by $117,398. Mr. Lathrop accepted the criticism on this factor, but maintained that it did not warrant a major readjustment.

**98**  In valuing improvements, Mr. Lathrop took assessed values from a valuation date of July 31, 2005, rather than July 31, 2006. This may have affected his valuation as well, but not nearly so seriously as Ms. Reilly's estimates affected hers in my view. Neither of the appraisers seem to disagree on the long-term potential for development of the subject property. My impression from hearing the two experts, and from reading their reports, was that the uncertainties at hand called for some fair margin for error.

**99**  I found Mr. Lathrop's report and testimony the more credible of the two. He was able to express himself with greater precision, consistency and objectivity.

**100**  In the result, and on the balance of probabilities, the evidence does not satisfy me that the value of this subject property as of November 7, 2005, was greater than the price of $1 million. Accordingly, I am unable to find any loss due to underpricing of the property.

**CONCLUSION**

**101**  On the whole, I find that ***negligence*** has not been proven. The standard of care has not been established, but even so, the evidence does not satisfy me on a balance of probabilities that Mr. Burmy acted with less than the reasonable knowledge, care and skill to be expected of a realtor in these circumstances.

**102**  I find that there was a fiduciary relationship established when Mr. Burmy brought the $1 million dollar offer to the McLaughlins. If the relationship was established earlier than that it makes no difference to my findings in the end. I find that Mr. Burmy disclosed all that he was required to disclose, explained all that he was required to explain, and acted in the best interests of the client. This was subject to the Dual Agency provisions included to resolve the conflict of interest arising from Mr. Burmy acting for both parties.

**103**  There was no ***negligence*** proven, nor breach of fiduciary duty, nor breach of contract. There was no damage or loss.

**104**  Accordingly, the action is dismissed, and the defendants shall have their costs at Scale B subject to the right of either party to apply to speak to costs within ten days of these reasons.

E. RICE J.

**End of Document**

[***Sun Life Assurance Co. of Canada v. 482147 B.C. Ltd., [2013] B.C.J. No. 1447***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JW09-M153-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

G.B. Butler J.

Heard: April 5, 2013.

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**[2013] B.C.J. No. 1447** | 2013 BCSC 1187 | 229 A.C.W.S. (3d) 1016 | 52 B.C.L.R. (5th) 202 | 29 C.L.R. (4th) 16 | 2013 CarswellBC 2038

Between Sun Life Assurance Company of Canada, Plaintiff, and 482147 B.C. Ltd., formerly Westbank Projects Corp., Westgate Shopping Centre Ltd., The Timberline Construction Group also known as Timberline Construction Group Western, Grousewoods Developments Ltd., Beachview Developments Ltd., Kasian Kennedy Gardner Partnership Architects, Interior Designers and Planners, formerly known as the Kasian Kennedy Design Partnership Architects, Interior Designers and Planners, Kasian Architecture Interior Design and Planning Ltd., Michael McDonald, W. Scott Douglas, D.M.G. Landscape Architects, Patricia Campbell, Weiler Smith Bowers Consulting Engineers, Darryl J. Bowers, C.K. Robinson Engineering, Cameron K. Robinson, BEP Engineering Services (1997) Ltd., David M. B. Drummond, Lang Structural Engineering Inc., Jay K. Pierson, Maitland Engineering, Gary M. Barclay, 67219 B.C. Ltd., formerly Gordon Spratt & Associates Ltd., John Doe No. 3 doing business as Canwest Glassland Inc., Homan Construction Company Ltd., M & L Painting Ltd., Pipke Construction Ltd., Terra Effects Ltd., Two Mile Sheet Metal Works Ltd., Westcoast Stucco Inc., The District of Maple Ridge, Norson Construction Ltd., 310501 B.C. Ltd., formerly John-Charles Ltd., Westbank Holdings Ltd., and John Doe Nos. 6 - 10 and Persons Unknown, Defendants, and 482147 B.C. Ltd., formerly Westbank Projects Corp., Westgate Shopping Centre Ltd., The Timberline Construction Group also known as Timberline Construction Group Western, Grousewoods Developments Ltd., Beachview Developments Ltd., Kasian Kennedy Gardner Partnership Architects, Interior Designers and Planners, formerly known as the Kasian Kennedy Design Partnership Architects, Interior Designers and Planners, Kasian Architecture Interior Design and Planning Ltd., Michael McDonald, W. Scott Douglas, D.M.G. Landscape Architects, Patricia Campbell, Weiler Smith Bowers Consulting Engineers, C.K. Robinson Engineering, Cameron K. Robinson, BEP Engineering Services (1997) Ltd., David M. B. Drummond, Lang Structural Engineering Inc., Jay K. Pierson, Maitland Engineering, Gary M. Barclay, 67219 B.C. Ltd., formerly Gordon Spratt & Associates Ltd., John Doe No. 3 doing business as Canwest Glassland Inc., Homan Construction Company Ltd., M & L Painting Ltd., Pipke Construction Ltd., Terra Effects Ltd., Two Mile Sheet Metal Works Ltd., Westcoast Stucco Inc., The District of Maple Ridge, Norson Construction Ltd., Morrison Hershfield Limited and Pierre E. Gallant, Third Parties

(55 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Parties — Third party procedure — Availability — Application by Morrison Hershfield and Gallant for summary judgment dismissing the third party claims against them allowed — Plaintiff sued contractors and developers for negligent construction of a building — Plaintiff purchased building after third party provided visual inspection of roof — Contractors issued third party claim alleging third parties failed to properly warn plaintiff — In their defence, contractors alleged plaintiff failed to adequately inspect building prior to purchase — Allegations in third party claim should be raised against plaintiff in defence to main action — Contractors had no independent right of action against third parties.**

**Construction law — Liability — Defences — Contributory *negligence* — Application by Morrison Hershfield and Gallant for summary judgment dismissing the third party claims against them allowed — Plaintiff sued contractors and developers for negligent construction of a building — Plaintiff purchased building after third party provided visual inspection of roof — Contractors issued third party claim alleging third parties failed to properly warn plaintiff — In their defence, contractors alleged plaintiff failed to adequately inspect building prior to purchase — Allegations in third party claim should be raised against plaintiff in defence to main action — Contractors had no independent right of action against third parties.**

**Tort law — *Negligence* — Duty and standard of care — Duty of care — Application by Morrison Hershfield and Gallant for summary judgment dismissing the third party claims against them allowed — Plaintiff sued contractors and developers for negligent construction of a building — Plaintiff purchased building after third party provided visual inspection of roof — Contractors issued third party claim alleging third parties failed to properly warn plaintiff — In their defence, contractors alleged plaintiff failed to adequately inspect building prior to purchase — Allegations in third party claim should be raised against plaintiff in defence to main action — Contractors had no independent right of action against third parties.**

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| Application by the third parties, Morrison Hershfield and Gallant, for summary judgment dismissing the third party claims. The plaintiff sued the developers, suppliers and contractors for negligent design and construction of a shopping centre due to water ingress issues. Before purchasing the shopping centre, the plaintiff retained Morrison to visually inspect the roof. Morrison had no other involvement with the shopping centre. Morrison and its principal, Gallant, were added by some of the general contractors. The contactors alleged the plaintiff failed to inspect the shopping centre adequately or at all, that it failed to retain competent consultants and that it failed to take steps to detect and repair defects. In the third party claim, the contractors alleged the third parties should have warned the plaintiff about the risks associated with the design and construction of the shopping centre. The third parties argued that they owed no duty of care to the plaintiff because they were only retained to provide advice on the roof systems, not in relation to the wall cladding systems. They also argued that any possible ***negligence*** by them arose in the course of duties owed to the plaintiff and that the contractors could raise the third parties' ***negligence*** directly against the plaintiff by way of defence.  HELD: Application allowed.  Whether the third parties owed a duty to warn with respect to the inadequacies in the design and construction of the wall cladding systems could not be determined on a summary judgment motion. Any decision made on a summary application regarding the existence, extent or scope of the third parties' duty to warn could constrain or embarrass the trial judge. There was a possibility of inconsistent findings of fact or law. The contractors could, however, raise the allegation that the third parties failed to provide proper advice or breached a duty to warn the plaintiff by way of defence to the plaintiff's claims. The contactors had no independent right of action against the third parties. The actions which formed the basis of all of the claims in the main action were the actions of the developers, contractors, consultants and suppliers who were involved in the construction of the shopping centre. Morrison's involvement came well after the construction of the building had ended. It did not owe an independent duty to any of those parties involved in the construction. The allegations against the third parties did not disclose events giving rise to the initial loss. |

**Counsel**

Counsel for 482147 B.C. Ltd.: Steven F. Lee.

Counsel for The Timberline Construction Group., also known as Timberline Construction Group Western, Grousewoods Developments Ltd. and Beachview Developments Ltd.: James D. Morin.

Counsel for Kasian Kennedy Gardner Partnership Architects, Interior Designers and Planners, formerly known as the Kasian Kennedy Design Partnership Architects, Interior Designers and Planners, Kasian Architecture Interior Design and Planning Ltd., Michael McDonald, W. Scott Douglas: L. Neil Matheson, Q.C.

Counsel for Norson Construction Ltd.: Donald S. Boyle.

Counsel for Morrison Hershfield Limited and Pierre E. Gallant: Christopher E. Hirst, M. Thea Hoogstraten.

**Reasons for Judgment**

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| **G.B. BUTLER J.** |

**1**   The plaintiff, Sun Life Assurance Company of Canada ("Sun Life") is the current owner of the buildings comprising the Westgate Shopping Centre (the "Shopping Centre") in Maple Ridge, British Columbia. In this action, Sun Life alleges that the defendants negligently designed and constructed the Shopping Centre. The numerous defendants include the developers, contractors, suppliers and consultants who were involved with the construction. Sun Life alleges that the building suffers water ingress issues and seeks compensation for the anticipated costs of repair which are said to total in excess of $7 million.

**2**  The Applicants, Morrison Hershfield Limited ("MH") and Pierre Gallant, a Senior Principal of MH, have been added as third parties by the defendants Norson Construction Ltd. ("Norson"), Timberline Construction Group ("Timberline") and 482147 B.C. Ltd., formerly Westbank Projects Corp. ("Westbank") (collectively the "Three Defendants"). Norson was the general contractor for the Save-On-Foods building, one of the larger units in the Shopping Centre. Timberline was the general contractor for the other buildings and Westbank was part of the developer group. Neither of the Applicants is a defendant in this action and neither was involved with the construction of the Shopping Centre. They bring this summary trial application to dismiss the third party claims.

**3**  The relevant background facts are not controversial. The Shopping Centre is comprised of nine building units and was constructed between 1997 and 1998. Sun Life entered into a purchase and sale agreement dated October 4, 2000, for the purchase of the Shopping Centre from the owner, Westgate Shopping Centre Ltd., one of the developers. The purchase of the Shopping Centre completed on or after November 30, 2000.

**4**  In early November 2000, Bob Pennington, a representative of Sun Life, contacted Brian Benson, an MH employee, seeking to have MH conduct a visual review of the roofs of the Shopping Centre. Mr. Benson inquired if Sun Life wished MH to look at anything else. Mr. Pennington indicated to Mr. Benson that MH was to confine its review to the roofs of the Shopping Centre. They agreed to a $2,000 fee for the service to be performed by MH. The review was conducted and MH delivered its report dated November 10, 2000, which was signed by both Mr. Benson and Mr. Gallant. Mr. Gallant's only involvement was to perform a peer review of the report and to sign off on it as a principal of MH. The report included the following description of its engagement:

On November 8, 2000 Morrison Hershfield Ltd. was verbally retained by Mr. Pennington of Sun Life Financial (Sun Life) to undertake a brief visual review of the roofs at Westgate Centre. It is understood that Sun Life is considering the purchase of this multi-unit complex. The purpose of this report is to provide our opinion regarding the existing condition of the roof.

**5**  In accordance with the agreement, MH issued an invoice to Sun Life for its services in the amount of $2,152.87 including taxes. MH had no other involvement with the Shopping Centre until it was retained to provide expert advice to Sun Life for the purpose of assisting Sun Life with this litigation.

**Pleadings**

**6**  As in most leaky building cases, the pleadings are lengthy and dense. I need not set out specific passages in the Amended Notice of Civil Claim, as the parties are well aware of the allegations. The claims against the defendants for negligent construction and design include the usual allegations made in these kinds of cases. The claims against the Three Defendants also include the allegation that each failed to warn Sun Life "about the defects and deficiencies in the design and construction of the Westgate Shopping Centre...".

**7**  The Three Defendants filed Responses which deny liability. In addition to denying ***negligence*** and denying that any of their acts or omissions caused damage, they say that Sun Life was negligent because it:

1. proceeded with the purchase of the Shopping Centre when it knew or ought to have known of the risks associated with the building envelope;
2. failed to inspect the Shopping Centre adequately or at all prior to the purchase;
3. failed to retain competent consultants to carry out inspection of the Shopping Centre prior to purchase or alternatively, failed to follow the recommendations of the consultants;
4. failed to maintain the Shopping Centre adequately or at all; and
5. failed to take reasonable steps to detect and repair the alleged defects in a timely manner.

**8**  The Third Party Notices issued by the Three Defendants allege:

1. MH and Gallant owed a duty of care to [Sun Life] to use all reasonable care, skill, diligence and competence in the preparation of the Visual Roof Assessment Report and to ensure that [Sun Life] was warned of any other risks which may have affected their decision to purchase the Shopping Centre.
2. MH and Gallant each owed a duty of care to [Sun Life] to warn [Sun Life]:
3. of probable failure of the wall system of the Shopping Centre;
4. of the increased risk of damage to the Shopping Centre buildings arising from any water ingress from the roofs;
5. that [Sun Life] would have to exercise a high degree of diligence in maintaining the wall system, and
6. of the inherent risks associated with purchasing a project that did not incorporate a drainage cavity in the buildings wall systems.

**9**  The Applicants base their application to dismiss the Third Party Notices on two arguments. First, they say they owe no duty of care to Sun Life because they were only retained to provide advice on the roof systems, not in relation to the wall cladding systems. They say that any possible duty in tort owed by MH to Sun Life is excluded, specifically or by implication, on the facts of this case. In response, the Three Defendants say that the Applicants' allegation has not been proven based on the material before the court, but in any event, this issue is not suitable for determination on a summary trial application.

**10**  The second argument advanced by the Applicants is that a third party claim does not lie against them because any possible ***negligence*** of the Applicants arose in the course of duties owed to Sun Life. Accordingly, the Three Defendants can raise the ***negligence*** of MH or Mr. Gallant directly against Sun Life by way of defence. The third party claim is thus unnecessary because the Three Defendants can have their full remedy against Sun Life. The Three Defendants say there are only two instances where the ***negligence*** of a proposed third party can be attributed to the plaintiff: first, where the third party is an agent of the plaintiff; and second, where the third party assisted the plaintiff to mitigate damages. The Three Defendants say that neither of these situations is applicable in this case.

**11**  I will consider the two arguments separately. For the reasons that follow, I conclude that the Applicants' argument that they owed no duty of care to Sun Life is not suitable for disposition under Rule 9-7. However, I conclude that the Applicants' second argument is well founded. They have established that no third party claim lies against them in the circumstances of this case. Accordingly, the third party claims are dismissed.

**Issue 1.Can the issue of the Applicants' duty of care to Sun Life be determined on this summary trial application?**

**12**  I will start the analysis by setting out in more detail the positions of the parties on both the duty of care issue and its suitability for summary trial.

**Position of the Applicants**

**13**  The Applicants say that the Third Party Notices are premised on the existence of an alleged duty of care on the part of MH to warn Sun Life of risks to health and safety arising from the inadequacies in the design and construction of the wall cladding systems at the Shopping Centre. They say it is clear that the duty in tort which is the basis of the third party claims was specifically or implicitly excluded by the terms of the retainer between Sun Life and MH. Here, MH's professional services were confined to a review of the roof systems and the law does not impose duties on professionals that go beyond the scope of the services for which they contracted. It would be contrary to principle and patently unfair if MH could face exposure for design and construction deficiencies in the wall cladding system when Sun Life specifically directed MH to look only at the roofs.

**14**  The Applicants note that the Three Defendants do not claim any independent duty was owed to them. Their claims are based on duties owed by MH to Sun Life. In these circumstances the Applicants say the ability of Sun Life to maintain a claim against MH is thus a precondition of the Three Defendants' claim for contribution or indemnity. The Applicants rely on *Giffels Associates Ltd. v. Eastern Construction Co. Ltd.*, [*[1978] 2 S.C.R. 1346*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-2532-00000-00&context=) and *Orange Julius Canada Ltd. v. Surrey (City)*, [*2000 BCCA 467*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-22PT-00000-00&context=), for the proposition that if a plaintiff cannot sustain a claim against a third party, then a defendant cannot claim contribution or indemnity from that third party unless the third party owes a duty directly to the defendant.

**15**  The Applicants say that because of the limited involvement between MH and Sun Life and the clarity of the evidence regarding their relationship, it is possible for the court to find the facts necessary to decide the issue on a summary trial application. Further, the determination rests primarily on a question of law. The Applicants say it would not be unjust to decide the issues on this application because they are quite separate from the design and construction issues which concern the defendants. Further, it would be unfair to drag MH through a very lengthy trial when it had no involvement with the design and construction of the buildings. In other words, the principle of proportionality as set out in R. 1-3 would be furthered by determining this issue on a summary trial proceeding.

**Position of the Three Defendants**

**16**  The Three Defendants take issue with the suggestion that tort claims against MH for a breach of a duty to warn were excluded by the terms of the retainer. The Applicants are unable to rely on a retainer letter or agreement, and there is nothing in the November 10, 2000 report that could exclude tort liability. Further, it is uncontested that architects and engineers have a duty to warn of health and safety issues. They also say that the Applicants were, at the time, well aware of the issues regarding building envelope failures in coastal British Columbia and the problems with face sealed stucco wall systems. The Three Defendants argue that no distinct line can be drawn between water ingress issues arising from roofs and those arising from wall systems; the systems are closely connected. In these circumstances, they argue that the Applicants have failed to prove they did not owe a duty of care to Sun Life to warn of possible water ingress issues with the buildings in the Shopping Centre.

**17**  The Three Defendants also argue that it would be unjust to decide this issue on a summary trial application. They note that Sun Life has made allegations of a failure to warn against most of the defendants. In addition, the Three Defendants have alleged that Sun Life failed to take adequate steps to inspect the Shopping Centre prior to the purchase and that it failed to retain consultants to carry out inspections and detect defects. They say that these allegations are closely interrelated with the allegations against MH. They argue that where such issues are intertwined, it is not just or fair to litigate one or some of these issues in advance of the whole case.

**Analysis**

**18**  Given the decision I have reached, it is not necessary or desirable that I examine the duty of care issue in detail. I have concluded that the issue is not as simple as the Applicants' argument suggests. Further, and more significantly, it is intertwined with other issues that will be left for determination no matter what happens on this application.

**19**  There is no question that a wrongful act by a professional can be the basis for an action in both contract and tort. Concurrency of liability is subject to the parties' right to arrange their rights and duties by contract so as to limit or exclude the tort duty of care. The duty imposed by the law of tort can be nullified only by clear contract language: *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [*[1993] 1 S.C.R. 12*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-609F-00000-00&context=) at paras. 16-18.

**20**  Here, the agreement between MH and Sun Life was verbal and there is no written exclusion clause. Accordingly, in order to consider the Applicants' assertion that they owed no duty of care to Sun Life, it would be necessary to examine a number of factors including, at least:

1. the scope of work to be performed by MH;
2. the steps taken to fulfill that work;
3. the interconnectedness of the roofs and the wall systems;
4. the state of knowledge of architects regarding water ingress problems on buildings with similar designs at the relevant time; and
5. anything else that might touch on the scope or extent of the duty to warn of health and safety issues.

**21**  The extent of the Applicants' knowledge of the existence of water ingress issues with buildings of this design is interconnected with similar allegations advanced against the defendants. The allegation that those professionals and contractors owed a duty to warn remains a live issue. Any decision made on a summary trial application regarding the existence, extent or scope of the Applicants' duty to warn could constrain or embarrass the trial judge. There is a possibility of inconsistent findings of fact or law.

**22**  The evidence regarding the work that MH did to review the roof structures will have to be led at trial in any event to respond to the defendants' allegation that Sun Life did not take adequate steps to inspect the Shopping Centre prior to the purchase and that its consultants failed to carry out inspections or failed to detect defects in the design and construction of the Shopping Centre. Little efficiency would be gained by dealing with the issue in advance of the trial.

**23**  The difficulty involved in attempting to determine a single issue on a summary trial application is not limited to construction cases, but these disputes are frequently confronted by this problem. In *The Owners, Strata Plan VIS 3815 v. Polo Pacific et al*, [*2003 BCSC 1811*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60TY-00000-00&context=), Macaulay J. summarized the problems that can arise where parties in complex cases attempt to resolve particular questions of law or fact by summary trial. He started his analysis with this comment at para. 35:

Ultimately, it is a matter of judicial discretion whether a just result can be achieved under Rule 18A. The cases are replete with warnings about the dangers associated with litigating questions of fact or law in slices or releasing one defendant from an action only to later discover that others seek to place blame on the same defendant at trial.

**24**  Justice Macaulay went on to summarize, at paras. 36-40, the nature of the problems highlighted in the jurisprudence:

1. Summary trials should not be used to resolve an issue where doing so raises the possibility of inconsistent findings of fact or law. An example of this difficulty is *Prevost v. Vetter*, *2002 BCCA 202*, where the court overturned a summary trial decision on the existence of a duty of care where that issue was intertwined with issues which remained to be determined at a full trial.
2. If summary judgment proceedings will not assist the efficient resolution of the proceeding, then a chambers judge should decline the invitation to litigate in slices: *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Ltd.*, [*2002 BCCA 138*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JC5P-G1HX-00000-00&context=).
3. There is a danger in separating out defendants in multiple party litigation, just as there is a danger in separating issues from their factual matrix.
4. A court should avoid making findings in multi-party ***negligence*** cases that may impact on other parties in ways that cannot, because of the complexity of the case, be fully anticipated: *Privest Properties Ltd. v. Foundation Co. of Canada*, [*[1990] B.C.J. No. 1349*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JK4W-M0S0-00000-00&context=) (S.C.).
5. Even where a summary trial application involves an apparently discrete issue such as the interpretation of an agreement, there may be a need to consider the factual matrix which formed the background which can only be explored at a full trial.

**25**  Many other decisions have highlighted these problems. In *B.M.P. Global et al v. Bank of Nova Scotia*, [*2003 BCCA 534*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FGRY-B0BG-00000-00&context=), the court noted that the extent to which issues are interconnected is not always obvious at the summary trial stage and reiterated Southin J.A.'s oft-repeated warning in *Bacchus Agents* that litigating in slices may be a hindrance to the just, speedy and inexpensive determination of disputes.

**26**  The circumstances of this case raise many of the concerns highlighted in the jurisprudence. It might have been possible to determine the issue as to whether the Applicants owed the alleged duty of care to Sun Life on a summary trial application if this case concerned only the two parties to the agreement, MH and Sun Life. However, with the myriad of parties involved in this case including other professionals and contractors, and the presence of numerous interconnected issues, it would not be advisable to commence this duty of care analysis. The decision could impact on other parties to the litigation in ways that I cannot anticipate. There is a possibility of inconsistent decisions on matters of fact or law. Further, there is little chance that the decision would assist the efficient resolution of the proceedings.

**27**  Taking into account the circumstances of this case and the principles I have cited, I conclude that it would be unjust to decide the duty of care issue raised by the Applicants under R. 9-7.

**Issue 2.Does a third party claim lie against the Applicants, or can the Three Defendants raise the *negligence* of the Applicants directly against Sun Life by way of defence?**

**28**  Before commencing this analysis, I note that the Three Defendants do not argue that it would be unjust to determine this issue on a summary trial application. Rather, they say that the position of the Applicants is wrong at law. I will set out the position of the parties and explain why I have concluded that the Three Defendants are able to raise the ***negligence*** of the Applicants directly against Sun Life by way of defence such that a third party action against the Applicants cannot succeed.

**Position of the Applicants**

**29**  The Applicants say the Third Party Notices are premised on the argument that MH failed to properly advise Sun Life as a result of which Sun Life was not able to mitigate or avoid the loss it suffered from purchasing the Shopping Centre. The Applicants argue that no claim can lie against them because any duty owed by them is owed to Sun Life and the Three Defendants can raise the Applicants' alleged ***negligence*** as a defence directly against Sun Life. In other words, they say that the Three Defendants can obtain a full remedy from Sun Life for the alleged ***negligence*** of the Applicants. Indeed, they have already raised this issue as a defence to Sun Life's claims against them.

**30**  The Applicants say there are two situations where a plaintiff may be responsible for the conduct of a proposed third party: where the acts of the third party fall within the scope of an agency relationship, and where it is claimed the third party should have advised or assisted the plaintiff to mitigate damages. They argue that both are applicable here. An allegation that the proposed third party failed to protect the interests of the plaintiff is the unifying factor in decisions where third party claims have not been permitted to stand. The Applicants say that is exactly what the Three Defendants allege in the Third Party Notices.

**Position of the Three Defendants**

**31**  The Three Defendants argue that the circumstances of this case do not fall within the category of situations where courts have found that the ***negligence*** of a third party can be attributed to the plaintiff. Such attribution can only occur where the third party is an agent of the plaintiff or where the ***negligence*** of the third party amounted to a failure to assist the plaintiff with mitigation of damages. The Three Defendants say that the Applicants were contractors to Sun Life. They were not given any power or authority to act on behalf of Sun Life and so cannot be considered to be its agent. Further, Sun Life had suffered no loss when MH provided services to it. Hence, there was no question of mitigation of damages. The Three Defendants say there is a difference between negligent advice which affects the mitigation of a loss and the failure to provide advice which may have allowed a plaintiff to avoid a loss. The situation here involves the latter and such ***negligence*** is not attributable to the plaintiff by way of a defence.

**Analysis**

**32**  I should note at the outset that the Applicants did not apply to strike the Third Party Notice pursuant to R. 3-5. Rather, this argument was made as part of their summary trial application. Given the decision I have arrived at on the first issue, I have not made findings of fact regarding the duty of care or contractual duty owed by the Applicants to Sun Life. However, the failure to make such findings does not prevent me from considering this issue. The question as to whether the third party action can be sustained is a question of law based on the allegations in the pleadings. There is no reason why I cannot make that determination under R. 9-7 even though it could also have been brought pursuant to R. 3-5. Indeed, the Three Defendants did not take the position that the Applicants could not raise this issue on the summary trial application.

**33**  The authorities establish that when a plaintiff contracts with two parties and later sues one of them, that defendant cannot claim contribution or indemnity from the other where the substance of the third party claim can be raised as a defence to the plaintiff's claim. The principle is explained by McLachlin J.A. in *Adams v. Thompson, Berwick, Pratt & Partners* [*(1987), 15 B.C.L.R. (2d) 51*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-FJDY-X10J-00000-00&context=) (C.A.) at 55:

It thus may be stated with confidence, in my view, that a third party claim will not lie against another person with respect to an obligation belonging to the plaintiff which the defendant can raise directly against the plaintiff by way of defence. Where the only ***negligence*** alleged against the third party is attributable to the plaintiff, there is no need for third party proceedings since the defendant has his full remedy against the plaintiff. On the other hand, where the pleadings and the alleged facts raise the possibility of a claim against the third party for which the plaintiff may not be responsible, the third party claim should be allowed to stand.

**34**  In *Laidar Holdings Ltd. v. Lindt & Sprungli (Canada) Inc.*, [*2012 BCCA 22*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1H1-00000-00&context=), Newbury J.A. referred to the two principles cited in this passage as the first and second branch of the rule in *Adams*. The jurisprudence in British Columbia has identified two situations where the first branch of the rule in *Adams* is applied. The first situation is where the alleged ***negligence*** involves acts which fall within the scope of agency between the proposed third party and the plaintiff. In that situation the plaintiff as principal is responsible for those acts and so they cannot be the subject of third party claims against the agent.

**35**  Here, MH was acting in a very limited role when it undertook to do a visual review of the roofs of the Shopping Centre for Sun Life. In that role, it was not required or authorized to deal with others on behalf of Sun Life. MH simply contracted with Sun Life to perform a visual inspection of the roofs and to provide advice following that inspection. The relationship between the parties was not in any sense a relationship of agency. Rather, MH was acting as a contractor to Sun Life. Accordingly, the relationship does not fall within the first situation covered by the first branch of the rule in *Adams*.

**36**  The second situation to which the rule applies is where the third party claim is based on an allegation that the proposed third party should have advised or assisted the plaintiff to mitigate a loss. This is explained in *Adams* at 56:

Another situation where a third party claim cannot be raised because the obligation is essentially that of the plaintiff is where the claim is one that the proposed third party should have advised or assisted the plaintiff to mitigate his damages. In that situation, like the situation of agency, third party proceedings are redundant because the defendant can obtain any relief to which he may be entitled by reduction of the plaintiff's claim if he makes out the defence of failure to mitigate.

**37**  In *Adams*, the plaintiffs retained the defendant engineers to assist them with a residential subdivision and later retained the third party law firm to prepare a prospectus and provide advice regarding the subdivision. The plaintiffs alleged damages as a result of delay in the construction of the subdivision. The defendant engineers brought third party proceedings against the law firm on the basis that it failed to advise the plaintiffs to issue a revised prospectus that would have allowed them to market a portion of the subdivision earlier, thus avoiding some of the loss. The court held that insofar as the solicitors were retained to file or amend the prospectus or deal with others on the plaintiffs' behalf, they were acting as the plaintiffs' agent. Further, even if the alleged failure to provide advice was not an act of agency, it was clear that the substance of the allegations was that the plaintiffs failed to mitigate. Accordingly, the court concluded that the third party claim could not be sustained.

**38**  In arriving at this decision, McLachlin J.A. noted at 55-56 that the provisions of the ***Negligence*** *Act*, (now) *R.S.B.C. 1996, c. 333*, did not assist the defendant. This is because s. 4 of the ***Negligence*** *Act,* which permits actions for contribution and indemnity between two tortfeasors who cause the same loss, does not come into play where the plaintiff is at fault:

... Where the third party claim can be raised by way of defence, the substance of the matter is that the plaintiff is at fault. That being the case, s. 1 of the ***Negligence*** Act, which deals with the situation where fault is alleged against the plaintiff, is applicable. Section 1 makes no provision for contribution or indemnity between co-defendants. By contrast, s. 4 of the ***Negligence*** Act, which deals with cases where the plaintiff is not at fault, provides for contribution and indemnity between those found at fault in causing the plaintiff's loss.

**39**  In *Laidar*, the court affirmed the chambers judge's decision to refuse leave to issue a fourth party notice. The defendant, Lindt entered into a lease for premises which it intended to use to sell chocolate. However, the use was not permitted under the property zoning. Lindt refused to take possession and was sued by the plaintiff lessor. Lindt was assisted in the lease negotiations by leasing agents and solicitors. Lindt third partied the leasing agents who then applied for leave to issue a fourth party notice against Lindt's solicitors.

**40**  The court had no difficulty rejecting the argument that the ***Negligence*** *Act* created an independent right of contribution from any other person at fault. The only cause of action alleged against the solicitors was a breach of duty owed to Lindt. At para. 35, Newbury J.A. noted that in those circumstances:

... The lesson of *Adams* is that at least under the ***Negligence*** *Act* of this province, the breach of such a duty does not give DTZ an "independent right of contribution" against Blakes. If the law firm was negligent in its advice to its client, DTZ would, like the engineers in *Adams*, "have a complete remedy" by way of reduction of Lindt's damages for which DTZ could be liable. A third party claim is unnecessary.

**41**  In *Laidar*, at para. 17, the court noted that the second branch of the rule in *Adams* has been applied where courts have concluded there is a possibility the proposed third party owed an independent duty to parties other than the plaintiff. This was the situation in *Quintette Coal Ltd. v. Bow Valley Resource Services Ltd.* [*(1986), 19 C.L.R. 153*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JSC5-M2KH-00000-00&context=) (B.C.S.C.), where various parties including professional consultants interacted in the course of a construction project. The situation in the present case is different. While the developer and the numerous contractors and consultants interacted in the course of the construction of the Shopping Centre, MH does not fall in that group of actors. Its involvement came well after the construction had ended. It does not owe an independent duty to any of those parties.

**42**  The allegations in the pleadings also make it clear that the Three Defendants do not have an independent right of action against MH. The central allegation advanced in the third party proceedings is that MH breached a duty to Sun Life. There is no allegation that MH owed or breached a duty to the Three Defendants. Accordingly, the only way that the third party proceeding can be permitted to stand is if there is some possibility that the alleged breach of duty by MH is one for which Sun Life is not responsible. In those circumstances, s. 4 of the ***Negligence*** *Act* would give the Three Defendants a right of contribution and indemnity against MH.

**43**  In *Laidar*, the leasing agents argued that Lindt might not be responsible for the ***negligence*** of its solicitors because it had hired competent lawyers to represent its interests. While the Three Defendants did not advance their argument in these terms, this must be part of their rationale for suggesting that Sun Life may not be responsible for any fault attributable to the Applicants. Madam Justice Newbury rejected this argument following a thorough review of the jurisprudence in British Columbia and Ontario which has considered whether to apply the first or the second branch of the rule in *Adams*.

**44**  The court examined two Ontario decisions which allowed third party proceedings to stand in circumstances which bore some similarity to *Laidar*: *Cardar Investments Ltd. v. Thorne Riddell* [*(1989), 71 O.R. (2d) 29*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FGCG-S2T3-00000-00&context=) (Div. Ct.); and *478649 Ontario Ltd. v. Corcoran* [*(1994), 118 D.L.R. (4th) 682*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JP9P-G4CM-00000-00&context=) (Ont. C.A.). In *Corcoran*, one of the key factors which led the court to allow the third party proceedings to stand was that:

... The plaintiff may be able to say that it acted reasonably in retaining the third party to advise it on the terms of the agreement and accordingly should not be responsible for any ***negligence*** on the part of its solicitor.

**45**  Madam Justice Newbury noted that subsequent Ontario decisions including *Davy Estate v. CIBC World Markets Inc.*, [*2009 ONCA 763*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-FBN1-22S4-00000-00&context=), make it clear that the ability of a principal to avoid liability because it selected a competent and qualified agent or contractor is quite limited. It is necessary to examine the particulars of the relationship to determine if the principal nevertheless remains responsible for the negligent actions of its agent or contractor. Madam Justice Newbury concluded her analysis with the following statement at para. 46, in which she reconciled and applied the various decisions to the facts in *Laidar*:

Returning finally to the instant case, all the threads of argument discussed above lead in my opinion to the conclusion that the chambers judge properly applied the first branch of *Adams*. The proposed fourth party notice against Blakes does not disclose "events giving rise to the initial loss", but simply alleges a failure to protect the interests of Lindt. The conduct described in the notice clearly falls within the scope of the firm's retainer, which is not "questioned or uncertain." Lindt was not performing a pre-existing obligation or duty; its only responsibility in the circumstances was to act reasonably to protect itself. In the words of *Adams*, that was an obligation "belonging to" Lindt, which can be raised by the defendant by way of defence, making third party proceedings unnecessary. Finally, I respectfully adopt the reasoning in *Davy Estate*, and conclude that even if one were to assume that in some circumstances, a client might avoid the consequences of an agency relationship by proving that he or she had retained a reputable agent, a defendant would nevertheless have no basis for a claim against the solicitor under the ***Negligence*** *Act* of this province for what remains the client's failure to mitigate.

**46**  In the present case, the Three Defendants say that the actions of MH could not have been part of Sun Life's mitigation efforts because at the time the work was performed, Sun Life had not purchased the property and had suffered no loss. In other words, the Three Defendants say that the alleged failure by MH to provide advice which would have given Sun Life the opportunity to avoid the loss altogether or to minimize the loss is different in principle from advice given to a plaintiff who has an obligation to mitigate.

**47**  I cannot accept that argument. In my view the various factors considered in *Laidar* result in the same conclusion in this case. Here, the Third Party Notices do not raise events related to the "initial loss". The actions which form the basis of all of the claims in the main action are the actions of the developers, contractors, consultants and suppliers who were involved in the construction of the Shopping Centre. The initial loss - that is the alleged deficiencies in design and construction - was complete when Sun Life contracted with MH. The Applicants had no involvement in the development, design or construction of the Shopping Centre. They came on the scene well after the events which resulted in the alleged damage which forms the substance of the claims raised in the main action. As in *Laidar*, the allegations against the Applicants do not disclose "events giving rise to the initial loss".

**48**  Further, the substance of the allegations in the Third Party Notices is an allegation that the Applicants failed to protect the interests of Sun Life. It is the same kind of allegation which was recently found to fall within the first branch of the *Adams* rule in *Laidar* and *Owners of Strata Plan BCS 2077 v. Polygon Glenlloyd Park Ltd*., [*2012 BCSC 945*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24JB-00000-00&context=).

**49**  Further, and most significantly, the fault alleged against Sun Life in the Third Party Notices is precisely that it failed to protect itself. The Three Defendants allege that Sun Life failed to inspect the Shopping Centre adequately or at all, that it failed to retain competent consultants and that it failed to take steps to detect and repair defects. The allegations in the third party proceedings against the Applicants raise the same issue: MH should have warned about the risks associated with the design and construction of the Shopping Centre. There is no question that this allegation is similar to the allegations which were found to be unsustainable in a third party claim in *Laidar* and *Adams*. It is an allegation that Sun Life failed to protect itself. To quote the language in those cases, this is an obligation "belonging to" Sun Life. Accordingly, it can be raised in defence by the Three Defendants. Indeed, it already has been raised in defence, and there is no need for a third party proceeding.

**50**  I have rejected the Three Defendants' argument that the timing of the loss prevents me from arriving at this conclusion. While Sun Life had suffered no loss prior to the purchase of the Shopping Centre, the actions it took to perform its due diligence are surely part of its own obligation. The obligation to perform proper due diligence is one that Sun Life cannot delegate or avoid. It will be responsible if found to have failed to take reasonable care. Accordingly, the alleged failure of MH to provide proper advice to Sun Life about the condition of the roofs is a breach that "belongs" to Sun Life. The failure to perform proper due diligence is akin to a failure to mitigate and does fall within the type of situation where the first rule in *Adams* is applicable.

**51**  Support for this proposition is found in *The Campbell River Indian Band v. WorleyParsons Canada Ltd.*, [*2013 BCSC 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JGHR-M37K-00000-00&context=). In that case the plaintiff sued the defendant Westmar for loss of profits and increased costs caused by alleged deficiencies in a cruise ship terminal. Westmar provided professional services for the planning, design and construction of the facility. The third party, David Nairne & Associates ("DNA") was retained by the plaintiff to provide project management advisory services with regard to construction of the terminal and act as a liaison between Westmar and the plaintiff. Westmar advanced a third party claim against DNA on the basis that the plaintiff's losses were attributable to the ***negligence*** of DNA. In particular, Westmar alleged that the terminal would not have been developed but for the negligent advice which created unrealistic expectations for profit.

**52**  Much of the reasoning of Russell J. relates to the finding that most of the services provided to the plaintiff by DNA fell within their agency relationship. However, she considered that the advice provided regarding development of the terminal might not fall within the concept of agency. In this regard she was following similar reasoning in *Adams* and *Laidar*. She concluded at paras. 61 and 62 that the allegation of negligent advice could be raised as a mitigation defence and thus falls within the first branch of the rule in *Adams*:

Westmar maintains that but for the faulty advice of DNA, the Terminal would not have been developed. This advice Westmar argues cannot be construed within an agency role.

The thrust of Westmar's submissions is that DNA should have provided different advice that would have allowed the plaintiff to mitigate its losses. This is an argument properly raised as a mitigation defence, from which the defendant can potentially obtain relief. Accordingly, the possibility that the advice provided to the Band was negligent is irrelevant.

**53**  There is a strong analogy between the nature and timing of the alleged negligent advice in *Campbell River* and the allegations in this case. DNA's alleged failure to provide advice would have given the plaintiff the opportunity to avoid the loss before the terminal was built and thus before the plaintiff suffered any loss or damage. Nevertheless, the court found that the alleged breach was in substance a failure to mitigate. It is an allegation that the plaintiff failed to protect itself. That obligation belonged to the plaintiff and is an obligation for which it must be responsible. The fact that the advice was rendered before the loss occurred does not change the nature of the plaintiff's obligation.

**54**  The same reasoning applies in this case. The Three Defendants allege that the Applicants should have provided advice which would have allowed Sun Life to avoid or minimize its loss. This is an allegation that Sun Life failed to protect its interests at the time of purchase of the Shopping Centre. That failure is properly raised as a mitigation defence. It matters not that Sun Life's failure to mitigate or protect its own interests occurred prior to the purchase or before it suffered the actual damage.

**55**  In summary, I conclude that the Three Defendants can raise the allegation that the Applicants failed to provide proper advice or breached a duty to warn Sun Life by way of defence to Sun Life's claims. They have no independent right of action against the Applicants. Accordingly, the third party actions cannot be pursued. Those actions are dismissed. The applicants are entitled to costs at Scale B.

G.B. BUTLER J.

**End of Document**

[***Taiga Building Products Ltd. v. Deloitte & Touché LLP, [2014] B.C.J. No. 1218***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B0WJ-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

K.N. Affleck J.

Heard: September 30, October 1-4, 7-11,

15-18, 21-23, December 2-4, 2013.

Judgment: June 16, 2014.

Docket: S074272

Registry: Vancouver

**[2014] B.C.J. No. 1218** | [*2014 BCSC 1083*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-V421-JP9P-G2DW-00000-00&context=) | [*2014 D.T.C. 5082*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-V421-JP9P-G2DW-00000-00&context=) | [*[2014] 6 C.T.C. 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-V421-JP9P-G2DW-00000-00&context=) | [*243 A.C.W.S. (3d) 200*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-V421-JP9P-G2DW-00000-00&context=) | [*2014 CarswellBC 1721*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-V421-JP9P-G2DW-00000-00&context=) | [*29 B.L.R. (5th) 108*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-V421-JP9P-G2DW-00000-00&context=)

Between Taiga Building Products Ltd., Taiga Building Products a partnership by its General Partner, Taiga Building Products Ltd., 2903 Ltd. and 624858 BC Ltd., Plaintiffs, and Deloitte & Touché, LLP, Defendant

(158 paras.)

**Case Summary**

**Professional responsibility — Self-governing professions — Duties — Contractual duties — Duty of care — Standard of care — *Negligence* — Remuneration — Contingency fees — Professions — Public accountants — Chartered accountants and auditors — Action by plaintiffs for damages for professional *negligence* and breach of fiduciary duty dismissed and counterclaim by defendant for unpaid fees allowed — Plaintiff implemented defendant auditor's recommended plan to avoid tax and agreed to pay percentage of taxes saved to defendant yearly — After plaintiff was reassessed, it stopped paying defendant — Parties had fiduciary relationship — Contingency fee not prohibited by parties' relationship or Rules of Professional Conduct — Advice defendants gave plaintiffs about risks and benefits of plan met standard of care — No breach of engagement letter as mere receipt of reassessment did not require refund of fees.**

**Tort law — *Negligence* — Duty and standard of care — Duty of care — Fiduciary duty — Action by plaintiffs for damages for professional *negligence* and breach of fiduciary duty dismissed and counterclaim by defendant for unpaid fees allowed — Plaintiff implemented defendant auditor's recommended plan to avoid tax and agreed to pay percentage of taxes saved to defendant yearly — After plaintiff was reassessed, it stopped paying defendant — Parties had fiduciary relationship — Contingency fee not prohibited by parties' relationship or Rules of Professional Conduct — Advice defendants gave plaintiffs about risks and benefits of plan met standard of care — No breach of engagement letter as mere receipt of reassessment did not require refund of fees.**

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| Action by Taiga Building Products Ltd ("Taiga") and 2903 Ltd for damages for professional ***negligence*** and breach of fiduciary duty and counterclaim by the defendant for unpaid fees. The defendant, a firm of chartered accounts, was the external auditor of Taiga. In 2001, it recommended that Taiga adopt the "Finco Plan" for a corporate reorganization to avoid the payment of taxes. In a letter of agreement, Taiga agreed to implement the Finco Plan and to pay a one-time fixed fee to the defendant and an annual 20 per cent contingent fee based on taxes saved. The Finco plan relied on a loophole in the Ontario Corporations Tax Act which provided that a foreign corporation with a permanent establishment in Ontario was not taxed on interest income from property outside Ontario. To take advantage of the loophole, on the advice of the defendant, the plaintiff implemented the Finco plan by incorporating the plaintiffs 624858 BC Ltd and 2903, creating a general partnership and transferring assets. The intent of the Finco Plan was to create a large specialty debt, equivalent to all Taiga's assets, owed by Taiga to 2903, a foreign corporation with permanent establishment in Ontario. Taiga would have an interest expenses to 2903, but 2903 would pay no tax on the interest earned on the speciality debt. The general partnership would carry on the business and income would be distributed 99 per cent to Taiga and 1 per cent to 624585. Relying on the general anti avoidance rules, the Canada Revenue Agency ("CRA") audited and reassessed Taiga and 2903. Taiga required the defendant to resign and retained other accountants and tax lawyers to resist the reassessments. However, it later settled with the CRA. The settlement required it to pay additional taxes, interest and penalties, which it sought to recover from the defendant as damages. It also sought the return of fees it paid to the defendant pursuant to the engagement letter and to recover the costs of accounting and legal services it incurred in the course of resisting and settling the reassessments. Taiga alleged that it was not advised of the high risk of the scheme and would not have implemented the Finco Plan but for the ***negligence*** and breach of fiduciary duty of the defendant. It further alleged that the percentage fee agreement caused a conflict between the defendant's role as auditor and its financial interested in saving Taiga taxes, and was a breach of the Rules of Professional Conduct that governed the defendant. Taiga also claimed that the defendant breached the engagement letter by rendering bills for contingent fees after the CRA challenged the Finco Plan and that it breached its contractual and fiduciary duties by refusing to assist Taiga to resist the reassessments. The defendant counterclaimed for contingent fees Taiga refused to pay once the reassessments were made.  HELD: Action dismissed and counterclaim allowed.  The relationship between Taiga and the defendant was a fiduciary relationship. The contingency fee was not improper because the defendant was Taiga's auditor. Furthermore, at the relevant time, there was nothing in the Rules of Professional Conduct that prohibited the defendant, while acting as Taiga's auditor, from contracting for a contingent fee for the Finco Plan. The advice given to the plaintiffs about the risks and benefits of the Finco Plan met the standard of care. Furthermore, the defendant did not breach the engagement letter. The terms of the engagement letter did not require that fees paid to the defendant be returned upon mere receipt of a notice of assessment. While the plaintiffs litigated the reassessments and were reasonable in settling the matter, the terms of the engagement letter did not permit the plaintiffs to settle and visit the consequences of settlement on the defendant, without at least some objective test of the success of the CRA's challenge to the plan. In addition, the defendant was under no obligation to assist the plaintiffs in resisting the reassessments, but offered their assistance. However, the plaintiffs ended their relationship with the defendant without seeking its assistance. |

**Statutes, Regulations and Rules Cited:**

Corporate Minimum Tax, [*O. Reg. 509/07*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W2C-V7H1-F8KH-X008-00000-00&context=),

Income Tax Act, [*R.S.C. 1985, c. 1 (5th Supp.), s. 245*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F2X-PKW1-JYYX-608M-00000-00&context=)

Corporations Tax Act, R.S.O. 1990, c. C-40, s. 2(2), s. 5(1.1)

**Counsel**

Counsel for the Plaintiffs: R. Basham, Q.C., P.A. Brackstone, G.J. Roper.

Counsel for the Defendant: T.M. Cohen, T.M. Pontin, S. Chang, Articled Student.

**Reasons for Judgment**

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| **K.N. AFFLECK J.** |

**Introduction**

**1**  For about 20 years the defendant firm of chartered accountants was the external auditor of the plaintiff, Taiga Building Products Ltd. ("TBPL") which conducts business as a distributor of building products. In 2001 the defendant recommended to TBPL that it adopt what was known as the "Finco Plan" for a corporate reorganization to avoid the payment of taxes. TBPL agreed in writing to implement the Finco Plan ("the engagement letter"). By the engagement letter TBPL was to pay a one-time fixed fee to the defendant and an annual 20% contingent fee based on the taxes saved.

**2**  Relying on the general anti avoidance rule found in the *Income Tax Act*, R.S.C. 1985 c. 1 s. 245 (the "GAAR"), the Canada Revenue Agency ("CRA") audited and reassessed TBPL and the plaintiff 2903 Ltd. ("2903"), which had been incorporated as part of the reorganization to implement the Finco Plan. In December 2003, TBPL required the defendant to resign as its auditors. TBPL engaged the services of other accountants with Cinnamon Jang Willoughby, and of tax lawyers with Borden Ladner Gervais, to resist the reassessments; however, in October 2008 it decided to settle with the CRA and three interested provinces.

**3**  To achieve the settlement TBPL alleges it was required to pay additional taxes, interest, and penalties, which it seeks to recover from the defendant as damages. It also seeks return of the fees it paid pursuant to the engagement letter and seeks to recover the cost of the accounting and legal services it incurred in the course of reaching the settlement agreement.

**4**  TBPL alleges that but for the ***negligence*** and breaches of fiduciary duty of the defendant it would not have implemented the Finco Plan. TBPL further alleges that because of the percentage fee agreement the defendant's role as auditor conflicted with its financial interest in the success of TBPL in saving taxes. It alleges the conflict could not be waived because the Rules of Professional Conduct governing the defendant did not permit it to enter into a contingent fee arrangement with TBPL while it was its auditor. The defendant is alleged to have failed to consider the Rules of Professional Conduct adequately and to have failed to advise TBPL of their implications for the contingent fee. TBPL also alleges the defendant breached the engagement letter both by rendering bills for contingent fees after the CRA had challenged the Finco Plan and by refusing, in breach of its contractual and fiduciary duties, to assist TBPL to resist the reassessments by the CRA.

**5**  In its counterclaim the defendant seeks judgment for the contingent fees TBPL refused to pay once the notices of reassessment have been delivered.

**The Finco Plan**

**6**  The Finco Plan relied on what was characterized as a "loop hole" in section 2(2) of the *Corporations Tax Act*, R.S.O. 1990 c. C-40 ("the *Ontario Act*"), as it read in 2001. A foreign corporation with a "permanent establishment" in Ontario was not taxed on interest income from property outside Canada. To take advantage of the loophole TBPL, on the advice of the defendant, implemented the Finco Plan by:

1. incorporating the plaintiff 624858 B.C. Ltd. ("624") as a wholly owned subsidiary of TBPL in British Columbia;
2. incorporating 2903 as a wholly owned subsidiary of the plaintiff in the British Virgin Islands;
3. arranging for 2903 to have a "permanent establishment" in Ontario;
4. creating a general partnership between TBPL with a 99% interest and 624 with a 1% interest;
5. transferring substantially all its assets to the general partnership in return for promissory notes of about $147,000,000 bearing interest at 9% (the "Finco Debt"); and
6. assigning the Finco Debt to 2903 in return for shares.

**7**  The intention of the Finco Plan was to create a large speciality debt, equivalent to all TBPL's assets, owed by TBPL to 2903, a foreign corporation with a permanent establishment in Ontario. TBPL would have an interest expense but 2903 would pay no tax on the interest it earned on the speciality debt which was on foreign property. The general partnership would carry on the business of distributing building products and its income would be divided 99% to TBPL and 1% to 624 in accordance with their respective interests in the general partnership.

**8**  There was also a savings in capital tax in Ontario which I do not need to discuss in these reasons at any length except to observe that the location of the specialty debt in the British Virgin Islands avoided application of the Ontario *Corporate Minimum Tax*, o Reg. 509/07, and that there is controversy between the parties about whether the Finco Plan had the effect of savings on the capital tax.

**9**  The plaintiffs do not complain that the structure of the Finco Plan had technical faults, nor that it was improperly implemented. The complaint, apart from the conflict of interest, is that the Plan was understood by the defendant, to be an "aggressive" tax avoidance scheme with a "high risk" of provoking a vigorous challenge by the CRA, of which risk the defendant failed to advise the plaintiffs.

**The General Anti-Avoidance Rule**

**10**  The GAAR was introduced federally in 1988 in s. 245 of the *Income Tax Act*, and in Ontario "avoidance transactions" were subject to the GAAR after December 20, 1990 pursuant to the provisions of s. 5(1.1.) of the *Ontario Act*.

**11**  An "anti-avoidance transaction", as defined in the *Ontario Act*, largely mimicked the provisions of the Federal *Income Tax Act*. It is a transaction or series of transactions which avoid tax unless the transaction or transactions may reasonably be considered to have been undertaken in good faith primarily for purposes other than avoiding tax. The GAAR will be applied and tax reassessed if a transaction can reasonably be considered to result in a misuse or abuse of the provisions of the applicable income tax legislation. It is the plaintiffs' position that the Finco Plan had no business purpose other than tax avoidance which made it vulnerable to challenge.

**12**  Michael Calder, C.A., whose opinion evidence formed part of the plaintiffs' case, referred to a 1988 article in the Canadian Tax Journal in which David Dodge, in discussing the criteria for determining "misuse or abuse", wrote that the analysis should involve consideration "of the *object and spirit* of the provisions of the [Income Tax] Act read as a whole in the context of *each particular case*. An attempt to define the object and spirit of the provisions will be the key to a coherent solution of those cases where it is uncertain whether the proposed rule should apply". [Emphasis in original.]

**13**  Mr. Dodge's predictions were realized. There was considerable uncertainty in the community of accounting and legal advisors about some aspects of tax planning following the enactment of the GAAR. Little guidance had been sought from the courts in the initial years. Over the years from 1988 until the defendant proposed the Finco Plan to TBPL in early 2001, the Tax Court of Canada had heard only 11 GAAR related cases and none had reached the Federal Court of Appeal. It was not until *Canada Trustco. Mortgage Co. v. Canada*, [*2005 SCC 54*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B14Y-00000-00&context=), was decided in October 2005, that the Supreme Court of Canada articulated a framework for the analysis of the GAAR. Those professionals advising clients on the application of the GAAR to any particular transaction in the early years before an understanding of the GAAR began to crystalize were, to use the language of Mr. Calder, applying "professional judgment and gut instinct". The uncertainties continued beyond the time when the defendant recommended the Finco Plan to TBPL.

**The Background to the Finco Plan and the Persons Principally Involved in its Implementation**

**14**  In early 2001 the board of TBPL had a number of long serving members including the founder of the company, Patrick Hamill, who died several years before the trial, but who was regarded by other members of the board as a knowledgeable and astute businessman.

**15**  Some members of the board were employees of TBPL and in addition there were external board members including representatives of a major Malaysian shareholder known as Berjaya. Not long after the Finco Plan was implemented the composition of the board was radically altered at the insistence of Berjaya including Mr. Hamill's resignation.

**16**  One of the external board members was Brian Aune, trained as a chartered accountant, with wide business experience including banking and investments. He was a board member of a number of public companies. He was described by the corporate secretary, Patrick Furlong, as a "financial guru". Saul Spears was another external director who had successfully managed his own substantial door manufacturing business and held directorships in public companies.

**17**  Mr. Furlong was the corporate secretary of TBPL in 2001. He was a solicitor of many years' experience and a partner with Davis and Company. He has since retired. He worked closely with Mr. Hamill and described him as "the clear leader of the group". Mr. Furlong, as did the directors who testified at the trial, characterized TBPL as a "risk averse" company.

**18**  Mr. Hamill was looked to by other board members for guidance on corporate decisions. Before matters of significance came before the board for decision Mr. Hamill would usually be consulted. Matters of significance would also be brought to the attention of Berjaya before submission to the board. In 2001 TBPL had a strong board which approached its obligations conscientiously with knowledgeable care and an aversion to excessive risk.

**19**  Alan Morris was much involved in tax matters for most of his career as a chartered accountant and retired in 2009 from the defendant as a tax partner. Mr. Morris was the member of the defendant most involved in proposing the Finco Plan to TBPL in 2001.

**20**  The genesis of the Finco Plan apparently occurred in July 1997 when a tax partner with the defendant circulated a memorandum to "Canadian Tax Partners for Corporate Clients" in which he advised that the structure of a tax plan had been identified which could eliminate provincial income tax entirely. The memorandum referred to the "loophole" in s. 2(2) of the *Ontario Act*. The view was taken by the tax partner that Ontario GAAR "does not seem to be a logical candidate" to attack a finco plan since such a plan would "fit squarely within the terms of the [*Ontario*] Act". The memorandum acknowledges a finco plan "is an aggressive strategy but offers very serious provincial income tax savings". Mr. Morris became aware of this memorandum before the Finco Plan was presented to TBPL. A memorandum within the defendant of October 21, 1997, with the heading "Creative Tax Ideas", refers to an idea for eliminating provincial taxes and says in part:

Fundamentally it uses an anomaly in the drafting of the Ontario Corporation Tax Act and exploits it to the advantage of our clients. This is a proprietary idea and should be exploited as such. To the best of our knowledge, our competition has not yet identified this opportunity. Please discuss it with discretion, and after receiving a signed confidentiality agreement if you are dealing with someone other than an on-going client. (For your convenience, we have included in this package of material a sample confidentiality agreement.)

**21**  Mr. Morris was favourably impressed by the suggested plan but recognized that when it became known to the tax authorities it was likely the relevant tax legislation would be changed to render the plan ineffective. Notwithstanding the expected changes would limit the life of any finco plan, it was Mr. Morris' experience that tax savings already realized from a tax avoidance plan would be retained because any legislative change was likely to be prospective only.

**22**  The suggested plan was analyzed within the defendant to ensure that, if a client chose to implement it, the technical details would be "bullet proof". Although there had been some concern within the defendant regarding the potential application of the GAAR Mr. Morris was not concerned with its impact on federal tax because the finco-type plan he was considering was not designed to avoid federal tax. However, in the years immediately before the Finco Plan was implemented by TBPL the provinces were also introducing their own GAARs. The unexpectedly aggressive approach taken by the CRA to the application of the GAAR (Mr. Weder, a tax lawyer with Borden Ladner Gervais, who testified at the trial, described some demands of the CRA as "outrageous") ultimately became the greatest threat to the success of the Finco Plan. The provinces with their own GAAR, with the exception of Quebec, left administration of provincial GAAR to the CRA.

**23**  Mr. Morris, and others within the defendant, considered the potential impact of provincial GAAR for the Finco Plan, but were limited in their means of doing so because no provincial GAAR case had yet been decided in the courts. Mr. Morris' evidence was that provincial GAAR was similar to federal GAAR and, although some cases had been decided on the latter, "it was not easy to follow the logic of them".

**24**  A document which was intended to form the basis of a presentation on the Finco Plan to tax partners within the defendant includes Mr. Morris' name as one of the "Product Champions". It contains the following bullet points:

1. Legislation risk
2. Exit strategy into another Financing Company
3. Fairly easy to implement
4. Relatively low maintenance costs.
5. GAAR - federal and provincial

and expands on them as follows:

The strategy is based on income tax legislation as it currently reads. We cannot assure a client that the provisions upon which the strategy is based will continue.

The exit approach will be more or less simple depending on certain choices made during the implementation phase. These will be discussed with the client and the service team as part of the implementation exercise to ensure that the client has an opportunity to make an informed choice regarding divergent risks and costs.

In the view of the CTS Group which has been championing the strategy [within the defendant], which was concurred by other members of the CTS Group and various other partners involved in actual implementations, the federal GAAR risk should be minimal. The strategy fundamentally does not reduce the federal tax paid by the affiliated group and given federal GAAR comments allowing tax planning within an affiliated group as being sanctioned by the structure of the Act, we have a high degree of comfort federally.

At a provincial level, the strategy should be no more or less subject to provincial GAAR than any other interprovincial financing strategy (see Quebec FinCo and the No PE FinCo strategies). That said, the strategy may be viewed as more provincially aggressive in that little or no provincial tax is paid on the interest income. While structurally that should not matter, practically it may. This is very limited guidance regarding the possible provincial applications of GAAR.

**25**  This "creative tax idea" is described as having a "limited window of opportunity". "[T]he competition may be marketing a similar structure therefore **we must act now** to get this in front of all clients and prospects that fit the target profile" (emphasis in original).

**26**  Mr. Morris testified he may have been involved in preparing the material for presentation to the defendant's tax partners. He explained the phrase "the strategy may be viewed as more provincially aggressive" to mean that it was a plan that unlike a somewhat similar plan in Quebec would avoid payment of all provincial income tax.

**27**  In November 1999, a draft letter was prepared within the defendant for another client which was contemplating the finco-type plan. Mr. Morris was involved in its drafting and it reads in part:

The Ontario GAAR provision requires there to be an avoidance transaction with respect to Ontario or federal tax. As mentioned, there is no avoidance of federal tax. Also, we feel that it would be difficult for the Ontario Ministry of Revenue to argue that there has been a series of transactions undertaken to avoid Ontario tax. This is because without the entire series of transactions, no Ontario tax would otherwise have been payable. In addition, there appears to be no individual transaction in the series that results in an Ontario tax benefit.

In addition, if the transactions were found to be an avoidance transaction, it would be very difficult to argue that they resulted in a misuse or abuse of the provisions of the Ontario Corporations Tax Act. This is because it is very clear in the Ontario Legislation that a corporation incorporated outside of Canada is not subject to Ontario income tax on its income from property. It would be difficult to argue that this result arises from a misuse or abuse of the legislation.

...

In summary, the Canadian federal and Ontario GAAR provisions should not apply to the proposed steps and, more likely than not, the GAAR provisions of BC, Alberta, and Saskatchewan will not apply.

**28**  Although the GAAR was not believed within the defendant to present a significant risk of triggering a reassessment, it was believed the benefits of a finco plan would soon be eliminated by legislative changes. The November 1999 letter under the heading "Retroactive Legislation" sets forth a view that Mr. Morris shared:

The taxation authorities in Canada have been extremely reluctant to make tax legislation changes on a retroactive basis, even in cases they view as offensive. By far the preferred approach of the legislators has been to change the law with prospective effect from the date of the announcement of the change. Nevertheless, in exceptional circumstances tax amendments have been made retroactively and it is clearly within the rights of taxing authorities to make retroactive changes under the Canadian constitution.

In our view it is unlikely that retroactive legislation will be introduced to block the results of the proposed steps outlined in this letter. The more likely scenario is that a prospective change of Ontario law will be introduced if and when the results of the proposed steps become known to officials in the Ontario Ministry of Revenue.

**29**  That prediction was borne out in May 2005 when the Ontario provincial budget led to implementation legislation which prospectively eliminated the "loophole" in the *Ontario Act*.

**The Presentation of the Finco Plan to TBPL**

1. **Mr. Morris' evidence**

**30**  On February 23, 2001, Mr. Morris, along with Norm Yurik, a tax partner with the defendant, and Angelique Bolger, who was a New Zealand chartered accountant on an exchange program with the defendant, met with representatives of TBPL including Mr. Hamill to discuss the proposed Finco Plan. Mr. Morris used a power point presentation to introduce the Plan as then proposed which was slightly different from the Plan eventually implemented. Mr. Morris testified that at this meeting the risks of the Finco Plan were discussed in some detail including the risk that it would be "challenged". Mr. Morris assured TBPL that the defendant would be closely involved in implementing the Finco Plan so that its technical features would be sound. Provincial GAAR was discussed and described as a factor that was "very uncertain". Mr. Hamill asked if a written opinion would be provided by the defendant. Mr. Morris said it could be given but it would say no more than that the Plan was likely to withstand a challenge based on provincial GAAR. Mr. Hamill did not request a written opinion. Mr. Morris informed the representatives of TBPL that the "down side risk" was that the tax avoided would need to be repaid but in the meantime TBPL would have the use of the money. The meeting ended with Mr. Hamill requesting Mr. Morris seek the approval of the corporate solicitor, Mr. Furlong, and if that was forthcoming, TBPL would implement the Finco Plan.

**31**  The fee proposal made by the defendant at the February 23, 2001 meeting included a non-refundable fee of $50,000 for implementation costs and an annual contingency fee of 20% of the taxes saved in excess of $250,000. Because the defendant anticipated the loophole through which the Finco Plan would pass would probably be closed when the government of Ontario realized its implications the defendant expected a primarily contingent fee would be attractive to TBPL.

**32**  The power point presentation given to TBPL on February 23, 2001 itself contained nothing about the risks of the Plan, which Mr. Morris testified were discussed "in some detail". To record those discussions Ms. Bolger was asked by Mr. Morris to prepare a memorandum to the file. It is dated March 12, 2001 and reads:

On February 23, 2001 Alan Morris, Norm Yurik and myself presented the Finco plan to Pat Hamill. As part of our presentation we discussed with Pat the risks of the plan. Particularly we mentioned:

1. Provincial GAAR-the whole point of Finco is that it eliminates provincial tax on interest income. The interest income is earned in Ontario. Therefore potentially the Ontario provincial government could challenge the idea under Ontario GAAR. Or alternatively the other provinces where the interest deductions are available could challenge it under GAAR. There is no Federal GAAR exposure. We explained to Pat in the past we have not seen provincial governments challenging, planning involving financing companies, but they could in the future.
2. The Finco plan exists because of a loophole in the Ontario legislation. We informed Pat that we foresee when the Ontario government become aware of the loophole they will close it. Therefore the Finco plan has a limited life. In most instances government's amend legislation on a prospective basis however occasionally legislation is amended on a retrospective basis. Whilst we informed Pat a retrospective change is unlikely it could happen. If the legislation were amended on a retrospective basis the benefits of Finco would be eliminated. The capital tax savings would still exist. If the legislation is amended on a prospective basis Taiga will still receive some Finco benefits from the Finco plan and also the capital tax savings.

Pat acknowledged he understood the risks but given the benefits of the plan he wished to proceed with the plan.

**33**  Mr. Morris recalled a telephone conversation with TBPL's corporate solicitor Mr. Furlong shortly after February 23, 2001 but could not remember its details and took no notes. It appears to have occurred on February 26. Mr. Morris had been requested by Mr. Hamill to obtain Mr. Furlong's views and this telephone call began that process. As well Davis and Company had been instructed by TBPL to do the legal work necessary to implement the Finco Plan. A partner of Davis and Company named Al Hudec then attended a meeting on March 12, 2001 with Mr. Morris along with Mr. Furlong. Mr. Morris testified that the Plan was fully discussed in the meeting "from start to finish" including a discussion of GAAR and the then state of the court cases which had addressed GAAR. There was a discussion of the level of uncertainty that surrounded GAAR. Mr. Morris and Mr. Furlong knew each other at least somewhat before they talked about the Finco Plan. Mr. Morris testified that Mr. Furlong was apparently familiar with tax matters including GAAR.

**34**  Shortly after the meeting with Mr. Furlong, who Mr. Morris assumed had kept Mr. Hamill informed, Mr. Morris was instructed by Lloyd Hansen, the Chief Financial Officer of TBPL, to implement the Finco Plan.

**35**  Mr. Morris and Chris Gimpel, another employee of the defendant, apparently met with Mr. Hamill on March 20, 2001 to discuss the Plan. No notes are available of what was discussed.

**36**  There was much controversy at the trial about the propriety of the contingent fee and I will discuss that issue more fully later in these reasons. For the present I will observe only that Mr. Morris' evidence was that before the engagement letter was signed he spoke with Ian Petrie, his responsible audit partner for TBPL, about the possibility of a contingent fee in regard to the Finco Plan. Mr. Morris testified that Mr. Petrie said he would obtain approval for a contingent fee from the defendant's office manager. Neither the defendant's office manager nor Mr. Petrie testified. Mr. Petrie had retired some years before Mr. Morris. There is no means to know on the evidence if Mr. Petrie obtained approval for a contingent fee.

**37**  A further meeting was held in March 2001 among Mr. Morris, Mr. Hamill, Mr. Hansen and Mr. Gimpel. Mr. Morris was not certain of the precise date of the meeting. It was probably March 30. At that meeting the structure of the Finco Plan was again discussed and in particular there was a discussion about changing the Plan to use a general partnership as part of the structure rather than a subsidiary as had been earlier proposed. Mr. Furlong had recommended against using a subsidiary because if TBPL transferred substantially all of its assets to a subsidiary company shareholder approval would be required, which would impose an unacceptable delay. It is apparent Mr. Furlong, at least by this time, had become familiar with the structure of the proposed plan. I believe he had made himself familiar with it before he gave the advice to Mr. Hamill which led to the instructions to implement it.

**38**  At the March 30, 2001 meeting Mr. Morris addressed the appointment of a retired partner of the defendant resident in Ontario as director of the financing company 2903. TBPL, as the sole shareholder of 2903, had the power to make this choice and accepted the suggestion of Mr. Morris that a retired partner of the defendant resident in Ontario would be suitable thereby providing 2903 with a permanent establishment in Ontario recognized by the tax authorities.

1. **Mr. Morris' Evidence on Cross Examination**

**39**  Mr. Morris was cross-examined at length on his evidence about the meetings and discussions during which the Finco Plan had been presented to TBPL. I do not intend to canvas all of the cross-examination but only those parts which will help to explain my ultimate conclusions.

**40**  Mr. Morris agreed there had been meetings with representatives of TBPL on February 23, March 12, March 20 and March 30, 2001. He did not take notes at the meetings. He relied on the power point presentation used at the meetings as an aide to his memory. It was suggested to him during his cross-examination that he did not have much of any actual recollection of the discussions at the meetings but he insisted he had "a surprisingly strong recollection".

**41**  Mr. Morris' evidence in chief had been that Mr. Hansen was present at the February 23 meeting but it was suggested to Mr. Morris in cross-examination that his memory was faulty in that regard. Mr. Morris testified he remembered Mr. Hansen was present, which was reinforced by his recollection that this had been the first occasion on which they had met.

**42**  In an email of February 27, 2001 from Ms. Bolger to Mr. Hansen she wrote "As I'm sure Pat Hamill mentioned to you, this is a highly confidential idea..." It was put to Mr. Morris in cross-examination that Ms. Bolger would not have written to Mr. Hansen using that language if he had been present at the meeting. Mr. Morris declined to speculate on the reason why Ms. Bolger worded her email as she did. Ms. Bolger did not testify.

**43**  Ms. Bolger's memorandum of March 12, 2001 entitled "Re: Finco-Risks" was shown to Mr. Morris in cross-examination and, while he acknowledged Ms. Bolger did not note there was any discussion that the impact of provincial GAAR was uncertain, he insisted that had been addressed.

**44**  Mr. Morris was reminded that in his evidence in chief he testified that he had advised TBPL that if the provinces learned of the Finco Plan they would attack it in any way possible yet Ms. Bolger's memorandum of March 12 makes no reference to that advice. Mr. Morris agreed the memorandum does not refer to that advice and explained that when he told TBPL the Finco Plan might be attacked "in any way possible", he was referring to the technical aspects of the Finco Plan, which therefore had to be "bullet proof".

**45**  Mr. Morris agreed in cross-examination that the defendant's tax group had a standard template for recording what was said to clients and that it had not been used for the meetings with representatives of TBPL. Mr. Morris testified that the template imposed no obligation on him to make use of it.

**46**  The draft engagement letter was sent by the defendant over the signature of Mr. Morris to the attention of Mr. Hamill. Mr. Morris agreed in cross-examination it contained the only written communication to TBPL by the defendant about the GAAR risk. Under the heading "Risks" are the following four paragraphs:

***Risks:***

As per our previous discussions, our Plan contains several risks. Although steps will be taken to mitigate these risks, it is possible that retroactive legislation or the application of the general anti-avoidance provisions may render the Plan ineffective.

*Retroactive Legislation*

Although a remote possibility, Ontario may take the initiative to amend its corporate income tax legislation on a retroactive basis. In this case, only the federal and provincial capital tax benefits would be realized from the Plan. More probable, however, is the likelihood that the Ontario government will make a prospective adjustment to such legislation. If the change is made prospectively the benefits of the Plan will be realized to the effective date of the change. At that time, the exit strategy, mentioned above, may produce ongoing benefits.

*General Anti-Avoidance Provisions*

The provincial tax authorities in British Columbia, Ontario, Quebec, Alberta, Manitoba, Nova Scotia and Saskatchewan may attempt to apply their respective general anti-avoidance provisions in attempts to deny the potential tax benefits deduction from our Plan. To date, we are not aware of any previous opposition by the provinces to companies engaged in tax planning that utilizes financing companies. We feel that it would be difficult for the provincial tax authorities to argue that financing within a corporate group, even if outside of a province, constitutes a misuse or abuse of a provincial tax act. Also, it would be difficult for Ontario to deny the benefits of the Plan by taxing Finco as the wording in the legislation which provides exemption from tax is very specific and clear.

*Consequences of Plan Being Successfully Challenged*

Should our Plan be rendered ineffective, the interest income received by Finco would likely be fully taxable in Ontario at 14% as of January 1, 2001. This represents a slight decrease to the current average provincial rate applicable to Taiga of 15.15%. Therefore some provincial income tax savings and all federal and provincial capital tax savings would still be realized. The costs of having implemented the Plan would be interest on the taxes in arrears (partially offset by the use of the funds in the interim) as well as the non-contingent costs of implementing, maintaining and winding up of the structure.

[Emphasis in original.]

**47**  Mr. Morris accepted that the engagement letter does not say that the application of the GAAR was uncertain nor that if there was an attack on the Finco Plan it would be vigorous.

**48**  Mr. Morris was cross-examined about his discussions with Mr. Furlong concerning the proposed Finco Plan. Their first conversation was on the telephone on February 26, 2001, shortly after the meeting on the 23rd with Mr. Hamill at which Mr. Morris had been asked to seek Mr. Furlong's approval for the Finco Plan. The conversation was described by Mr. Morris as a "high level discussion", by which expression I understand Mr. Morris to mean the discussion was at a high level of generality, because the defendant wanted a confidentiality agreement before the Plan was explained in detail. Mr. Morris expected that in due course Mr. Furlong would give his own assessment of the Finco Plan to Mr. Hamill and believed Mr. Furlong was capable of understanding the Plan, and understood whether it should be characterized as "aggressive". He also testified that he believed Mr. Furlong would understand the GAAR implications. There are no notes of the telephone conversation.

**49**  There was then the discussion in person with Mr. Furlong on March 12, 2001 at which Mr. Gimpel and Mr. Hudec also attended. This was the only meeting in person between Messrs. Morris and Furlong in which they discussed the Finco Plan. Mr. Morris insisted GAAR was discussed. Handwritten notes were shown to Mr. Morris in cross-examination dated March 12, 2001 and entitled "Taiga Finco Meeting". Mr. Morris agreed the note may be in the hand of Mr. Gimpel. No mention of GAAR is made in the note.

1. **Mr. Gimpel's evidence on discovery**

**50**  Mr. Gimpel did not testify at the trial. He was examined for discovery by the plaintiffs and asked to inform himself about certain matters. Some of the information he provided in writing in response to discovery questions became evidence at the trial read in by the plaintiffs. The following are three of Mr. Gimpel's written responses that refer to the advice given by the defendant to TBPL about the proposed Finco Plan:

What did Mr. Morris tell Taiga about the plan before Taiga signed on? Answer: On February 23, 2001, Mr. Morris, Mr. Yurik, and Ms. Bolger met with Pat Hamill, Lloyd Hansen and perhaps one other individual from Taiga. During that meeting, Mr. Morris reviewed the presentation materials with Taiga in detail and explained the nature of the plan, how it worked, and the steps necessary to implement the plan. He told Taiga about the potential risks of implementing the plan. In particular, he told Taiga that there was a risk of the potential application of provincial GAAR in all of the jurisdictions in which Taiga operated. He explained why there was a risk of the application of provincial GAAR. He told Taiga that there was no jurisprudence or precedent with respect to the application of provincial GAAR that could be drawn upon and so it was difficult to assess whether, if any or all of the provinces did challenge the plan on the basis of provincial GAAR, the challenge would be successful or not. He told them that the fact that there was no jurisprudence or precedent was a result of the fact that the provinces did not appear to be actively going after taxpayers on the basis of provincial GAAR, although there were other inter-provincial plays that had been going on for many years, but that that could change. He told them that he did not think that the Ontario GAAR would apply because the legislation was so clear, but the real risk was with respect to the other provincial GAARs. He does not specifically recall whether he told them during that meeting that if the plan was successfully challenged they would be back to square one and would have to pay the taxes plus interest, but that he did not think that there would be any penalties, but he recalls that being discussed at some point with Taiga. During that meeting he told Taiga that there was also the risk of Federal GAAR. He told them that he did not think that Federal GAAR had any potential application, as there was no avoidance of federal tax pursuant to the Plan. He also told them about the risk of the legislation being changed with retroactive effect to prevent the plan from being beneficial. He told Taiga that it was anticipated that once the tax authorities looked at the legislation (upon receipt of tax returns filed by taxpayers with a finco plan) they would very likely change the legislation. He told them that it was anticipated that the legislation could be changed any day. He discussed with them the fact that there was a risk that the legislation could be changed on a retroactive basis, but that was not generally how it was done. He also discussed with them the free for implementation of the plan. Mr. Morris had a number of subsequent discussions with Taiga about the Plan prior to Taiga signing on.

...

Speak to Mr. Morris and ask him everything he recalls about what he said, if anything, to Taiga at the meeting of March 30th relating to risks. Answer: Mr. Morris recalls the meeting of the Board of Directors of Taiga and that there was a detailed discussion about the reorganization. He recalls that he essentially repeated to the Board what he had said during the meeting of February 23, 2001. He does not recall in detail what was said, but is confident that he would have repeated the risks of the implementation of the plan as expressed during the February 23, 2001 meeting and set out above in response to request 23, as this was his practice in making a presentation the plan.

...

Confirm whether there are any other documents prior to March 30, 2001 that set out the risks of the plan in writing to Taiga, other than the March 21, 2001 retainer agreement and identify same.

Answer: Deloitte is presently unaware of any documents dated prior to March 30, 2001 that set out the risks of the Plan in writing to Taiga, other than the engagement letter dated March 21, 2001.

1. **Mr. Furlong's evidence**

**51**  Mr. Furlong agreed he and Mr. Morris had known each other professionally, at least somewhat, before their discussions about the Plan. Mr. Morris called Mr. Furlong on the telephone on February 26, 2001 to talk about the Plan. Mr. Furlong recalled the "timing was on a tight deadline" because if the Plan was to be implemented to meet TBPL's financial year end, that had to be accomplished by the end of March 2001. Mr. Furlong testified he was given a brief "thumb-nail sketch" of the Plan on the telephone. He had concerns which related to the lengthy delay that would be imposed if the structure of the Plan included a subsidiary to which TBPL would transfer its assets. Mr. Furlong had not previously dealt with a finco plan. The role of Davis and Company was not to give tax advice but to prepare the necessary documents to implement the Plan. Mr. Furlong testified that the defendant gave instructions on their content.

**52**  Mr. Furlong's time records for the relevant time were introduced into evidence and he described them as accurate and complete. There is an entry for February 26, 2001 recording a half hour telephone call from Mr. Morris "regarding possible tax restructuring" which reflects their first discussion about the Finco Plan. On March 12, 2001 Mr. Furlong recorded "Attendance with Al Hudec on Alan Morris and Chris Gimpel to review proposed corporate reorganization; Telephone call to Pat Hamill regarding same". The total time entry is 2 1/2 hours.

**53**  Mr. Furlong took notes at the March 12, 2001 meeting. He testified that he would have made a note if the advice given was that the tax authorities "would not like the plan" or that it would be audited. He testified that "everybody involved in corporate-commercial" work at the time would have known about GAAR but there were no cases decided yet in the courts and nobody knew how the rules might be applied. Mr. Furlong's rather cryptic note on the GAAR discussion reads:

GAAR - issues provl jurisdictions where now carrying on bus or Ont. - no tax on int., etc.

1. Ont. embarrassed by gap in law & unlikely to have retroactive legisl

**54**  The next afternoon Mr. Furlong sent an email to the chief financial officer of TBPL, Mr. Hansen, saying in part:

I have not heard from Pat [Hamill] this afternoon. When he spoke to me this am, he had not talked to Brian Aune, or Alain Lee or other directors, so from my perspective we don't have absolute approval to proceed yet.

**55**  Mr. Furlong made notes on March 30, 2001 of the board's discussion of the Finco Plan with Mr. Morris and Mr. Gimpel. The notes refer to a conference call. If someone on the call did not actually participate by speaking Mr. Furlong did not note their attendance. His notes show Robert Yong and Alain Lee of Berjaya attended as did Mr. Hamill, Mr. Aune and Mr. Spears. Mr. Furlong and a junior associate, Ann McGucken, were on the call from the office of Davis and Company.

**56**  Mr. Furlong took four pages of notes of the March 30, 2001 discussion and he describes them as very accurate and "in some cases verbatim" particularly when noting Mr. Morris' and Mr. Gimpel's remarks. Mr. Furlong testified that Mr. Gimpel gave an "outline" of the Finco Plan and Mr. Morris was mainly responsible for answering questions from board members. The notes do not record any mention that the tax authorities "would not like the plan", nor that it was likely to be audited and if so would need to be defended in the courts and that the outcome was uncertain or that the Plan was "aggressive". Mr. Furlong's evidence was that Mr. Aune, Mr. Spears, and Mr. Yong of Berjaya were "skittish" about the Plan and if they had been told discouraging things about the response of the tax authorities they probably would not have agreed to implement the plan. Of this group of directors only Mr. Spears gave evidence. He testified that he thought the Finco Plan was a good idea: "a no brainer".

**57**  Mr. Furlong's note of Mr. Morris' reference to GAAR is as follows:

1. general anti-avoidance rule of [Provincial] Income Tax Act
2. DT [the defendant] believes chances are relatively low
3. only on income tax portion
4. risk of capital tax component being denied is very low
5. financing company structure risk is quite low.

**58**  In his evidence in chief Mr. Furlong testified that some of those present on the conference call would have tended to speak in "shorthand". I understand this to mean that those present readily understood each other about such questions as GAAR, and the likely reaction of the tax authorities, without the need to engage in detailed explanations.

**59**  In cross-examination Mr. Furlong testified he was familiar with what happened in tax audits (TBPL had experienced many), was familiar with the concept of a reassessment and that he understood that a challenge to the Finco Plan could mean a reassessment. He was also aware that legal and accounting costs would be incurred if there was a reassessment. He had given some tax advice previously to TBPL, was familiar with the GAAR and assumed Mr. Hamill was as well. He agreed the GAAR created uncertainty and raised the possibility of a challenge by the tax authorities. Mr. Furlong understood Mr. Hamill was aware of that possibility. Mr. Furlong agreed that when the Ontario tax authorities realized the effect of the "loophole" they would seek to change the law because "they wouldn't like it".

**60**  Ms. McGucken's notes of the March 30, 2001 meeting were shown to Mr. Furlong in cross-examination. Ms. McGucken recorded that Mr. Morris had said that there was a risk of the GAAR being applied but it was low and there was discussion about the "interest but not penalties" that might be assessed following an audit. Ms. McGucken's note also uses the word "unwind" in relation to the Finco Plan. Mr. Furlong testified that he did not recall any discussion about unwinding the Plan but if it was referred to in Ms. McGucken's note he would not deny it had taken place. Ms. McGucken also noted "legal fees to defend it" which Mr. Furlong agreed must mean there had been discussion on the topic of defending the Plan, if there was a reassessment, which he had not noted himself. Ms. McGucken did not testify.

**61**  Following these discussions the Finco Plan was implemented through the steps described in paragraph 6 of these reasons.

**62**  I have considered the notes that were taken at the meetings when the Finco Plan was presented and became evidence at the trial. The notes were not entered by the parties as evidence of the truth of their contents but only as evidence of what was said at the meetings and I have read them with that limitation in mind.

**Analysis**

**1. Was the Defendant in a Conflict of Interest in Entering into a Contingency Fee Contract in Regard to the Finco Plan while Acting as TBPL's Exterior Auditor?**

**63**  TBPL alleges a conflict between its interests and those of the defendant in paras. 6, 9 and 27(b) of the amended statement of claim which read as follows:

1. In or about 2001, the defendant Deloittes were Taiga's auditors and tax advisors and had been for a number of years. As Taiga's auditors and tax advisors, Deloittes owed a duty to Taiga to fairly and objectively review Taiga's financial circumstances and prepare objective financial statements, and in so doing, Deloittes had a duty not to impair their own judgement and impartiality by taking, or obtaining, an interest in Taiga's business including in its tax planning.

...

1. Deloittes further owed a fiduciary duty to Taiga, including a duty of undivided loyalty, to ensure, in providing professional advice to Taiga, that Deloittes was not in a conflict of interest, that Deloittes' interests were not put before those of Taiga, and that Taiga's interests in respect of any Plan were properly presented, including to any taxing authority.

...

1. The actions of Deloittes, in promoting, contracting to implement and implementing the Plan in the manner described above was in breach of contract, negligent and in breach of fiduciary duty in that:

...

1. Deloittes placed itself in a conflict of interest with respect to the Plan, and continued to act as Taiga's auditors at the time when Deloittes was in a conflict of interest and directly or indirectly held a financial benefit in Taiga;

[Emphasis in original.]

**64**  The relationship between the defendant and TBPL was a fiduciary relationship. The defendant, as TBPL's external auditor, and in its role of providing tax planning advice, owed TBPL a duty of full disclosure of any potential conflict of interest and was under an obligation not to prefer its own interests over those of TBPL. See *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=). In *Hodgkinson* the respondent Simms advised the appellant to make investments in real estate tax shelters without disclosing that he was acting for the real estate developers at the relevant time. Justice La Forest, with whom the majority agreed, accepted the trial judge's conclusion that "Mr. Simms was serving two masters and was attempting to make both of them happy".

**65**  The facts before me do not raise the same issues as led to liability in *Hodgkinson*. The defendant was not serving two masters. Its only master was TBPL (for these purposes I draw no distinction between TBPL and the other plaintiffs). The real complaint of the plaintiffs is that the defendant could not enter into a contingency fee agreement with TBPL while it was its external auditor without violating the Rules of Professional Conduct as they applied at the time of the engagement letter.

**66**  The plaintiffs can be understood as alleging that the defendant, as auditor, risked providing impaired financial statements to TBPL because the defendant could distort the financial statements to enable it to earn a greater contingent fee by reporting larger taxable earnings than could properly be justified, thereby exaggerating the plaintiffs' tax savings.

**67**  The plaintiffs rely on the Rules of Professional Conduct governing the defendant at the relevant time which they submit precluded a contingent fee. The plaintiffs' allegation is that the defendant failed to review the relevant Rules of Professional Conduct and therefore failed to inform the plaintiffs of them. It is submitted that if TBPL had known of a prohibition on contingent fees in relation to the Finco Plan it would not have agreed to implement it, at least on the terms proposed in the engagement letter. I accept that is correct but the question remains if there was such a prohibition.

**68**  I am not aware of any general legal principle which prevents an accounting firm from recommending a corporate reorganization to a client to avoid tax and to charge an agreed percentage fee on the taxes saved. In the absence of a professional conduct rule to the contrary I do not accept that a contingent fee became improper because the defendant was TBPL's auditor.

**69**  However, it is the alleged existence of a complete prohibition on contingent fees in such circumstances found in the Rules of Professional Conduct which is at the heart of the plaintiffs' complaint of a breach of fiduciary duty in this regard. If there was such a prohibition, and if TBPL was not informed of it by the defendant, I agree the defendant would have breached a fiduciary duty and may be liable for losses the plaintiffs incurred by implementing the Finco Plan. Whether there was such a prohibition depends on the language of the Rules of Professional Conduct that applied to the defendant when it presented the Finco Plan to TBPL.

**70**  In addressing the applicability of the Rules of Professional Conduct the plaintiffs rely on the expert evidence of Brian Gardiner, a chartered accountant who was the first Director of Ethics of the Institute of Chartered Accountants of British Columbia ("ICABC") from 1989 to mid-2000. One of Mr. Gardiner's primary roles in that capacity was to apply his expertise to professional standards and the Rules of Professional Conduct for Chartered Accountants. Mr. Gardiner opines on the standard of care expected of the defendant. In particular he states:

1. A reasonably competent Chartered Accountant tax practitioner should have considered whether the FINCO plan would give rise to a conflict of interest to his partners and the firm.
2. A reasonably competent Chartered Accountant should have complied with the Institute of Chartered Accountants of British Columbia's ("ICABC") Rules of Professional Conduct and the related Council Interpretations which were the minimum practice standard.
3. A reasonably competent Chartered Accountant should have concluded that taking on the FINCO engagement on a contingent fee basis would violate the Rules of Professional Conduct and fall below the standard of a reasonably competent Chartered Accountant.
4. A reasonably competent Chartered Accountant should have advised the client of the conflict and that the firm could not take the FINCO retainer on a contingent fee basis and remain as auditors of TBP.

I agree that the standard of care that applies to the defendant is that of a reasonably competent chartered accountant tax practitioner, but I am not persuaded I ought to accept Mr. Gardiner's opinions. There are serious flaws in the methodology of his report.

**71**  Paragraphs 2 through 5 of Mr. Gardiner's report set out what Mr. Gardiner describes as "Assumed Facts". All testifying experts must form their opinions based on facts about some matter in issue in the lawsuit. An expert may be given facts to assume and may also make assumptions of fact but ultimately they must be proven at trial by admissible evidence if the opinion is to be useful. See *Healey v. Chung*, [*2014 BCSC 429*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JP4G-61SR-00000-00&context=) at para. 106. Many of Mr. Gardiner's "facts" were not proven at trial.

**72**  Mr. Gardiner testified that to assume the "facts" on which his opinion is based he used his knowledge of the "entities", by which I understand he means the plaintiffs and the defendant, and he reviewed, in what he has described as a "fair and objective manner", thousands of documents disclosed by the defendant. He then arrived at what he concluded were relevant facts. To perform this task Mr. Gardiner made a selection from a large number of documents of those he considered material to the question of the standard of care as it related to the Rules of Professional Conduct and at least implicitly decided the balance of the documents could safely be ignored. It is difficult at best for the defendant and this Court to know with confidence which documents Mr. Gardiner considered relevant. Not all are listed in his report. Those he considered irrelevant can never be known on the evidence presented at the trial. I consider Mr. Gardiner's approach to be significantly deficient for that reason.

**73**  Further, at paragraph 6 of his report Mr. Gardiner writes the following, which suggests to me that he viewed his role in a manner which is not consistent with that of an expert witness:

1. On March 12, 2001 Deloittes provided a Tax Memo accurately reporting on the meeting that Deloittes had with Pat Hamill, President of TBP. This memo records the discussion of the FINCO-RISKS

*a)* "*the whole point of FINCO is that it eliminates Provincial tax on interest income*"; and

1. "*the plan exists because of the loophole in the Ontario legislation*" - DT001170 [the defendant's document list number.]

[Emphasis in original.]

The "Tax Memo" is reproduced at para. 32 of these reasons. Mr. Gardiner did not attend the meeting and has no means of knowing if the Tax Memo he described as "accurately reporting the meeting" is in fact accurate. He did not interview Mr. Hamill or anyone else from the defendant present at the meeting. Even if he had his views on the accuracy of the memo cannot be a relevant opinion. That is for the court. This is a further example of Mr. Gardiner making factual assumptions that if not proven at trial deprive his opinions of value.

**74**  At paragraph 12 of his report, Mr. Gardiner concludes, following a review of those documents disclosed by the defendant which he considered relevant, that it was the defendant that had "determined what a reasonable interest rate would be for the inter-company debt issued under the [Finco Plan]". This was a controversial question at the trial. The defendant asserts TBPL retained control over the 9% rate which was adopted, whereas TBPL takes the view that it was the defendant that was solely responsible for establishing the rate. Mr. Gardiner acknowledged that if his assumption in para. 12 was not correct that would influence his opinion. I do not intend to speculate on how it would influence his opinion and Mr. Gardiner did not elaborate.

**75**  Mr. Gardiner's report is as much an argument as it is an opinion. It reads, in large measure, as though counsel in addressing the court in final argument, submitted that the trial judge should make certain findings of fact from the evidence and reach conclusions on liability from those facts. That is the role of an advocate not an expert witness.

**76**  I am neither able nor willing to attempt to perform the burdensome and probably impossible task of editing Mr. Gardiner's report to be confident that what remains is reliable for the purposes of this trial on the matters on which he opines.

**77**  The defendant puts forward the report and testimony of Lenard Boggio who became a partner in PricewaterhouseCoopers LLP in 1988 and retired in 2012. Mr. Boggio was a member of the ICABC Professional Conduct Inquiry Committee for six years, a president of the ICABC and at the time of the trial, vice chairman of the Canadian Institute of Chartered Accountants.

**78**  Mr. Boggio's evidence was offered as a response to the report of Mr. Gardiner. Mr. Boggio's opinion is that a reasonably competent chartered accountant in 2001, without violating the Rules of Professional Conduct, could take on the "FINCO engagement on a contingent fee basis". Mr. Boggio states that in his experience in 2001 reasonably competent chartered accountants offered contingent fee arrangements in regard to tax services and in doing so met the appropriate standard of professional conduct.

**79**  The plaintiffs' complaint, which relies on the Rules of Professional Conduct, is principally directed to the defendant's decision to recommend and implement the Finco Plan while continuing as TBPL's external auditor. Mr. Boggio does not agree this complaint has merit.

**80**  Both Mr. Boggio and Mr. Gardiner reviewed the Rules of Professional Conduct as they applied in 2001. Before turning to a consideration of those Rules it is important to observe that there is no complaint made by the plaintiffs in the amended statement of claim, nor by a witness, that any audit of the consolidated financial statements conducted by the defendant for TBPL was not in accordance with Canadian generally accepted audit standards. Further, Mr. Hamill and Mr. Hansen in the relevant years provided the defendant with letters representing to the defendant that as President and Chief Financial Officer respectively, they and not the defendant:

... are responsible for the fair presentation in the financial statements of the financial position, results of operations, and cash flows in conformity with Canadian generally accepted accounting principles';

... reviewed the year end adjusting entries and acknowledge our responsibility for their accuracy.

In each of the years in which the defendant audited the financial statements of TBPL, following the implementation of the Finco Plan, it issued "independence letters" in which it advised TBPL's audit committee that it was not aware of any relationship between the defendant and TBPL which could be seen as compromising the defendant's objectivity as an auditor. There is no evidence of any failure on the part of the defendant to perform its audit function objectively and competently. There is no complaint that it failed to do so. The complaint is that there was a relationship which had the potential to compromise objectivity and if that relationship had been properly analyzed by the defendant, it would not have recommended the Finco Plan, and if TBPL had been told about the Rules of Professional Conduct if would not have implemented the Plan. The merits of those complaints as they relate to the defendant's duties in the circumstances of this case rest on a consideration of the particular Rules of Professional Conduct that are said to apply.

**81**  At page 7 of his report at para. 8 Mr. Gardiner opines:

1. The reasonably competent chartered accountant in his role as auditor who has identified a threat to his/her independence that is not clearly insignificant would document a decision to accept or continue the particular engagement. This documentation would describe the nature of the engagement, the threat identified, the safeguard or safeguards identified and applied to eliminate the threat or reduce it to an acceptable level, and explain how the safeguards eliminate the threat.

**82**  This language is found under the heading "the standards of independence that existed in 2001". Mr. Boggio points out that Mr. Gardiner's opinions closely track rule 204.3 of the Rules of Professional Conduct which reads:

A member who, in accordance with Rule 204.2, has identified a threat that is not clearly insignificant, shall document a decision to accept or continue the particular engagement. The documentation shall include the following information:

1. a description of the nature of the engagement;
2. the threat identified;
3. the safeguard or safeguards identified and applied to eliminate the threat or reduce it to an acceptable level; and
4. an explanation of how, in the member's professional judgment, the safeguards eliminate the threat or reduce it to an acceptable level.

It appears Mr. Gardiner relied on Rule 204.3 as the governing Rule. However, Rule 204.3 did not come into force until November 2003. It had no application to the audits performed by the defendant in relation to the Finco Plan.

**83**  The substance of TBPL's complaint about the defendant's alleged breach of the Rules of Professional Conduct is that the contingent fee gave the defendant a financial interest in TBPL thereby compromising its independence. The defendant's contingent fee was to be earned as taxes were saved. Mr. Boggio addresses this complaint by pointing to Rule 204.1 which reads:

A member who engaged or participates in an engagement

1. to issue a written communication under the terms of any assurance engagement, or
2. to issue a report on the results of applying specified auditing procedures

shall be and remain free of any influence, interest or relationship which, in respect of the engagement, impairs the members' professional judgement or objectivity or which, in the view of a reasonable observer, would impair the member's professional judgement or objectivity.

The ICABC's Interpretation of Rule 204.1 reads as follows:

A member may not be complying with Rule 204.1 if the member or a partner of the member engages, or participates in an engagement, to provide an assurance engagement report or a report on the results of applying specified auditing procedures for a client and any of the following circumstances are present:

1. the member, a partner, or the immediate family of either, holds, directly or indirectly, through a trust or otherwise, any financial interest, including shares, bonds, debentures, mortgages, notes, advances or other instruments of investment in a client or any of its associates;

The "financial interest" defined in the Interpretation is of a wholly different kind from that complained of by the plaintiffs.

**84**  Mr. Boggio detected no language in the Rules of Professional Conduct or the ICABC's Interpretation of the Rules at the relevant time which precluded the defendant, while remaining as TBPL's auditor, from contracting for a contingent fee for the Finco Plan. I agree.

**85**  The contingent fee was beneficial to both parties. The Finco Plan proposed by the defendant to TBPL had already been implemented by other clients of the defendant over the previous two years. There was an expectation, of which the defendant advised TBPL, that as the tax authorities became aware of the impact on revenues of various finco plans that had been in effect for some time, legislative changes would eliminate their use. In that circumstance a modest fixed fee to implement the plan and a probably much more substantial contingent fee calculated against actual tax savings was more attractive to the defendant's clients than a larger fixed fee with the risk that little benefit from the Plan would be realized. The board of TBPL was aware of these considerations and, of course, aware that the defendant was its external auditor.

**86**  The independence of an external auditor is independence from improper influence originating with the client or anyone else. A person who relies on an audited financial statement cannot consider the question of independence unless that person is informed of the relevant circumstances. In my opinion that informed person, considering the dealings between the parties to this lawsuit, would have known of the rationale for a contingent fee and would have known that TBPL was aware of that rationale and had accepted it. An informed person would have known that nothing in the Rules of Professional Conduct that governed the relationship between TBPL and the defendant at any relevant time prevented the defendant from recommending the Finco Plan on a contingent fee basis while remaining TBPL's auditor. That informed person would have known that the defendant had no "financial interest" in TBPL, as that expression was understood and defined in the Interpretation in 2001 and in the following relevant years.

**87**  In the Foreword to the Rules of Professional Conduct these words are found:

A member who engages to perform an assurance or specified auditing procedures engagement shall be and remain free of any influence, interest or relationship, in respect of the client's affairs, which impairs the member's professional judgment or objectivity or which, in the view of a reasonable observer, would impair the member's processional judgment or objectivity.

...

The reasonable observer should be regarded as a hypothetical individual who has knowledge of the facts, which the chartered accountant knew or ought to have known, and applies judgement objectively with integrity and due care.

In the result a reasonably informed person would not conclude the defendant's independence as auditor was compromised by the contingent fee agreement.

**88**  I will add that TBPL's audit committee, along with the board as a whole, was responsible for managing TBPL's finances, including bookkeeping, financial, and accounting policies. It was not for the defendant as the external auditor to establish those policies and of course an external auditor does not keep the books of account. That was entirely the responsibility of TBPL. Furthermore TBPL did not relinquish control over the implementation of the Finco Plan to the defendant. TBPL relied on the defendant to give advice and make recommendations but the defendant did not act unilaterally in such matters. For example, I do not conclude the defendant chose the interest rate for the inter-company debt that was central to the Finco Plan. The evidence suggests it was the Chief Financial Officer of TBPL, Mr. Hansen who made the decision on the defendant's advice. He did not testify. The defendant's advice to appoint a retired partner of the defendant as the sole director of 2903 similarly did not eliminate the decision-making role of TBPL's board. The participation of TBPL's board and senior management in the implementation of the structure of the Finco Plan was not hollow. TBPL had an active and sophisticated board, a sophisticated audit committee, and sophisticated senior employees. They did not abdicate decision-making to the defendant.

**89**  I find the defendant did not breach the Rules of Professional Conduct by which it was bound in 2001 by recommending the Finco Plan while it was TBPL's external auditor. It had no obligation to advise TBPL of those Rules because they were immaterial to TBPL's decision to sign the engagement letter.

**90**  I will add that in *Galambos v. Perez*, [*2009 SCC 48*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1GF-00000-00&context=), the court discussed some of the implications of Rules of Professional Conduct as they relate to an alleged breach of duty. Justice Cromwell for the Court at para. 29 wrote:

... there is an important distinction between the rules of professional conduct and the law of ***negligence***. Breach of one does not necessarily involve breach of the other. Conduct may be negligent but not breach rules of professional conduct, and breaching the rules of professional conduct is not necessarily ***negligence***. Codes of professional conduct, while they are important statements of public policy with respect to the conduct of lawyers, are designed to serve as a guide to lawyers and are typically enforced in disciplinary proceedings. They are of importance in determining the nature and extent of duties flowing from a professional relationship: *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 p. 425. They are not, however, binding on the courts and do not necessarily describe the applicable duty or standard of care in ***negligence***. [citations omitted.]

**2. Did the Defendant Fail to Advise TBPL Properly About the Risk of the Finco Plan?**

**91**  The plaintiffs submit that the defendant's internal documents are inconsistent with its advice to the plaintiffs. The plaintiffs submit the defendant failed to tell them that its internal documents placed a higher risk on the Finco Plan than was expressed to the plaintiffs. These allegations were not pleaded but I will make some comment on the evidence.

**92**  I am not persuaded that the question of the alleged breaches of duty of the defendant should be examined by a review of its internal documents. The advice given to the plaintiffs about the risks and benefits of the Finco Plan should be considered on that advice in light of the standard of care imposed on the defendant. In my view its advice met the standard.

**93**  I do not consider the internal documents helpful in determining if the plaintiffs were properly informed of the risks and benefits of the Finco Plan. As well, I do not find the internal documents of the defendant which were placed in evidence to be inconsistent with the advice given to TBPL. In particular I do not accept the internal reference to the "high" risk of the Finco Plan to mean the defendant knew the Plan posed a high risk that the tax authorities could inflict significant financial losses on the plaintiffs through audits and reassessments. The reference to high risk was intended to alert people within the defendant that the Plan had to be implemented with scrupulous care to avoid criticism by the CRA on the ground it had technical faults, and was also a reference to the high risk the Plan would be rendered ineffective by legislation.

**94**  The plaintiffs pressed Mr. Morris in cross-examination to agree that he was bound by the internal Tax Quality Assurance System ("TQAS") of the defendant. TQAS is a series of bulletins beginning in 1993, with which "all offices must now comply" to permit the defendant to become "the pre-eminent provider of tax services in Canada". Mr. Morris resisted agreeing that TQAS was mandatory at the time and in the circumstances of advocating the Finco Plan to TBPL.

**95**  Even if Mr. Morris and other representatives of the defendant who presented the Finco Plan to TBPL did not comply with TQAS, on which I make no finding, and assuming compliance was mandatory, on which I also make no finding, such a breach would not in the circumstances of this action tend to demonstrate an actionable breach of duty. I will add that the argument of the plaintiffs that the defendant had one opinion internally about the risks of the Finco Plan and another opinion externally for the plaintiffs is not an allegation of ***negligence***; rather it is an allegation of misrepresentation, which is not pleaded.

**3. Did the Defendant Breach the Engagement Letter?**

**96**  At paragraph 46 of these reasons I have quoted paragraphs from the engagement letter which describe the risks of the plan and "Consequences of the Plan Being Successfully Challenged". What follows describes the fees to be charged:

*Calculation of Implementation Fee*

Our fee for implementing the Plan is a non-contingent component of $50,000 and a contingent component of 20% of the actual tax savings realized from the plan in excess of $250,000. Our fee would cover the following costs of implementation:

1. Our time and disbursements for implementing the structure;
2. Incorporation costs of two corporations;
3. Legal fees for establishing the companies and creating/documenting the inter-company debts and transferring the business from Taiga to a new subsidiary company.

*Payment of Fees*

Our fee is payable as follows:

1. $50,000 plus GST (non-contingent component) payable on the commencement of the Plan
2. When cumulative savings exceeding $250,000 have been realized by Taiga in its corporate tax returns as filed, 20% of the excess savings will become payable on the day the returns are filed. This will occur on an annual basis.

In the event that a tax authority successfully challenges the savings claimed by Taiga, our contingent implementation fees will be refundable proportionately to the reduction of the savings claimed by Taiga. The amount of refund that may be due to Taiga is limited to the contingent implementation fee received for this plan. Thus, the majority of our fees for the implementation of the Plan are dependent on the success of the Plan.

[Italics in original.]

**97**  "Taiga" is defined in the engagement letter as Taiga Forest Products Limited. TBPL is the successor to Taiga Forest Products Limited.

**98**  The plaintiffs submit there was a "successful" challenge when the notices of reassessment were delivered demanding the avoided taxes be paid. The plaintiffs' position is that there were no tax savings and therefore no fees payable.

**99**  The engagement letter does not read throughout in contractual language. After each of the headings the defendant recorded, in a much truncated form, the advice already given in the previous discussions about how the Finco Plan would operate. I do not accept that TBPL could reasonably believe the information given under the headings was intended to delineate the binding terms of a contract or contained representations with contractual effect.

**100**  The words found under the headings (except for the description of fees) ought not to be understood to define the circumstances in which the contingency fee would be refundable. I am reinforced in this view by considering the first sentence under the heading "Consequences of Plan Being Successfully Challenged" which reads "[s]hould our Plan be rendered ineffective, the interest income received by Finco would likely be fully taxable in Ontario at 14% as at January 1, 2001". This language, notwithstanding the use of the phrase "Successfully Challenged", contemplates the Plan may be "rendered ineffective" by the possibility of retroactive legislation. It is only retroactive legislation which could have the effect of nullifying the Plan "as of January 1, 2001". I do not find the proper construction to be placed on the phrase "in the event that a tax authority successfully challenges the savings claimed by Taiga" to be assisted by the earlier portions of the engagement letter.

**101**  There were two realistically possible events that could diminish or eliminate tax savings from the Finco Plan. One of those events would be amendments to the *Ontario Act* to eliminate the "loophole". The other would be a reassessment by the CRA relying on the GAAR. Both of those events eventually happened but it is the latter which in my view is relevant to the expression "successfully challenges". The expression "rendered ineffective" refers to a change in the *Ontario Act*.

**102**  Nothing in the engagement letter defines a "successful" challenge. I do not agree with the plaintiffs' submission that if reassessments were issued by a tax authority, that alone could reasonably be understood to trigger an obligation on the defendant to repay the contingent fees.

**103**  The plaintiffs urge the application of the *contra proferentum* rule to resolve any ambiguity in a manner unfavourable to the defendant which had prepared the engagement letter. See for example *Tyson v. Nam Tai Electronics (Canada) Ltd.*, [*[1991] B.C.J. No. 2189*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F27X-60J3-00000-00&context=) at 7. I do not find that rule helpful in the present circumstances. The parties were sophisticated in their understanding of contractual arrangements. Further for the rule to be applied an ambiguity must be present which can be resolved by extrinsic evidence. The phrase "successfully challenges" in my view is not ambiguous in the present instance. It is only when there are plausible alternative interpretations that the *contra proferentum* rule has application. See *Bell Express Vu Ltd. Partnership v. Rex*, [*2002 SCC 42*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4CN-00000-00&context=) at para. 29.

**104**  A plain reading of the phrase "successfully challenges" leads me to conclude that it means a notice of reassessment was not only delivered, it was also either unsuccessfully resisted in the courts or, at the least, the plaintiffs were professionally advised there was no reasonable prospect of successful resistance in the courts. Neither happened in this instance. Max Weder of Borden Ladner Gervais, from whom TBPL sought advice on resisting the reassessments, considered litigation a viable option. The engagement letter could not have reasonably been understood by the parties to mean that mere receipt of a notice of reassessment required return of the contingent fees.

**105**  I do not conclude the plaintiffs were required by the terms of the engagement letter to litigate the notices of reassessment through all levels of courts no matter what the cost and no matter the advice on the risk of failure. Nor do I understand this to be the position of the defendant. In my view, the plaintiffs were required to take reasonable steps to resist the notices of reassessment. The question is, what was reasonable in the circumstances?

**106**  The defendant invites me to second-guess the wisdom of the settlement agreement that the plaintiffs reached with the CRA in 2008. I do not intend to do so. The plaintiffs settled relying on competent professional advice. It ought to be assumed their advisors understood the plaintiffs' circumstances at the relevant time, including the views of their senior management on the reputational and other risks of litigation. My conclusion is not that the plaintiffs made an improvident settlement. On the contrary it appears it was wise to settle on the terms agreed. However it is my opinion that the terms of the engagement letter did not permit the plaintiffs to settle and to visit the consequences of the settlement on the defendant, without at least some objective test of the "success" of the CRA's challenge to the Plan.

**107**  In my view the plaintiffs were required by the engagement letter to resist the notices of reassessment in the courts. If the parties intended the engagement letter to mean the contingent fees were to be refunded simply because a notice of reassessment and demand for payment were delivered that language could have been employed in the engagement letter. It was not. To read it as if that language was present in my opinion would fail to give effect to the intention of the parties as revealed in the engagement letter. Such an interpretation ought not to be adopted. See *Athwal v. Black Top Cabs Ltd.*, [*2012 BCCA 107*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-624B-00000-00&context=) at para. 42.

**108**  In my opinion for the phrase "successfully challenges" to be invoked by the plaintiffs they must demonstrate not only that there had been a challenge but that it had succeeded. The only means to measure "success" in the context of the dealings between the parties would be for the plaintiffs to file notices of objection and ask a court to decide whether the reassessments were supportable under the GAAR.

**109**  TBPL argues that the requirement for it to litigate would impose an unreasonable burden of legal and accounting costs. Mr. Weder believed it could cost several hundred thousand dollars to litigate objections to the notices of reassessment. Furthermore, it is argued in the event of litigation that TBPL could have been exposed to the risk of unfavourable publicity, and if TBPL was required by the terms of the engagement letter to litigate through to a decision in the courts it would not have been able to take advantage of a possibly favourable settlement proposal, which would not be consistent with sound business practice.

**110**  A difficulty with the argument that the plaintiffs were entitled to demand the return of the contingent fees on receiving notices of reassessment is that its effect would be to impose financial burdens on the defendant which the plaintiffs say would be unreasonable if imposed on them. Thus the defendant would be required to refund about $750,000 in fees, would risk unfavourable publicity at least with professionals in tax planning if it became known its advice to implement the Finco Plan had failed, and the plaintiffs would have no obligation to attempt to persuade the CRA to reduce its demands, thereby preserving some tax savings for the plaintiffs and some contingent fees for the defendant.

**111**  The plaintiffs did not challenge the notices of reassessment in the courts but instead settled with the CRA. They had the right to do so but not to impose the results, if unfavourable to the tax savings, on the defendant. It might be possible to take the opposite view if the jurisprudence made a legal challenge so precarious that it would have been unwise to embark on it. However, when the plaintiffs were negotiating towards the settlement, no judicial decision had yet been made which was critical of a finco plan as a violation of provincial GAAR. A few years later two companion cases in Alberta held that provincial GAAR was not breached when, as with the plaintiffs in the case before me, a corporate tax payer reorganized and refinanced through a related company thus enabling an interest expense deduction for the debtor company while the financing company took advantage of the *Ontario Act* to avoid tax. See *Husky Energy Inc. v. Alberta*, [*2012 ABCA 231*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-93D1-F81W-21H9-00000-00&context=), leave to appeal to SCC refused, [*[2012] S.C.C.A. No. 411*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SJ1-FGY5-M529-00000-00&context=), and *Canada Safeway Limited v. Alberta*, [*2011 ABQB 329*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-93D1-JCRC-B261-00000-00&context=). These authorities were not available to the plaintiffs when they made their decision to settle with the CRA. However, along with the absence of hostile jurisprudence in the years leading up to the settlement, and the evidence of Mr. Weder that he had advised the plaintiffs that successful resistance in the courts was a reasonable prospect, they at least suggest the defendant's insistence that the plaintiffs were not entitled on the terms of the engagement letter to settle without any attempt to test the waters in the courts, is reasonable.

**112**  The plaintiffs' submit *Inter-Leasing, Inc. v. Ontario (Revenue)*, [*2013 ONSC 2927*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SFV1-JJYN-B567-00000-00&context=), was a successful challenge to the Finco Plan "under any interpretation of those words" and ought to trigger a return of the contingent fees. I do not agree. The engagement letter did not speak of a successful challenge to another finco plan but to the Finco Plan of the plaintiffs. Moreover, it is far from certain *Inter-Leasing Inc.* ought to be applied on its facts to the Finco Plan.

**113**  *Inter-Leasing Inc.* involved tax reassessments under the *Ontario Act*. A form of finco plan was in issue and the first question the court asked was whether the interest income which the province sought to tax was "income from a business" carried on in Canada or "income from property held outside of Canada". If it was the former it was taxable, if the latter it was not. The Ontario Superior Court observed at para. 24 that a GAAR analysis "only becomes relevant if a determination is first made that the interest income is not income from a business carried on in Canada". The court ultimately found the interest income was from a business carried on in Canada. This is not the outcome that the corporate reorganization that implemented the Finco Plan was intended to achieve.

**114**  The court in *Inter-Leasing* engaged in what it described as "some brief comment" on the GAAR and in doing so remarked that "no deference needs to be afforded to these comments on any appeal." The court was persuaded that if a GAAR analysis was performed the reorganization undertaken by Inter-Leasing Inc. would have been found to have been an "avoidance transaction" and thus "inconsistent with the object and purpose" of the *Ontario Act*.

**115**  *Inter-Leasing* does not assist me to decide the issues in the present case. Any observations on the GAAR were expressly *obiter* and as Mr. Weder testified, there are "good facts" and there are "bad facts" to be considered when a corporate tax payer contemplates a legal challenge to a notice of reassessment. The facts present in *Inter-Leasing Inc.* both good and bad, were unlikely to be the same as the plaintiffs' in the case at bar if the plaintiffs had chosen to litigate the notices of reassessment. To characterize *Inter-Leasing* as a case which demonstrates a successful challenge to the Finco Plan is not appropriate.

**116**  I conclude the defendant did not breach the engagement letter by refusing to repay the contingent fees when the notices of reassessment were received.

**4. The Alleged Refusal of the Defendant to Assist the Plaintiffs in Responding to the Notices of Reassessment**

**117**  The plaintiffs allege the defendant had a fiduciary duty implied by law and expressed in the engagement letter to assist the plaintiffs to resist the notices of reassessment. It is submitted the express duty is found in the following language in the engagement letter:

In the event of a change in the law which renders the Plan ineffective after a certain date, we [the defendant] have developed an exit strategy to wind up the structure into a second financing company should that plan still be available at the time.

**118**  I cannot derive from the language of the engagement letter an agreement by the defendant to assist the plaintiffs in resisting the notices of assessment. The plaintiffs were informed that the Finco Plan could be challenged by the tax authorities. The paragraph in the engagement letter that speaks of the successful challenge by a tax authority must have been understood by TBPL's board to mean that a reassessment could happen. That risk was not only expressed in the engagement letter, it had been repeatedly alluded to by the defendant when it presented the Plan to TBPL. There can be little doubt Mr. Hamill was aware of that risk and Mr. Furlong was fully alive to the possibility of reassessment. Mr. Furlong acknowledged that he was aware the tax authorities would be hostile to the Finco Plan and would take steps to prevent further reduction in provincial revenue when the implications of the Plan came to their attention. One obvious way to attempt to limit the loss of provincial tax revenue was to reassess corporate tax payers who sought to take advantage of the *Ontario Act*.

**119**  Mr. Hamill, Mr. Furlong, and other members of the board would also have known that resistance to reassessments would require the plaintiffs to instruct lawyers and accountants with the requisite expertise and they knew that would cost money. There is nothing in the engagement letter to suggest the defendant would provide its services at no cost to the plaintiffs. They could not demand return of the contingent fees (presumably on the basis they would be repaid if resistance was successful) and also insist the defendant help to resist the reassessments in the absence of an agreement on the terms on which the defendant would assist.

**120**  The defendant advised TBPL that it intended to make a proposal to assist but the plaintiffs ended any discussion and commenced this action. On June 14, 2007 Mr. Morris emailed TBPL to say that the defendant was "working on a draft agreement(s) [regarding assistance to resist the reassessment], as we discussed at our meeting. I expect to provide this for your consideration sometime next week." The writ of summons was issued a week later without waiting for a draft of an agreement from the defendant. The writ was not served immediately but I consider the commencement of the action as indication that the plaintiffs did not intend to look to the defendant for its assistance. Indeed, TBPL did not contact the defendant again for assistance after the writ was issued. By that time TBPL had terminated the role of the defendant as its external auditor and had refused to pay the defendant's accounts for the annual contingent fees. It also turned to other accountants for tax advice. None of this suggests reliance by the plaintiffs on the defendant for assistance with the reassessments.

**121**  The plaintiffs submit that apart from the engagement letter the defendant acknowledged its duty to assist. They rely on a letter of August 9, 2006 from the defendant bearing the signature of Mr. Morris addressed to Mr. Weder. The letter appends a letter from the CRA to the defendant and goes on to inform Mr. Weder of a meeting between various "taxation officials" and representatives of the defendant and KPMG LLP. The letter advises the plaintiffs that the taxation officials spoke of the erosion of the provincial tax base arising out of corporate tax payers' reliance on s. 2(2) of the *Ontario Act* and that GAAR reassessments would be issued. The letter describes in some detail the views and intentions of the tax officials. The defendant informed Mr. Weder that it had "been asked to forward this information to you and believe we have a professional obligation to do so." It is this last phrase which the plaintiffs rely on as the defendant's acknowledgement of its duty to assist. I do not agree with that characterization. I consider the letter to be no more than a professional courtesy of the defendant. The defendant had acquired information which Mr. Weder might find useful in his dealings with the CRA and passed it along to him. The letter was not an acknowledgement that the defendant accepted it had a duty imposed by law or by contract to assist the plaintiffs to resist the assessments. Even if such a duty could be found, in my view it was not breached. The letter itself is an example of the defendant providing assistance to the plaintiffs and there are others which I will describe.

**122**  The evidence of Mr. Weder was that the defendant was invariably helpful to him when he began to advise the plaintiffs in regard to the reassessments. Mr. Weder testified that at all times the defendant answered questions that he posed. Furthermore, Mr. Morris met with Mr. Weder early in 2005 to discuss other tax audits the CRA was performing in similar circumstances to those of the plaintiffs'. Mr. Weder met with Mr. Gimpel who Mr. Weder observed was "helpful and provided some good points". Mr. Weder asked for and received Mr. Gimpel's assistance in drafting a letter to the CRA. Further Mr. Gimpel, apparently unsolicited, sent comments to Mr. Weder in May 2005 on the then recent Ontario budget which had eliminated the "loophole". In June 2005 Mr. Weder wrote to TBPL by email to advise that he had spoken with Ron Crawford, the director of 2903, who indicated he was assembling the material requested by the Ontario auditor and would be sending it to Mr. Morris for further compilation. Mr. Weder stated Mr. Morris told him, that despite the fee dispute, "we should be cooperating in dealing with the audit". In August 2006 Mr. Morris emailed Mr. Weder "to set up a time to meet regarding Taiga". He arranged to discuss matters with Mr. Weder in person: "You have probably heard about an 'offer' from CRA ... and the provinces but I just wanted to let you know the current status as far as we are aware. Are you available this week sometime?" In October 2006, Mr. Morris again emailed Mr. Weder passing along information that the defendant had obtained about the position of the CRA on the audit of various finco plans.

**123**  Even in the circumstances of this case where the defendant was under no contractual or fiduciary obligation to assist the plaintiffs to resist the notices of reassessment, it nonetheless offered assistance and was prepared to provide more if an agreement could be reached establishing the basis on which it would do so. I can find no misconduct in this regard as alleged by the plaintiffs.

**5. Credibility of Mr. Morris**

**124**  The plaintiffs are highly critical of the evidence of Mr. Morris. They characterize his testimony on his cross-examination as argumentative and quarrelsome and suggest he was actively attempting to mislead the court. There are several areas of particular criticism. Mr. Morris is said to have improperly attempted to shift the burden to give tax advice to TBPL onto Mr. Furlong. They contrast Mr. Furlong's "accurate" notes, taken contemporaneously with meetings, with Mr. Morris' evidence about the meetings which the plaintiffs say was misleading. The plaintiffs' point to the internal policies of the defendant, which they submit required written records to be kept of advice given to clients. They refer to the refusal of the defendant, controlled or at least influenced by Mr. Morris, to disclose the records of the internal policies without an order from the court. The plaintiffs submit Mr. Morris acknowledged he had been involved in document production for the defendant and the refusal of the defendant to disclose the internal policy documents without an order should lead this court to draw an inference that Mr. Morris deliberately attempted to withhold relevant documents because they would not support the defendant's position in this lawsuit. I do not agree with these criticisms.

**125**  There are some criticisms of Mr. Morris' testimony which are valid. In particular he overstated the extent of his recollection of meetings and there were occasions during a rigorous cross-examination over five days in which Mr. Morris had to concede that some of his answers had been incorrect. I agree that Mr. Morris on occasion was combative. He was responding to an aggressive cross-examination extending over many days in which his trustworthiness as a witness was repeatedly impugned and he occasionally responded with some asperity.

**126**  In my opinion Mr. Morris' recollections of the meetings and conversations which dealt with the defendant's presentation of the proposed Finco Plan to TBPL were substantially unshaken notwithstanding a vigorous cross-examination. The plaintiff's position that Mr. Morris was deliberately attempting to deceive cannot stand up to scrutiny. He made mistakes in his evidence but I do not accept he was deceitful. The fact that Mr. Morris' recollections of meetings were on some points faulty, is not a useful point of attack on his credibility generally. He was attempting to recall events of some complexity from about 12 years earlier. I accept he was doing his best.

**127**  I will add that Mr. Furlong in cross-examination accepted that some of his contemporaneous notes were incomplete and he had on occasion to acknowledge that, notwithstanding contemporaneous notes, his evidence about the meetings was incorrect. In my opinion both Mr. Morris and Mr. Furlong were honest although at times mistaken.

**128**  I do not agree Mr. Morris improperly attempted to shift onto Mr. Furlong the obligation to give tax advice to TBPL. Mr. Morris recognized that Mr. Furlong, while not a tax expert, nevertheless understood the structure and intention of the Finco Plan and had the capacity to give advice to TBPL in that regard. Mr. Hamill relied on Mr. Furlong and must have recognized that capacity as well.

**129**  I do not agree that an inference should be drawn that Mr. Morris improperly attempted to withhold documents concerning the defendant's internal policies. The plaintiffs throughout this action have been represented by experienced counsel. No inference should be drawn that Mr. Morris exercised control over document disclosure decisions. There is no basis to assume that the defendant's refusal to disclose internal policy documents without an order was made in bad faith.

**6. Should an Adverse Inference be Drawn Against the Defendant for Failure to Call Material Witnesses?**

**130**  The plaintiffs invite me to draw an adverse inference against the defendant for failure to call witnesses who could be expected to testify about the analysis of the Finco Plan undertaken by the defendant, its failure to call witnesses who could be expected to testify to the defendant's analysis of the alleged conflicts of interest, and in particular its failure to call Mr. Gimpel to testify about the discussion in which he participated when the Finco Plan was presented.

**131**  I heard many days of evidence about the advice given to the plaintiffs about the Finco Plan's risks and benefits. The only potential witness whose absence from the trial gave me any initial concern was Mr. Gimpel. He attended a number of meetings where the Finco Plan was presented to the plaintiffs and therefore it may be said that his evidence would have been useful to support the position taken by the defendant if he was prepared to do so. The fact he was not called may suggest the defendant knew Mr. Gimpel's evidence was not favourable to it. Nevertheless, for the reasons that follow I am not prepared to draw an adverse inference.

**132**  The failure, without explanation, of a party to call a witness who may have relevant evidence does not lead inexorably to an adverse inference drawn against that party. There is a discretion to be exercised: see *McTavish v. MacGillivray* [*(1997), 38 B.C.L.R. (3d) 306*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-F361-M0WN-00000-00&context=) (S.C.) at para. 14. The rule was once applied with considerable rigour, perhaps leading to the calling of witnesses whose testimony was only cumulative of the evidence already offered. *Barker v. McQuahe* (1964), 49 W.W.R. 685 (B.C.C.A.), is an oft quoted example of the stricter application of the rule in relation to physicians and in different conditions from those which prevail today. As trials have become more lengthy, complex and expensive, and as the pretrial discovery process has become more extensive, the discretionary aspect of the rule has been increasingly emphasized. In Western CED West (West 4th) v 26, title 61, at 200, these words are found:

Advances in disclosure and exchange of documents between parties mean that both sides now have equal access to information, and can call witnesses who might assist them. Today, the adverse inference is discretionary, and should not be drawn unless it is warranted in all the circumstances. In particular, the judge should consider whether: there is a legitimate explanation for failing to call the witness; the witness is within the exclusive control of the party or is equally available to both parties; and the witness has key evidence to provide or is the best person to provide the evidence in question.

**133**  Mr. Gimpel was examined for discovery on behalf of the defendant over three days on September 22, 2011, November 9, 2011 and January 20, 2012. One hundred and eighty-one requests were left with Mr. Gimpel for additional information to be provided to the plaintiffs. The plaintiffs were entitled to read into the trial record answers given by Mr. Gimpel on his examination for discovery but chose not to do so. They were also entitled to read answers to requests left with Mr. Gimpel and took advantage of that opportunity. To assert that an inference should be drawn against the defendant because Mr. Gimpel did not testify at the trial has an artificial quality. The plaintiffs cross-examined him at length on discovery and could not reasonably believe he had other evidence to give not favourable to the defendant. In my opinion the adverse inference rule has little if any role to play when a corporate party does not call a material witness at trial, but whom that party has nominated as its representative for the purpose of an oral examination for discovery, and whom an opposing party has examined.

**134**  Mr. Morris was the person with the defendant principally responsible for presenting the Finco Plan to TBPL. He attended all of the meetings with the representatives of TBPL and was in the best position of any potential witness to testify about what was said at the meetings. I do not criticize the defendant for failing to call Mr. Gimpel at the trial.

**135**  This trial involved 16 witnesses. There were others who could reasonably have been called including Mr. Aune and Mr. Hansen on behalf of the plaintiffs who likely would have had useful evidence to offer. For example, whether Mr. Hansen attended at a meeting became a matter of controversy which might have been resolved more readily if Mr. Hansen had testified. I draw no inference from his absence. Mr. Aune with his considerable business experience and his close relationship with Mr. Hamill, could have shed light on what was said at some of the meetings, in particular the meeting of March 30, 2001, and he could have testified about his understanding of the risks of the Finco Plan and his discussions with the late Mr. Hamill about those risks. Mr. Aune did not testify nor was any explanation given for his absence. I draw no inference.

**136**  I am not willing to reach the conclusion that any party to this action kept a potential witness, over whom that party had control, out of the witness box because of a fear the witness would not support that party's case. The fact-finding process would not be enhanced by making assumptions and drawing inferences about the motivations of the parties in relying on some witnesses and not others. I decline to draw any inference from the absence of a potential witness.

**137**  In summary I conclude the following:

1. When the defendant proposed the Finco Plan it informed TBPL of the risks of implementing the plan as follows:
2. The Ontario Tax Authorities "would not like" the Plan;
3. TBPL and other plaintiffs incorporated for the purpose of implementing the Plan, could be subject to audits and reassessment by the CRA relying on the provincial GAAR to recover the taxes which had been avoided by the Plan;
4. although the application of the provincial GAAR was uncertain the Plan was likely to survive a challenge based on the GAAR;
5. tax audits and reassessments would impose legal and accounting costs if they were resisted; and
6. the Ontario government would probably introduce legislation to amend the *Ontario Act* which would render the Plan ineffective; and
7. that information met the standard of care.
8. The defendant did not have a fiduciary or contractual obligation to assist the plaintiffs to resist the notices of reassessment.
9. The Rules of Professional Conduct applicable to the defendant when it proposed the Plan did not preclude a fee contingent on the tax savings and there was no conflict of interest as alleged.
10. The mere delivery of notices of reassessment did not constitute a successful challenge to the Plan within the meaning of the engagement letter.
11. The defendant is not obliged to refund the contingent fees already paid.
12. The defendant did not breach a duty to the plaintiffs by continuing to render bills for contingent fees after the notices of reassessment were delivered.

**7. Did the Plaintiffs Suffer a Loss as a Result of the Implementation of the Finco Plan and the Notices of Reassessment?**

**138**  I have not found that the defendant breached a duty to the plaintiffs in regard to the Finco Plan. However, if I am wrong it is appropriate to consider whether the plaintiffs suffered loss as a result of the implementation of the Finco Plan. The defendant submits the engagement letter contains a contractual limit on the defendant's liability to pay damages. For the reasons that follow I do not need to address that question.

**139**  The measure of damages in tort is that sum of money that will put the plaintiffs back into the position they would have been but for the misconduct of the defendant. The measure of damages for breach of contract is that sum of money that will put the plaintiffs back in the position they would have been if the contract had been properly performed. See *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [*[1993] 1 S.C.R. 12*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-609F-00000-00&context=) at 37. Damages for breach of fiduciary duty are restitutionary. The plaintiffs are to be "put in as good a position as [they] would have been in had the breach not occurred": *Hodgkinson* at para. 73. For the purpose of determining damages in this case there is no difference among these approaches.

**140**  I am faced with the complex written opinions and oral evidence of several accountants, each of high standing in his profession, who have either attempted to calculate the loss or benefit the plaintiffs experienced from implementation of the Finco Plan or who have provided critiques of opinions of those who have attempted to perform these calculations. I will describe each of the opinions briefly to assist the reader of these reasons to understand my eventual conclusions.

**141**  In a report dated November 18, 2011, Kevin Wong, CA, now with MNP LLP, but once with Cinnamon Jang Willoughby, provided an opinion for the plaintiffs ("Wong Report"). He concludes that as a result of the corporate reorganization undertaken by TBPL on the advice of the defendant the "Taiga Entities" (TBPL, 2903 and 624), in the years leading up to the settlement agreement in October 2008, avoided $7,155,615 in provincial income tax and paid additional federal income tax of $440,373, leaving a net tax saving of $6,715,242 on the Finco interest. As a result of the settlement agreement, Mr. Wong concludes the Taiga Entities paid $7,089,379 in provincial income tax, received no refund of the $440,373 in federal income tax and paid $1,565,647 in penalties and interest for a total of $9,095,399. Mr. Wong calculates the provincial income tax TBPL that would have been paid if the Finco Plan had not been implemented would have been $7,286,436 leaving a net loss of $1,808,963. ($9,095,399 - $7,286,436).

**142**  A report of December 20, 2011, prepared by Robert Sandy of PricewaterhouseCoopers LLP on behalf of the defendant addressed two questions namely:

1. Whether it was appropriate for Mr. Wong to add $440,373 of additional federal tax; and
2. did Mr. Wong take into account all of the savings that Taiga Forest Products Ltd. obtained as a result of the implementation of the Finco Plan that would not have been realized had the Finco Structure not be undertaken, and that were not required to be repaid pursuant to the October 7, 2008 settlement agreement?

**143**  In preparing his opinion Mr. Sandy relied on a report of John Robinson, CA also of PricewaterhouseCoopers LLP which report is in evidence.

**144**  Mr. Sandy concludes that Taiga Forest Products Ltd., which he defines as "Taiga", by which I understand him to mean TBPL, "did not pay any additional net federal income taxes [of $440,373] as a result of implementing the Finco Structure" and therefore Mr. Wong's calculation of the loss is overstated by that sum. Further, Mr. Sandy opines that "Taiga realized and retained $2,494,479 in after tax savings", not included in the Wong Report, $152,948 of which was a saving of provincial capital tax, and $2,341,531 was a savings in interest expense "as a result of reduced financing requirements" over the years before the settlement agreement, during which years the plaintiffs had the benefit of the substantial sums of money not paid in taxes.

**145**  In a report of October 7, 2013, from PricewaterhouseCoopers LLP over the signatures of Mr. Sandy and of Mr. Robinson the savings in interest expense of $2,494,479 was said to be $2,118,625 after some correcting calculations.

**146**  In a report of December 19, 2011, prepared by Mr. Robinson on behalf of the defendant, three questions are posed namely:

1. Did Taiga Forest Products Ltd. ("Taiga") enjoy any tax benefits from the implementation of the Finco Structure that were not required to be repaid to the tax authorities pursuant to the October 7, 2008 settlement agreement (the "Settlement Agreement")?
2. Were any of the benefits reflected in the Wong Report?
3. What were Taiga's blended federal and provincial income tax rates for the fiscal years ending March 31, 2008 to 2012?

**147**  Mr. Robinson opines that Taiga Forest Products Ltd. enjoyed:

1. A net deferral of corporate income taxes during the period April 1, 2001 to March 31, 2007 which would have increased Taiga's cash flow.
2. A permanent savings of $152,948 in provincial capital tax relating to the fiscal year ending March 31, 2002.

Neither of the foregoing are referred to in the Wong Report. They were not repaid pursuant to the settlement agreement.

**148**  The December 20, 2011 report of Mr. Sandy was reviewed by Michael Sileika, like Mr. Wong a member of MNP LLP. Mr. Sileika's report is intended to bolster the Wong Report. Mr. Sileika was requested by the plaintiffs to prepare "a Limited Critique Report" of Mr. Sandy's conclusion that Taiga Forest Products Ltd. "retained $2,494,479 in after tax savings as a result of the implementation of the Finco Structure". Mr. Sileika's report dated July 5, 2013, addresses the Sandy report but also comments on the Robinson report of December 19, 2011. Mr. Sileika disagrees with Mr. Robinson's opinion that the saving in provincial capital tax was attributable to the creation of the general partnerships through the implementation of the Finco Plan. Mr. Sileika opines that "this one time saving was independent of the Finco [Plan]" but also observes that it is beyond the scope of his report to comment on the quantum of the 2002 capital tax savings. Mr. Wong had addressed only income tax savings and not the implications of the Finco Plan for provincial capital tax.

**149**  Mr. Sileika includes in the cost to the plaintiffs, to establish and maintain the Finco Plan, the accounting and legal costs including approximately $750,000 of contingent and other fees billed by the defendant. It appears, however, that although TBPL did not pay a large portion of the contingent fees it nevertheless deducted all of them as an expense for tax purposes. On the settlement it retained the entire deduction.

**150**  Mr. Sileika concludes his report of July 5, 2013 with the sentence "if one accepts the Sandy Report, the $2,494,479 in after tax savings concluded in paragraph 34 of the Sandy Report should be reduced by $1,315,226 to a total of $1,179,253". I understand Mr. Sileika would also deduct the cost of implementing, maintaining and defending the Finco Plan including the fees billed by the defendant. Mr. Sileika's report of July 5, 2013 does not reach a conclusion on the loss if any suffered by the plaintiffs.

**151**  Mr. Sileika prepared a further report dated September 30, 2013, which is said to be supplemental to the Limited Critique Report. The supplemental report is again intended, at least in part, to reinforce Mr. Wong's opinions. It concludes with a similar sentence to the conclusion in Mr. Sileika's earlier report except that the reduction is $1,050,458. Again Mr. Sileika does not express an opinion on the plaintiffs' gain or loss as a result of the implementation of the Finco Plan.

**152**  The evidence presented by the plaintiffs that could allow me, if there was liability, to award damages to the plaintiffs is only that of Mr. Wong. The defendant urges me not to rely on the report of Mr. Wong for a number of reasons. First, the defendant submits Mr. Wong is not an independent expert. Mr. Wong was a tax advisor to the plaintiffs for most of the years after the notices of reassessment were delivered and throughout the time when the settlement agreement was being negotiated. He was then a member of Cinnamon Jang Willoughby, the firm of chartered accountants to whom TBPL turned when it required the defendant to resign as its auditor. Mr. Wong was personally involved in giving advice on the reassessments and the various proposals for settlement, and after leaving Cinnamon Jang Willoughby for MNP LLP Mr. Wong continued to remain in touch with TBPL - presumably with the hope that it would again become a client.

**153**  I agree with the defendant that these are valid concerns that go to the weight to be attached to Mr. Wong's opinions. However, the defendant makes another submission with which I largely agree and which makes Mr. Wong's opinions unreliable.

**154**  TBPL was a substantial company at the time it adopted the Finco Plan. In 2001 it had sales in excess of $790,000,000 which had grown in 2002 to in excess of $854,000,000 and in 2003 to well over $912,000,000. Its consolidated financial statement for the year ended March 31, 2001 shows bank indebtedness of about $84,000,000.

**155**  TBPL managed its expenses, its debt servicing and investments through its cash flow and through complex arrangements with its bankers which no doubt would have varied from time to time over the years depending on general business conditions and TBPL's particular circumstances. In my view it is not appropriate to attempt to determine the effect of the Finco Plan without a broad consideration of the whole of the financial circumstances of TBPL in the years between 2001 when the Finco Plan was implemented and when the settlement agreement occurred in October 2008. Once those circumstances were known it would then be necessary to compare them with TBPL's circumstances as they probably would have been if the Finco Plan had not been implemented. Over those years the board and management of TBPL would have made multiple decisions, many unconnected to the Finco Plan, each with its individual impacts on TBPL's earnings before taxes and thus its tax obligations. Little if any analysis of these considerations has been done by Mr. Wong.

**156**  I appreciate the complexity of such an analysis but in my view its absence presents an insuperable barrier to reliance on Mr. Wong's report. One example may assist to illustrate the difficulty I have in relying on Mr. Wong's report. Between 2002 and 2005, 2903 received cash payments pursuant to the partnership agreement. No evidence was given as to their amounts. In 2005, 2903's assets were transferred to TBPL. Mr. Wong does not mention these events and I have no other evidence to allow me to understand their impact on gains or losses experienced by TBPL from the Finco Plan.

**157**  When I couple my difficulty with Mr. Wong's report with the evidence of Mr. Sandy and Mr. Robinson, which in my view supports the proposition that the plaintiffs made a prudent settlement agreement preserving at least some of the benefits of the Finco Plan, I am not persuaded the plaintiffs have met their burden of demonstrating that they suffered any loss as alleged in the amended statement of claim.

**Disposition**

**158**  The action is dismissed. The defendant is entitled to judgment on the counterclaim. The parties may arrange to speak to costs.

K.N. AFFLECK J.

**End of Document**

[***Weldon v. Teck Metals Ltd., 2013 CBPG para. 8027***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6X-MT61-F8SS-60FB-00000-00&context=)

Canadian Employment Benefits & Pension Guide

Supreme Court of British Columbia

Before: N. Smith J

Decision: March 4, 2013.

Docket No. S095159

***Canadian Employment Benefits & Pension Guide*  > *Cases* > *2010s* > *2013***

**2013 CBPG para. 8027** | [*[2013] B.C.J. No. 374*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JC5P-G1YY-00000-00&context=) | [*2013 BCSC 345*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JC5P-G1YY-00000-00&context=)

James Weldon and Leonard Bleier, Plaintiffs v. Teck Metals Ltd., Cominco Pension Fund Coordinating Society, and Towers Perrin Inc. Defendants

See commentary at [*CBPG para. 1923*](https://advance.lexis.com/api/document?collection=analytical-materials-ca&id=urn:contentItem:5M76-G4N1-FJDY-X0FH-00000-00&context=).

**Case Summary**

**Benefits and Pensions — Employer plans - standards legislation — Federal pension benefits standards — Parties consented to certification of class action arising from claims of plaintiff pension plan members given one-time option in January 1993 to transfer from defined benefit to defined contribution plan — Plaintiffs claimed likely diminution of value of pension in defined contribution plan, alleged that employer gave inadequate information at time of transfer, and included employer's actuarial consultant as defendant — Two of class action's 23 common issues related to whether claims were time-barred by operation of six-year limitation period under the Limitation Act (the "Act") or whether postponement or discoverability provisions under s. 6 of Act were available — Parties brought application for determination of limitation issue — Action was not time-barred — Plaintiffs' right to bring action arose in January 1993, outside six-year limit, but all claims, including claim of professional *negligence* against actuarial consultant, were subject to postponement provisions of the Act — All common issues were potentially subject to postponement of applicable limitation period under s. 6(3)(b) of Act for damage to property — Pensions were intangible property; postponement of claims was not restricted to pure economic loss arising solely from physical damage to or defect in real property — Postponement under s. 6(3)(c) of Act for actions in professional *negligence* against actuarial consultant to employer was also available to plaintiffs — Limitation Act, RSBC 1996, c. 266, s. 3(5), 6(3), 6(4) — Supreme Court Civil Rules, *BC Reg. 168/2009, Rule 9-3* — Class Proceedings Act, *RSBC 1996, c. 50*.**

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| --- |
| **Facts:** The plaintiffs were employees who were given a one-time option in January 1993 to transfer from the defendant employer's defined benefit pension plan to a defined contribution plan. The employer distributed a booklet and computer program describing the new plan. Employees later became concerned that the pension from the defined contribution plan would be much lower than the pension from the defined benefit plan. They claimed that they were given inadequate information when they agreed to transfer to the defined contribution plan and sought to mount a class action against the employer, actuarial consultant, and asset manager. The defendants were unsuccessful in their application to set aside the order extending the employees' time for service of the writ, and the employer and actuarial consultant were unsuccessful in their application for summary dismissal of the action. Subsequently, the parties consented to certification of the action as a class proceeding under the *Class Proceedings Act* (the "CPA") and agreed to 23 common issues. The defendants took the position that most of the claim was barred by the operation of the *Limitation Act* (the "Act"). Section 3(5) of the Act provided for a six-year limitation period after the right of action arose; section 6 of the Act, the postponement or discoverability provision, listed certain categories of action postponing the commencement of the limitation period until after the plaintiff knew or ought to have known the facts giving rise to the action. The actions available for postponement included damage to property and professional ***negligence***. The defendants took the position that the action arose in January 1993, when the pension changes took effect. The employees argued that no action arose until a member suffered a loss on the payment of a pension. The parties agreed to bring an application under Rule 9-3 of the *Supreme Court Civil Rules* for determination of the limitation issue.  HELD: The action was not time-barred.  The employees' right to bring an action arose on January 1, 1993, outside of the six-year limit, but all claims, including the claim of professional ***negligence*** against the actuarial consultant, were subject to specific postponement provisions in sections 6(3) and (4) of the Act. The employees' argument that the action arose upon a contingent loss, realized only when pension benefits were collected, was not supported. Distinctions between immediate and contingent losses were not recognized under Canadian law. Pursuant to appellate jurisprudence, the employees' damages arose once they acted upon relevant advice to their detriment, in January 1993, regardless of whether the loss or damage was discoverable at that time. Nevertheless, all common issues in the class action were potentially subject to postponement of the limitation period under section 6(3)(*b*) of the Act for damage to property, as pension plans came within the definition of intangible property. Postponement of claims under section 6(3)(*b*) of the Act was not restricted to pure economic loss arising solely from physical damage to or defect in real property. Postponement under section 6(3)(*c*) of the Act, for actions in professional ***negligence***, was also available to the employees. The employees were not clients of the actuary, who advised the employer, but the types of actions referred to in section 6(3) were broad categories, and no evidence supported the view that the legislature intended to limit the reference to professional ***negligence*** to claims in contract. The more likely conclusion was that the provisions were intended to apply equally to clients of professional defendants as well as those to whom duty arose on a different basis. |

**Counsel**

R. Mogerman and J.D. Winstanley for the plaintiffs; G.B. Gomery, QC, for the defendant Teck Metals Ltd; H. Poulus, QC, and M.L. Bromm for the defendant Towers Perrin Inc.

**N. Smith J**:

**1**  The plaintiffs in this class action say that certain employees of what is now the defendant Teck Metals Ltd. ("Teck") were given inadequate information when they agreed to transfer to a new pension plan in 1993. The result, they say, is that employees have been left with reduced pensions. The defendants say most of the claim is barred by operation of the *Limitation Act*, [*RSBC 1996, c. 266*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-FC1F-M0TW-00000-00&context=) ('the Act').

**2**  The parties have consented to certification of this action as a class proceeding under the *Class Proceeding Act*, *RSBC 1996, c. 50*. They have agreed on 23 common issues to be decided and have submitted the first two of them for judgment on a special case pursuant to *Supreme Court Civil Rules*, *B.C. Reg. 168/2009, Rule 9-3*. Those issues are:

1. When did the right to bring action arise pursuant to the *Limitation Act*?
2. If the basic limitation period has expired, to what extent, if at all, can the plaintiffs rely on the postponement provisions in the Act?

**3**  Rule 9-3 includes the following:

1. The parties to a proceeding may concur in stating a question of law or fact, or partly of law and partly of fact, in the form of a special case for the opinion of the court....
2. With the consent of the parties, on any question in a special case being answered, the court may grant specific relief or order judgment to be entered.

**Factual Background**

**4**  Teck was formerly known as Cominco Ltd. ('Cominco'). In 1992, Cominco and related companies established a defined contribution pension plan (the 'DC Plan') and offered non-union employees the option of transferring into it. Those employees had previously belonged to a defined benefit pension plan (the 'DB Plan').

**5**  By letter dated August 19, 1992, Cominco formally notified employees of the intended date of implementation of the DC Plan and the election available to them. Cominco distributed a booklet and computer program describing the new plan.

**6**  The deadline for affected employees to make the election was November 30, 1992, but some were given a brief extension into December, 1992. The plaintiffs and others elected to transfer to the DC Plan, which came into effect on January 1, 1993.

**7**  The plaintiff Leonard Bleier took early retirement on September 28, 2006. The plaintiff David Weldon remains an employee of Teck and a member of the DC Plan.

**8**  Mr. Weldon commenced his action on July 13, 2009. Mr. Bleier commenced his on October 17, 2011. The two actions have been consolidated into a single proceeding. Claims against some of the original defendants have been discontinued or dismissed. The only remaining defendants are Teck and Towers Perrin Inc. ('Towers'). Towers was an actuarial consultant retained by Teck in relation to the pension plans, but its client was Teck, not the pension plans.

**9**  On December 21, 2012, the court, by consent, certified the consolidated action as a class proceeding on behalf of both current and former "salaried, pension-eligible, non-union employees of Teck Metals Ltd., Teck Resources Limited, Cominco Resources International Limited, CESL Limited and Agrium Inc, who elected to move from the [DB Plan] to the [DC Plan] effective on or about January 1, 1993" (the 'Class Members').

**10**  The plaintiffs say that Teck, with the assistance of Towers, structured and implemented the DC Plan in a way that favoured Teck's interests over those of its employees, transferring risks from Teck to the pension plan members. They say the defendants provided employees with incomplete, inaccurate or misleading information, and claim damages and other relief for breach of statutory and fiduciary duties, deceit and negligent misrepresentation.

**Judicial History**

**11**  This is the third application raising the limitation issue in this case. Each application has relied on a different procedure under the *Supreme Court Civil Rules*. Those procedures have differed in the extent to which the Court is permitted to consider the issue on its merits.

**12**  Mr. Weldon's action was commenced by writ of summons under the former Rules of Court. The defendants first applied to set aside a master's order that had extended the time for service of the writ. I held that such an application permits only very limited consideration of the merits and was not the appropriate procedure to consider the limitation question: *Weldon v. Teck Metals Ltd.*, [*2011 BCSC 489*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1WK-00000-00&context=). An appeal from that judgment was dismissed, but the Court of Appeal made clear that the defendants could apply to have the action struck at a later date: *Weldon v. Agrium Inc.*, [*2012 BCCA 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1RP-00000-00&context=).

**13**  The defendants next applied for summary judgment pursuant to Rule 9-6. That rule permits the court to give judgment only where it is clear that there is no "genuine issue for trial" and I held that the present remaining defendants had failed to meet that test: *Weldon v. Teck Metals Ltd.*, [*2012 BCSC 1386*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JWR6-S24B-00000-00&context=).

**14**  The present application is brought by agreement under Rule 9-3, which does permit a conclusive determination of the issues raised.

**Issue 1: When did the right to bring action arise?**

**15**  It is common ground that the relevant limitation period is set out in s. 3(5) of the Act:

3(5) Any other action not specifically provided for in this Act or any other Act may not be brought after the expiration of 6 years after the date on which the right to do so arose.

**16**  The defendants say that limitation expired long before this action was started because the right to bring action arose and the time began to run when the pension changes took effect on January 1, 1993. On that date, they say, the class members acquired a new bundle of rights which they now allege to be inferior to the rights they previously held. The defendants say that amounts to an allegation of immediate injury, completing the cause of action.

**17**  The plaintiffs say a right of action does not arise and no limitation period can begin to run until the plaintiff suffers a loss. They say no class member suffered a loss until a "payment event" - the date he or she retired or otherwise became eligible to receive money from the pension plan.

**18**  The defendants rely primarily on *Burke v. Greenberg*, [*2003 MBCA 104*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DJ1-JF1Y-B23W-00000-00&context=), and on statements made by the Court of Appeal when it dealt with the first application in this case.

**19**  *Burke* was a ***negligence*** claim against a solicitor who had created limited partnership agreements under which the plaintiffs were to acquire and hold certain land. Another defendant fraudulently mortgaged the properties and the plaintiffs alleged that the agreements failed to protect them from that fraud.

**20**  The solicitor's work was done between 1979 and 1981, and the alleged fraudulent mortgaging of the properties took place in 1984. As a result of foreclosure proceedings, title to the properties passed to the mortgagee in 1986. The action was started in 1988, more than six years after the allegedly negligent services were performed.

**21**  Applying legislation similar to the *Limitations Act* in this province, the Manitoba Court of Appeal held that the claim was out of time because the damage occurred when the advice was given. The Court found, at para. 24:

The plaintiffs have focussed their argument on the concept of deprivation and that loss only occurs when deprivation arises. The plaintiffs argue that in this case the deprivation occurred when the fraud occurred and they were in fact deprived of their security. My view of this argument is that the plaintiffs are equating deprivation with quantum of loss and not the loss itself. The loss to the plaintiffs occurred when the defendant Greenberg negligently had them enter into the new agreement. Had Heaton never acted fraudulently, the amount of the plaintiffs' loss could well have been nominal but that remains an issue of quantum and not an issue of when the loss in fact occurred.

**22**  Among the authorities referred to by the Court was the English case of *Knapp v. Ecclesiastical Insurance*, [1997] All E.R. (D) 44 (H.L.), where an insurance broker was alleged to have been negligent in advising the plaintiffs about their disclosure obligations. When a fire damaged some buildings on the plaintiffs' property, the insurer denied coverage based on the plaintiff's failure to disclose the condition and use of the buildings. Hobhouse L.J. said:

From these authorities it can be seen that the cause of action can accrue and the plaintiff have suffered damage once he has acted upon the relevant advice "to his detriment" and failed to get that to which he was entitled. He is less well off than he would have been if the defendant had not been negligent. Applying this to the present case, the Plaintiffs paid their renewal premium without getting in return a binding contract of indemnity from the insurance company. They had acted to their detriment: they did not get that to which they were entitled. The fact that how serious the consequences of the ***negligence*** would be depended upon subsequent events and contingencies does not alter this; such considerations go to the quantification of the Plaintiffs' loss not to whether or not they have suffered loss. The risk of loss existed from the outset and in the absence of better evidence would have to be evaluated and assessed as a risk and damages awarded accordingly.

**23**  In its judgment on the earlier motion in this case, the Court of Appeal said the same approach applies in British Columbia. Newbury J.A. said, at para. 24:

There can be no doubt that in this province, the point at which an action in ***negligence*** (which includes negligent misrepresentation) arises is the date on which "every fact [exists] which is material to be proved to entitle the plaintiff to succeed - every fact which the defendant would have a right to traverse" (*per* Brett J. in *Cooke v. Gill* (1873) L.R. 8 C.P. 107, quoted by this court in *Arishenkoff v. British Columbia* [*2004 BCCA 299*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X3RV-00000-00&context=) at para. 68; and *Wyman and Moscrop Realty Ltd. v. Vancouver Real Estate Board* [*(1957) 8 D.L.R. (2d) 724*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JX3N-B24S-00000-00&context=) (B.C.C.A.) at 726; *Scarmar Constructions Ltd. v. Geddes Contracting Co.* [*(1989) 61 D.L.R. (4th) 328*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-DY33-B07K-00000-00&context=) (B.C.C.A.) at 334; *Inmet Mining Corp. v. Homestake Canada Inc.* [*2003 BCCA 610*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FGRY-B0MG-00000-00&context=) at para. 209.

As confirmed in *Kingu v. Walar 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 23 (C.A.), the five elements of the tort of negligent misrepresentation are the existence of a duty; the making of a false or misleading statement; the fact the statement was made negligently, i.e., in breach of the applicable standard of care; the plaintiff's reasonable reliance on the statement; and the fact that such reliance resulted in loss or deprivation to the plaintiff. It is important not to confuse the final element with "damages" or the ability to quantify loss by means of financial compensation.

**24**  Newbury J.A. cited the above passages from *Burke* and *Knapp*, emphasizing the reference in *Knapp* to the plaintiff having suffered damage "once he has acted on the relevant advice 'to his detriment'." She then said, at para. 26:

This remains the rule in British Columbia regardless of whether the loss or damage was discoverable.

**25**  Newbury J.A. also stressed that the concept of postponement in s. 6 of the Act "involves a separate and fact based analysis" from consideration of the limitation period under s. 3.

**26**  The plaintiffs argue that the only issue before the Court of Appeal was the question of whether the limitation issue should have been considered on its merits on the motion to set aside the extension of the time for service. They say the above statements by Newbury J.A. are *obiter dicta* that did not consider important authorities such as *Wardley Australia Ltd. v. Western Australia*, [1992] HCA 55, and *Law Society v. Sephton* & Co., [2006] UKHL 22.

**27**  In *Wardley*, the plaintiff alleged that, based on false representation by a merchant bank, it had indemnified another bank against any loss that bank may suffer as a result of credit granted to a certain company. The alleged misrepresentations related to the financial position and assets of the company. The majority in the High Court of Australia held that no loss was suffered and time did not begin to run until the plaintiff was called upon to pay the indemnity. The Court said, at para. 10:

The indemnity was not one of a kind which generates an immediate non-contingent liability to pay upon execution of the instrument. It was neither a promise to meet a liability of the promisee to make a payment nor a promise to pay a debt owing by a third party to the promisee.

**28**  In reference to earlier English cases, the High Court said:

1. Be that as it may, the English decisions have proceeded according to the view that, where the plaintiff is induced by a negligent misrepresentation to enter into a contract and the contract, as a result of the ***negligence***, yields property or contractual rights of lesser value, the plaintiff first suffers financial loss on entry into the contract, notwithstanding that the full extent of the plaintiff's financial loss may be incapable of ascertainment until some later date ((34) Melton v. Walker and Stanger (1981) 125 SJ 861; Baker v. Ollard and Bentley (A Firm) (1982) 126 SJ 593; D.W. Moore and Co. v. Ferrier (1988) 1 WLR 267; Islander Trucking Ltd. v. Hogg Robinson Ltd. (1990) 1 All ER 826; Bell v. Peter Browne and Co. (1990) 2 QB 495). ...

...

1. It has been contended that the principle underlying the English decisions extends to the point that a plaintiff sustains loss on entry into an agreement notwithstanding that the loss to which the plaintiff is subjected by the agreement is a loss upon a contingency. For our part, we doubt that the decisions travel so far. Rather, it seems to us, the decisions in cases which involve contingent loss were decisions which turned on the plaintiff sustaining measurable loss at an earlier time, quite apart from the contingent loss which threatened at a later date ((36) Forster v. Outred and Co. and D.W. Moore and Co. v. Ferrier illustrate the point.).

...

1. If, contrary to the view which we have just expressed, the English decisions properly understood support the proposition that where, as a result of the defendant's negligent misrepresentation, the plaintiff enters into a contract which exposes him or her to a contingent loss or liability, the plaintiff first suffers loss or damage on entry into the contract, we do not agree with them. In our opinion, in such a case, the plaintiff sustains no actual damage until the contingency is fulfilled and the loss becomes actual; until that happens the loss is prospective and may never be incurred.

**29**  Those passages were referred to with approval by the House of Lords in *Sephton*. In that case, a solicitor had misappropriated large sums of money over a six-year period. During that period, an accounting firm had negligently certified the solicitor's accounts for the purpose of his annual reports to the Law Society. The Law Society was eventually required to compensate the solicitor's clients from its compensation fund and sued the accountants to recover what it had paid.

**30**  The House of Lords held that the cause of action arose only when a claim was made against the fund. Lord Hoffman described the Law Society's liability as "contingent on the misappropriation not being otherwise made good and a claim in proper form being made." He said that until a claim was made, the fund suffered no loss or damage.

**31**  Lord Walker reviewed and distinguished the authorities that held the cause of action to arise when negligent advice was given, at para. 48:

In all these cases the claimant has as a result of professional ***negligence*** suffered a diminution (sometimes immediately quantifiable, often not yet quantifiable) in the value of an existing asset of his, or has been disappointed (as against what he was entitled to expect) in an asset which he acquires, whether it is a house, a business arrangement, an insurance policy, or a claim for damages. Your Lordships have not, I think, been shown any case in which the imposition on a claimant of a purely personal and wholly contingent liability, unsecured by a charge on any of the claimant's assets, has been treated as actual loss.

**32**  The plaintiffs argue that the unique circumstances of this case require unique analysis, similar to what was undertaken in *Wardley* and *Sephton*, and that the diminished pensions received by the class members should be treated as a contingent loss that is only realized when pension benefits are collected.

**33**  There are four reasons why I cannot accept the plaintiffs' analysis of the law. First, and most important, is the decision of the Court of Appeal in this case. The comments made by Newbury J. A. on when a cause of action accrues may be *obiter* in the sense of not being strictly necessary to decide the narrow issue that was before the Court. But they represent a considered opinion, given in the context of this very proceeding, on an issue that the Court of Appeal expected to be the subject of further applications. I consider the Court's analysis to be binding upon me.

**34**  Second, the English and Australian authorities have recognized a distinction between immediate (but not yet quantifiable) losses and contingent losses that has not been recognized in this context in Canadian law. If it had been, cases like *Burke* would have been decided differently. I fail to see how the fraud that took place in *Burke* was any more likely or any less a contingency than the losses suffered by the plaintiffs in *Wardley* or *Sephton*.

**35**  Third, I find with respect that the distinction recognized by the English and Australian authorities is an exceedingly fine and uncertain one, highly dependent on how one chooses to characterize a given set of facts. A major part of the plaintiffs' claim in this case is that the DC Plan exposed class members to the risk that changes in the investment market would produce lower than anticipated returns. Did that create a pension plan that was less valuable at the outset, or did it merely expose class members to the contingency of a falling market? Either approach may be arguable, but the law should, as far as possible, attempt to avoid exposing litigants to such uncertainty.

**36**  Finally, even if I could consider the distinction set out in the English and Australian cases, I would hold the loss here to be immediate and not contingent. A pension plan creates entitlement to future benefits, but is also an asset that has a present value that can be calculated at any point before those benefits are paid. That is a concept with which this Court is very familiar in matrimonial litigation.

**37**  If one pension plan exposes beneficiaries to greater risk or uncertainty than does another, actuaries could presumably discount the present value of future benefits to reflect that risk. Indeed, if the plaintiffs are to eventually succeed in this action, they may have to rely on just such expert evidence to show that the defendants knew or ought to have known that the DC Plan was less valuable from the outset. On that analysis, the court must find that the alleged loss occurred when the class members obtained a less valuable pension plan.

**38**  Accordingly, I answer the first question by holding that the right to bring action arose on January 1, 1993.

**Question 2: Postponement**

**39**  The effect of my ruling on Question One is that the six-year limitation period set out in s. 3(5) of the Act expired on January 1, 1999 - more than 10 years before the commencement of this action. The action is therefore statute barred unless and to the extent the plaintiffs can rely on the postponement provisions in s. 6 of the Act.

**40**  Section 6 lists certain categories of action for which the limitation period does not begin to run until the plaintiff knows or ought to know of the facts giving rise to the action. The relevant portions of the section are:

1. The running of time with respect to the limitation period set by this Act for an action

(*a*) based on fraud or fraudulent breach of trust to which a trustee was a party or privy, or

(*b*) to recover from a trustee trust property, or the proceeds from it, in the possession of the trustee or previously received by the trustee and converted to the trustee's own use, is postponed and does not begin to run against a beneficiary until that beneficiary becomes fully aware of the fraud, fraudulent breach of trust, conversion or other act of the trustee on which the action is based.

1. For the purposes of subsection (1), the burden of proving that time has begun to run so as to bar an action rests on the trustee.
2. 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):

(*a*) for personal injury;

(*b*) for damage to property;

(*c*) for professional ***negligence***;

(*d*) based on fraud or deceit;

(*e*) in which material facts relating to The cause of action have been wilfully concealed;

(*f*) for relief from the consequences of a mistake;

(*g*) brought under the *Family Compensation Act*;

(*h*) for breach of trust not within subsection (1).

1. Time does not begin to run against a plaintiff or claimant with respect to an action referred to in subsection (3) until the identity of the defendant or respondent is known to the plaintiff or claimant and those facts within the plaintiff's or claimant'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

(*a*) 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

(*b*) 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.

1. For the purpose of subsection (4),

(*a*) "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,

(*b*) "facts" include

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

(*c*) 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

(*d*) 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.

1. The burden of proving that the running of time has been postponed under subsections (3) and (4) is on the person claiming the benefit of the postponement.

**41**  The agreed upon common issues include 19 separate questions going to issues of liability. The plaintiffs say postponement is available on all issues under ss. 6(3)(*b*),(*c*),(*d*), (*e*) and (*h*).

**42**  Teck concedes that two of the common issues arguably raise a claim in deceit and that postponement under s. 6(3)(*d*) is available to that extent. Those issues relate to allegations of knowing distribution of false or misleading information. Another common issue asks whether Teck administered the pension fund as a trustee. Teck concedes that an administrator of pension funds had certain trust duties under the *Pension Benefit Standards Act*, RSC 1985, chapter 32, and, to the extent the plaintiffs can bring their breach of trust claim within those duties, s. 6(3)(*h*) would apply. It does not concede that s. 6(3)(*h*) applies to broader claims for breach of fiduciary duty that the plaintiffs rely on.

**Damage to Property: s. 6(3)(*b*)**

**43**  The plaintiffs say that s. 6(3)(*b*) applies to all issues because they are claiming economic loss flowing from damage to their pension plans, which are intangible property. The defendants say the claim does not arise in any way from damage to property.

**44**  Section 3(1)(*a*) of the Act creates a two-year limitation period for "injury to person or property, including economic loss arising from the injury." That refers to damage caused to property by an extrinsic act or external event. Section 6(3)(*b*) refers not to "injury" but to "damage to property", which has been held to include damage caused by an inherent defect in the property itself. That is characterized as "pure economic loss" subject to the six-year limitation in s. 3(5): *Armstrong v. West Vancouver (District)*, [*2003 BCCA 73*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7ND-G02F-00000-00&context=).

**45**  *Armstrong* was a claim against the municipality for alleged ***negligence*** in the inspection of the foundations of a house while it was under construction. The claim was dismissed on the basis of the ultimate 30-year limitation period in s. 8 of the Act, but the Court of Appeal said, at para. 15:

While the 6 year limitation under s. 3(5) is more generous than the 2 years for injury, I do not think that the wording of the section supports an inference that the Legislature intended to exclude pure economic loss claims from the postponement provisions. Pure economic loss is often hidden and thus particularly suitable for postponement relief.

**46**  As the Court of Appeal later pointed out in *410727 B.C. Ltd. v. Dayhu Investments Ltd.*, [*2004 BCCA 379*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JXG3-X03T-00000-00&context=), the legislature had not really intended to say anything about pure economic loss claims in tort because, at the time the *Limitation Act* was enacted, such claims had not yet been recognized by the common law. The Act has to be interpreted in light of more recent developments:

[1] ... That statute was enacted as a comprehensive reform measure in 1975 (see S.B.C. 1975, c. 37), but is now being tested by developments in the law that were then unforeseen. In this case, the 'new' development is the lifting of the bar against recovery in tort for pure economic loss, famously exemplified by *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=). As a result of the Supreme Court of Canada's decisions in *Kamloops (City) v. Nielsen* [*[1984] 2 S.C.R. 2*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2339-00000-00&context=), *Canadian National Railway Co. v. Norsk Pacific Steamship Co.* [*[1992] 1 S.C.R. 1021*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-6070-00000-00&context=), and *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co. Ltd.* [*[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=), architects, engineers, contractors, builders and others who take part in the design, construction and inspection of buildings may now generally be sued in Canada -- unlike the United Kingdom -- for ***negligence*** by the owners and subsequent purchasers of such buildings, even in the absence of physical damage or personal injury.

[2] ... In cases of negligent construction or inspection, unlike most instances of physical injury, the deprivation or damage (i.e., the defect in construction) may remain concealed for many years. Yet at common law (at least as it existed prior to *Kamloops v. Nielsen, supra*), time would normally begin to toll for limitation purposes from the date of construction.

[3] The "acute hardship" experienced by a plaintiff whose cause of action expires before the loss or damage even becomes apparent was one of the key concerns addressed by the new *Limitation Act* in 1975, although it is likely the Legislature was contemplating only cases of property damage or physical injury (such as the plaintiff's lung disease in *Cartledge v. E. Jopling & Sons* [1963] 1 All E.R. 341 (H.L.)), at the time. (See the 1974 *Report on Limitations (Part 2 General)* of the Law Reform Commission of British Columbia (No. 15), at 71-76.) The legislative solution was a set of rules regarding discoverability and disability, which postponed the running of time against a plaintiff until he or she could reasonably become aware or had reasonable means of knowledge of the facts giving rise to the right to sue, and be in a position to sue. These rules are codified in ss. 6 and 7 of the Act.

**47**  The defendants say that s. 6(3)(*b*) only allows postponement of claims for pure economic loss in a limited category of cases that arise from some physical damage or defect in real property. While it is true that postponement under s. 6(3)(*b*) for pure economic loss appears to have been successfully argued only in such cases, the question is whether it is necessarily limited to them.

**48**  This case does not involve physical property, but what the defendants characterize as "a bundle of pension rights" that the class members received in replacement of another, different bundle of rights.

**49**  The word "property" without more, includes both tangible and intangible possessions. The definition of "property" in the *Shorter Oxford English Dictionary* includes "that which one owns." *Black's Law Dictionary* defines "property" as "any external thing over which the rights of possession, use and enjoyment are exercised." Clearly, a pension plan comes within the definition of property. Dealing with pensions in the context of matrimonial litigation, the Supreme Court of Canada said in *Clarke v. Clarke*, [*[1990] 2 SCR 795*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-6005-00000-00&context=) at 824:

... pensions are choses in action or incorporeal personal property. The named recipient of a pension is entitled to the benefits therefrom as of right. As stated by Dea J. in *McAlister* at p. 15, the receipt of the pension benefit is not "dependent upon arbitrary whim or the exercise of any discretion by any third party".

**50**  In this case, the plaintiffs say they acquired a pension plan that was defective in that it lacked qualities or characteristics they expected or were led to believe it had. That is in some ways comparable to a complaint made by a purchaser of a building that turns out to have inadequate foundations, ineffective fire protection or other defects.

**51**  The difference, of course, is that a defect in intangible property is not hidden behind a wall or buried in foundations. It will arise from, or be in some way related to, the contractual or other legal documents that create and define the intangible property. In most cases, it would be extremely difficult for a plaintiff to meet the burden of proving that defects in intangible property were hidden or not discoverable. That probably explains the lack of decided cases on the issue. But the question now before me is not how these plaintiffs might prove postponement, but only whether it is open to them to try.

**52**  In *Armstrong*, the court agreed that it would be an "an anomaly contrary to the scheme of the Act if the postponement provisions did not apply to pure economic loss claims." In my view, it would equally be an anomaly if the postponement provisions applied to some pure economic losses and not others, with the distinction based solely on the type of property involved. The underlying policy concern - protection for the plaintiff whose cause of action would otherwise expire before the loss or damage became apparent - is the same.

**53**  I therefore find that all common issues are potentially subject to postponement of the applicable limitation period under s. 6(3)(*b*).

**Professional *Negligence*: s. 6(3)(*c*)**

**54**  Because I have found that s. 6(3)(*b*) has potential application to all common issues, it is not necessary to consider whether they fall within any of the other categories in s. 6(3). However, I will address the question of whether s. 6(3)(*c*) applies because the defendant Towers has advanced a separate argument that applies only to it.

**55**  Towers provided professional advice only to Teck. It argues that the term "professional ***negligence***", as used in the Act, must be given the meaning that would have been understood and intended by the legislature when the Act was enacted in 1975.

**56**  At that time, Towers says, the term referred only to claims in contract brought against professionals by their own clients. Because the right to bring an action in contract arises at the date of breach, not the date of damage, there had been cases in which plaintiffs found claims against professional advisors to be statute-barred before they became aware of the ***negligence*** and before any loss was suffered, *Schwebel v. Telekes*, [*[1967] 1 OR 541*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJT1-JK4W-M450-00000-00&context=) (CA).

**57**  Towers says s. 6(3)(*c*) was included in the Act for the sole purpose of remedying that problem, as had been recommended by the Law Reform Commission of British Columbia in its 1974 *Report on Limitations*. The report said at 73:

It is not difficult to envisage situations in which relief ought to be available, but which do not involve a personal injury. A solicitor may negligently cause his client to acquire an imperfect title to land which only comes to light at some later date when the client attempts to resell the property. Should that solicitor be relived of the consequences of his conduct by the mere running of time? We think not. How far should the boundaries of this relief extend? ...

The most acceptable solution would seem to be that first propounded by the Alberta Uniformity Commissioners in their report to the 1968 Conference: that relief be restricted to actions involving personal injury, property damage, and professional ***negligence***.

**58**  The report of the Alberta Commissioners, referred to in that passage, had said at 70:

The great difficulty arises where the claim is on the borderline of tort and contract. This can arise where the claim is for bodily injuries and also for property damage and indeed there may be a third category, financial loss, which is usually a claim for professional ***negligence***, e.g., against a solicitor or architect. The reason for the difficulty is that a cause of action in contract arises on breach and in tort [with irrelevant exceptions] on damage.

[Square brackets in original.]

**59**  While the position of a professional's own client was a matter of concern to the law reform commission and the legislature, I do not accept that the legislature intended to limit the reference to professional ***negligence*** to claims in contract. By 1975, it was well recognized that professionals and others who have special expertise could in some circumstances be liable in tort to plaintiffs who were not their clients. The landmark English case of *Hedley Byrne v. Heller*, [1964] AC 465, had been decided in 1964 and the 1972 edition of Allen Linden's *Canadian* ***Negligence*** *Law* (Toronto: Butterworths), had said, at 39:

The duty owed by a lawyer to his client has been founded on contract, not on tort, for well over a century. Since 1964, however, third persons, who may not be clients, may also sue lawyers in tort for ***negligence***, in certain circumstances.

**60**  The real difficulty being addressed by the law reform commission in the passages relied upon by Towers was that, at the time, claims in tort were generally not available in circumstances where the relationship between the parties was governed by contract: *J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co.*, [*[1972] SCR 769*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B02H-00000-00&context=). The legislature must have intended the postponement provisions to apply equally to plaintiffs who were clients of professional defendants and those to whom a duty arose on a different basis.

**61**  Even if Towers is correct in its assertion that the legislature, in 1975, understood the term "professional ***negligence***" to be limited to claims by clients in contract, that is not necessarily how the term should now be interpreted. Whether a statute must be construed in accordance with its original meaning depends on the nature of the statutory provision at issue. In *R. v. Perka*, [*[1984] 2 SCR 232*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-233R-00000-00&context=), the Supreme Court of Canada said at 264:

The doctrine of *contemporanea expositio* is well established in our law. "The words of a statute must be construed as they would have been the day after the statute was passed ..." *Sharpe v. Wakefield* (1888), 22 Q.B.D. 239, at p. 242 (*per* Lord Esher, M.R.). See also Driedger, *Construction of Statutes* (2nd ed. 1983) at p. 163: "Since a statute must be considered in the light of all circumstances existing at the time of its enactment it follows logically that words must be given the meanings they had at the time of enactment, and the courts have so held"; *Maxwell on the Interpretation of Statutes, supra*, at p. 85: "The words of an Act will generally be understood in the sense which they bore when it was passed".

This does not mean, of course, that all terms in all statutes must always be confined to their original meanings. Broad statutory categories are often held to include things unknown when the statute was enacted.

**62**  The types of actions referred to in s. 6(3) are broad categories and, in my view, *Dayhu* confirms that they have been and must be interpreted in light of subsequent developments in the law.

**63**  I therefore conclude that postponement is potentially available to the plaintiffs' claims of professional ***negligence***.

**Wilful Concealment: s. 6(3)(*e*) and Breach of Trust: s. 6(3)(*h*)**

**64**  As said above, I have found s. 6(3)(*b*) to be applicable and broad enough to make postponement arguable on all common issues. It is therefore not necessary for me to decide whether the plaintiffs can rely on alleged wilful concealment of facts under s. 6(3)(*e*) or whether s. 6(3)(*h*) might apply to a broader definition of "trust" than Teck has conceded.

**Summary and Conclusion**

**65**  For purposes of the *Limitation Act*, the plaintiffs' right to bring action arose on January 1, 1993, but all claims giving rise to common liability issues are subject to the postponement provisions in ss. 6(3) and (4) of the Act.

**66**  Of course, it will be for the plaintiffs and other class members, at a later stage in this proceeding, to prove the facts that they say entitle them to postponement. Some of those facts may be sufficiently applicable to all class members for consideration as additional common issues. I will leave it for the parties to consider that question and, if necessary, make further application.

**End of Document**

[***Wiggins v. British Columbia, [2007] B.C.J. No. 2459***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-21NG-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

N.J. Garson J.

Heard: September 13 and November 2, 2007.

Judgment: November 14, 2007.

Docket: S066445

Registry: Vancouver

**[2007] B.C.J. No. 2459** | 2007 BCSC 1644 | 162 A.C.W.S. (3d) 742

Between John Wiggins, Plaintiff, and Her Majesty the Queen in the Right of the Province of British Columbia, Defendant BROUGHT UNDER the Class Proceedings Act, R.S.B.C. 1996, c. 50

(20 paras.)

**Case Summary**

**Civil procedure — Actions — Parties — Class or representative actions — Government or Crown agents — Application by the plaintiff Wiggins to amend his amended statement of claim allowed — The plaintiff's proposed class action against the defendant Crown related to the school board's requirement of payment of certain fees — The school boards were not necessary parties — A trial would be required to determine whether the Crown owed the plaintiff a direct duty of care with respect to the activities of the school boards — The pleadings were sufficiently clear as to the particulars of the alleged *negligence*.**

**Civil procedure — Pleadings — Amendment of — Statement of claim — Adding a new cause of action — Particulars — Application by the plaintiff Wiggins to amend his amended statement of claim allowed — The plaintiff's proposed class action against the defendant Crown related to the school board's requirement of payment of certain fees — The school boards were not necessary parties — A trial would be required to determine whether the Crown owed the plaintiff a direct duty of care with respect to the activities of the school boards — The pleadings were sufficiently clear as to the particulars of the alleged *negligence*.**

**Government law — Crown — Actions by and against Crown — *Negligence* by Crown — Application by the plaintiff Wiggins to amend his amended statement of claim allowed — The plaintiff's proposed class action against the defendant Crown related to the school board's requirement of payment of certain fees — The school boards were not necessary parties — A trial would be required to determine whether the Crown owed the plaintiff a direct duty of care with respect to the activities of the school boards — The pleadings were sufficiently clear as to the particulars of the alleged *negligence*.**

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| Application by the plaintiff Wiggins to amend his amended statement of claim -- The plaintiff's proposed class action against the defendant Crown related to the payment of school fees -- He claimed that the fees, required by provincial school boards, were in contravention of the School Act and regulations -- His amended statement of claim against the Crown was based on vicarious liability -- The plaintiff sought to amend the amended claim to plead direct ***negligence*** by the Crown in allowing the school boards' unlawful activities -- The defendant opposed the application on the grounds that the school boards should be added as party defendants where relief was sought against them, and that the amendments related to ***negligence*** without pleading material facts -- HELD: Application allowed -- The school boards were not necessary parties -- It was not plain and obvious that the plaintiff's claims could not succeed -- A trial would be required to determine whether the Crown owed the plaintiff a direct duty of care with respect to the activities of the school boards -- The pleadings were sufficiently clear as to the particulars of the ***negligence*** alleged against the Crown. |

**Statutes, Regulations and Rules Cited:**

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

Crown Proceedings Act, [*R.S.B.C. 1996, c. 89, s. 2*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FM1-JG59-220D-00000-00&context=), s. 3(2)(d)

School Act, R.S.B.C. 1990, c. 412

School Board Fees Order 125/90,

**Counsel**

Counsel for the Plaintiff: J.M. Poyner.

Counsel for the Defendant: T.H. MacLachlan, Q.C.

**Reasons for Judgment**

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| **N.J. GARSON J.** |

**Introduction**

**1**  The plaintiff applies to further amend his statement of claim in this proposed class action.

**2**  The defendant opposes the further amendment, as it is framed in the proposed further amended statement of claim on the grounds that the claim, as originally plead and as amended, is an abuse of process. The defendant says the allegations against it are based on its alleged direct liability in ***negligence*** in failing to ensure British Columbia school boards comply with the ***School Act***, R.S.B.C. 1990, c. 412. The defendant says British Columbia school boards are independent legal entities incorporated pursuant to the ***School Act***, and they have legal standing to be joined where relief is, in essence, being sought against them, and accordingly the British Columbia school boards should be added as defendants before the plaintiff is permitted to further amend his claim.

**3**  The second ground for opposing the amendment is that the further amendment is based on ***negligence*** and the plaintiff has failed to plead any underlying material facts.

**Background**

**4**  The within proposed class action is based on the plaintiff's assertion that he, and others in the proposed class, paid school fees, as required from time to time by the British Columbia school boards, in contravention of the ***School Act*** and the ***School Board Fees Order*** 125/90, as amended from time to time.

**5**  The plaintiff at first sought certain amendments based on the theory that the Crown was vicariously liable for the alleged breach of the ***School Act*** by the British Columbia school boards. The plaintiff was asked by the court to consider if s. 3(2)(d) of the ***Crown Proceedings Act,*** *R.S.B.C. 1996, c. 89*, which states that nothing in s. 2 of the ***Crown Proceedings*** ***Act*** "authorizes proceedings against the government for a cause of action that is enforceable against a corporation or other agency owned or controlled by the government", was an impediment to the action, as it was then framed. The plaintiff then withdrew his proposed amendment and replaced it with a second draft amendment pleading only that the Crown was directly liable in ***negligence*** for failing to ensure the British Columbia school boards complied with the ***School Act***.

**6**  It is the application to amend the statement of claim to plead direct ***negligence*** and not vicarious liability that is now before me.

**7**  The following proposed further amended sections of the statement of claim are pertinent to this application:

3. Section 93 of the *Constitution Act*, 1867 (U.K.). 30 & 31 Victoria c. 3 gives each of the provinces in Canada exclusive jurisdiction to enact laws governing education.

4. The Province has chosen to fulfil its obligations in the provision of, and the funding for, all aspects of public education through the enactment of the British Columbia *School Act*.

5. Through the provisions contained in the *School Act* and in particular, though not exclusively, s. 168(2) thereof, the Province maintains wide and exclusive authority for, and control over, the provision of educational services for residents within the Province of British Columbia.

6. The Province, under the provisions contained in the *School Act*, has established discrete school districts, each operating through boards of elected school trustees throughout the Province of British Columbia (hereinafter referred to as "School Boards").

7. In partial satisfaction of its responsibility to provide funding as aforesaid, the Province, through various Ministerial Orders amended from time to time and known as "School Board Fees Orders" has empowered School Boards throughout British Columbia to charge fees for certain categories of goods and services provided by the School Boards to students of school age who are resident in each school district and has also prohibited them from charging certain fee.

...

12.<u/> Fees paid by the Plaintiff to schools in British Columbia have been billed and received by each respective school on behalf of its controlling School Board which in turn has directed the billings and has received the fees on behalf of the Province.

...

15. Fees billed to and paid by the Plaintiff as set out in paragraphs 13 and 14 herein have been unlawfully charged by the schools or School Boards on behalf of the Province in contravention of the provisions of the *School Act*, *R.S.B.C. 1996, c. 412* and of the School Board Fees Order 125/90 as amended from time to time.

16. School Fees, which have been billed to and paid by the Plaintiff as aforesaid, are in contravention of the provisions of s. 82(1) of the *School Act* and are also in contravention of the provisions contained in the School Board Fees Order, being Ministerial Order 125/90 as amended from time to time.

17. School fees billed to and paid by the Plaintiff as aforesaid are unlawful because they have been charged for the provision of instruction and resource materials in educational programs **required to meet the general requirements for graduation.**

18. The Plaintiff says that the Province has a duty to oversee and control the activities of its agents, the schools and/or the School Boards in British Columbia, and to ensure that their billings, rendered as aforesaid, are in compliance with the provisions of s. 82(1)(a) of the *School Act* and of the School Board Fees Order 125/90 as amended from time to time, and that the Province's ***negligence*** in failing to take these steps has caused the Plaintiff and putative class members damages.

19. This action is brought on behalf of the Plaintiff and on behalf of a proposed class of persons with similar claims pursuant to the provisions of the *Class Proceedings Act*, *R.S.B.C. 1996, c. 50* and described as follows:

**All persons, resident in British Columbia, who claim to have been billed fees by, and to have paid fees to, since January 1, 1990, a school or a School Board in British Columbia for goods and services necessary for a student to complete education programs required for graduation.**

**WHEREFORE, THE PLAINTIFF CLAIMS ON HIS OWN BEHALF AND ON BEHALF OF MEMBERS OF THE PUTATIVE CLASS AS FOLLOWS:**

1. damages for ***negligence***;
2. interest pursuant to the *Court Order Interest Act*;

(c) costs; and

(d) such further and other relief as to this Honourable Court mayseem just.

**Analysis**

**8**  This lawsuit has its genesis in the case of ***Young v. British Columbia (Minister of Education)***, [*2006 BCSC 1415*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JX3N-B1KW-00000-00&context=), [*60 B.C.L.R. (4th) 163*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JX3N-B1KW-00000-00&context=), where the plaintiff sought declaratory relief against the Minister of Education and the Attorney General for British Columbia. No school board was joined as a party in the ***Young*** action, notwithstanding that the petitioner sought declarations in the alternative that the school boards may not charge for materials and equipment necessary to meet the learning outcomes of an educational program. However, Johnston J. did find that a school board was not permitted to charge student fees for any materials required for a course leading to graduation. At paras. 60, 62 and 66 he found:

No school boards are parties to this action. I will not infer that any of them are acting contrary to law, even inadvertently. Any suggestion that any school board is charging fees not permitted by the *Act* should be explored in an action supported by admissible evidence, and with the necessary parties before the court.

...

In summary, a school board is not permitted to charge students fees for any materials, or for musical instruments, that are required for students to successfully complete a course leading to graduation. Similarly, any portion of a course that occurs outside the classroom or school, and which the teacher considers necessary for "... the communication of information or knowledge to students ... sufficient to meet the learning outcomes or assessment requirements of an educational program provided by a board;" must be free to the student. Field trip, or other extracurricular outings or events, not considered by the teacher or the school to be so necessary, should be purely voluntary and a school board may charge fees. As some fees can be properly charged under ss. 4 and 5, the provisions of s. 6 are not only permissible as within the authority of the Minister to order, but to be commended.

...

These claims trouble me because they ask the court to decide what may or may not be done by school boards when they have not been parties to the action, were not before the court, and have had no opportunity in this proceeding to lead evidence or to make submissions. To obtain such declaratory relief, the petitioner should have joined in the petition the school boards he complains about, and given them an opportunity to respond. I do not think it either wise or proper to go any further than I have already gone in these reasons.

**9**  The Crown relies on the judgment of Johnston J. in ***Young*** at para. 66 to argue that the plaintiff could not succeed on his proposed further amended statement of claim because that would require a court to decide what may or may not be done by school boards when they have not been parties to the action, were not before the court, and have had no opportunity in the proceeding to lead evidence or make submissions.

**10**  The plaintiff stands by the proposed further amendment which he says is sufficient to plead that the Crown is directly liable in ***negligence*** for the alleged unlawful activities of the British Columbia school boards.

**11**  The pertinent legislation was reviewed by Johnston J. in the ***Young*** case. He concluded that British Columbia school boards are not entitled to charge fees for materials necessary for a student to complete a course that is part of the educational program leading to graduation. With respect to the School Board Fees Order, he found that there was some ambiguity in the language of the Order and accordingly he read down the School Board Fees Order to make it consistent with the ***School Act***. Having read the School Board Fees Order down in a manner that interpreted it as consistent with the ***School Act***, he found nothing in either enactment was *ultra vires*.

**12**  It appears, according to the statement of claim in this action, that Mr. Wiggins, the plaintiff, was charged school fees he alleges are in contravention of the law. What the Crown objects to in the proposed further amended statement of claim, is the allegation that the Crown is liable, in ***negligence***, for the misinterpretation and misapplication of provincial legislation by an independent legal entity, the British Columbia school boards.

**13**  In ***J.C.R. (Litigation Guardian) v. British Columbia***, [*2007 BCCA 496*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-F5KY-B1M8-00000-00&context=), the Crown applied for leave to appeal from an order granting the plaintiff leave to amend his statement of claim. Donald J.A. refused leave. The plaintiff, J.C.R., had sued the Crown for damages alleging that the Crown was vicariously liable for sexual abuse suffered by him while he lived in a foster home. Neither the individual (another foster child) alleged to have committed the assault, nor the foster parent, were joined as defendants. Donald J.A described the arguments of the Crown at paras. 10 to 14:

The Crown accepts that it may be vicariously liable for the ***negligence*** of its employees but submits that it cannot be directly liable in ***negligence***, as a matter of law. The Crown says that it is therefore plain and obvious that the plaintiff's claim of direct liability will fail.

The Crown argues that it cannot be directly liable for two reasons. First, the tort of ***negligence*** involves a mental element of fault. In the case of Her Majesty, who is the legal entity before the court pursuant to Crown proceedings legislation, the necessary mental element is not present because Her Majesty is not herself involved in any of the relevant acts or omissions. This is reflected, the Crown submits, in the language of the Crown proceedings legislation in every Canadian common law jurisdiction except British Columbia.

Second, the Crown says that the Supreme Court of Canada decision in *K.L.B. v. British Columbia*, 2003 S.C.C. 51, [*[2003] 2 S.C.R. 403*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0Y8-00000-00&context=), (S.C.C.) does not, as the chambers judge held, create an ambiguity as to whether the Crown may be directly liable. According to the Crown, the Supreme Court of Canada was not considering whether Her Majesty could herself be held directly liable for ***negligence***.

The Crown says that its proposed appeal has merit, for the above reasons, and that the appeal is important to all claims of ***negligence*** against the Crown.

The Crown says that the appeal has utility because there is no basis for the claim that Her Majesty has knowledge of the acts or omissions of social workers, and thus the Crown should not have to demand particulars, demand documents and examine for discovery in an attempt to understand the claim.

**14**  At paras. 18 to 20, Donald J.A. said that having ascertained from counsel that the plaintiff's only assertion was "that the duty of care alleged in support of direct liability is based on the statute," the question of whether the Crown could be found directly liable could be "debated at trial".

**15**  Similarly, in this case, the Crown argues that it cannot be directly liable for the breach of a statute by another person, or legal entity. However, the plaintiff's case rests on the notion that the Crown owes a duty of care to ensure the activities of the British Columbia school boards are in compliance with provincial law.

**16**  My task at this stage of the proceedings is only to assess whether it can be said that it is plain and obvious that a reasonable cause of action is not disclosed: ***Forliti (Guardian ad litem of) v. Woolley,*** [*2003 BCSC 1082*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JS0R-22G1-00000-00&context=), [*17 B.C.L.R. (4th) 184*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JS0R-22G1-00000-00&context=).

**17**  The trial is the forum to determine if the plaintiff has proven that the Crown owes him a duty of care and that the Crown is liable for failing to "oversee and control the activities of its agents, the schools and/or the School Boards". I cannot say that these pleadings are so deficient that they do not meet the low threshold to allow the application.

**18**  With respect to the complaint that there are no particulars of the ***negligence*** alleged, I think it is sufficiently clear that the particulars of ***negligence*** are those set out in the paragraphs that precede para. 18. The pleading is adequate in its present form. The plaintiff's application to further amend the pleadings is therefore allowed.

**Disposition**

**19**  The plaintiff's application to further amend his statement of claim is allowed.

**20**  The parties should arrange a further case management conference to set the terms and schedule of the next steps in the proceeding toward certification.

N.J. GARSON J.

**End of Document**

[***A.B. v. C.D., [2011] B.C.J. No. 1087***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JJK6-S25R-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

V. Gray J.

Heard: September 27-30, October 1, 4-6, 8 and November 2-3,

2010.

Judgment: June 14, 2011.

Docket: S090657

Registry: Vancouver

**[2011] B.C.J. No. 1087** | 2011 BCSC 775 | 2011 CarswellBC 1480 | 205 A.C.W.S. (3d) 968

Between A.B., Plaintiff, and C.D. and Board of School Trustees of District E.F., Defendants

(193 paras.)

**Case Summary**

**Damages — For torts — Affecting the person — Assault — Sexual assault — Action by student sexually touched by high school teacher for damages for sexual battery allowed — Student unable to consent to seven incidents of touching based on parties' relationship — Teacher pleaded guilty in court to sexual touching of young person over whom he had authority — School board not liable where it did not create opportunity for improper conduct to occur and could not have discovered conduct had it investigated earlier.**

**Damages — Physical and psychological injuries — Psychological injuries — Emotional and mental distress — Personality change — Post-traumatic stress disorder (PTSD) — Action by student sexually touched by high school teacher for damages for sexual battery allowed — Student willing but unable to consent to seven incidents of touching based on parties' relationship — Student left with psychological problems resulting in lost year of university, personality changes and PTSD — Damage awards included $50,000 for non-pecuniary loss, $30,000 for lost income, special damages for counselling and lost tuition costs and $20,000 for three more years of counselling.**

**Damages — Types of damages — General damages — For personal injuries — Cost of future care — Loss of earning capacity — Special damages — Expenses and expenditures — Non-pecuniary loss — Action by student sexually touched by high school teacher for damages for sexual battery allowed — Student willing but unable to consent to seven incidents of touching based on parties' relationship — Student left with psychological problems resulting in lost year of university, personality changes and PTSD — Damage awards included $50,000 for non-pecuniary loss, $30,000 for lost income, special damages for counselling and lost tuition costs and $20,000 for three more years of counselling.**

**Education law — Civil liabilities — Of school boards and schools — Injuries and property damage — On school premises — Emotional injuries — Harassment and emotional abuse — Sexual harassment or abuse — Vicarious liability of school board and schools — For acts of staff — Of school staff — Injuries and property damage — On school premises — Emotional injuries — Harassment and emotional abuse — Sexual harassment or abuse — Action by student sexually touched by high school teacher for damages for sexual battery allowed — Student unable to consent to seven incidents of touching based on parties' relationship — Teacher pleaded guilty in court to sexual touching of young person over whom he had authority — School board not liable where it did not create opportunity for improper conduct to occur and could not have discovered conduct had it investigated earlier.**

**Tort law — Trespass — To person — Battery — Defences — Consent — Action by student sexually touched by high school teacher for damages for sexual battery allowed — Student unable to consent to seven incidents of touching based on parties' relationship — Teacher pleaded guilty in court to sexual touching of young person over whom he had authority — School board not liable where it did not create opportunity for improper conduct to occur and could not have discovered conduct had it investigated earlier.**

**Tort law — Vicarious liability — Liability of employer for acts of employee — Action by student sexually touched by high school teacher for damages for sexual battery allowed — Student unable to consent to seven incidents of touching based on parties' relationship — Teacher pleaded guilty in court to sexual touching of young person over whom he had authority — School board not liable where it did not create opportunity for improper conduct to occur and could not have discovered conduct had it investigated earlier.**

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| --- |
| Action by AB seeking damages from her former high school teacher CD for sexual battery. She also sought damages from the school board. AB was a good student in high school and had a good relationship with CD, a popular English teacher. AB sought out opportunities to spend more time at school with CD and started flirting with him. She researched the law regarding the age of consent. CD indicated he would not have a sexual relationship with AB while she was his student. Nonetheless, when the opportunity arose, CD on seven occasions over a five-month period touched her in a sexual manner. Close to the end of high school, AB began to distance herself from CD, feeling as though he was not treating her appropriately academically as well as in their relationship. Another student became close with CD and this irritated AB. She met with the student and subsequently informed her parents she had been sexually touched by CD. CD was suspended from teaching, was charged and pleaded guilty to the sexual touching of AB, a young person, while he was in a position of authority. AB went out-of-province to university as she had planned, but did not do as well as expected. She did not make friends and called her parents frequently. She changed her career focus from journalism and returned to B.C. to study and live at home. She became more dependent on her family than she had been in high school and struggled emotionally. Her counsellor reported she suffered from psychological problems including self-loathing, anxiety, shame, embarrassment, suspiciousness and interpersonal neediness. He diagnosed a chronic post-traumatic stress disorder. He considered AB likely to continue to experience interpersonal difficulties, which would probably impact her employment and education. Her prognosis for recovering from her difficulties was good.  HELD: Action allowed as against CD and dismissed against the school board.  Although she was almost 18 years old and sexually experienced at the time of her relationship with CD, AB was, by the nature of the relationship, unable to consent to sexual relation with CD. CD was liable for damages AB sustained as a consequence of the sexual battery. The school board was not negligent in failing to stop CD from engaging in sexual battery with AB. It had no duty to provide special oversight of their relationship simply based on the amount of time they spent together. AB concealed her relationship with CD and would not have revealed any details of their relationship if questioned. The Board would not have discovered anything from investigating the matter with CD. The Board was not vicariously liable for CD's conduct, despite the fact the battery took place during the course of his employment. The Board did not create opportunities for the pair to spend inordinate amounts of time together, nor did not it give CD unlimited power over AB. Given the seriousness of battery and its duration, the nature of the parties' relationship and the effects it had on AB, AB was entitled to $50,000 in non-pecuniary damages. She was awarded $30,000 for future income loss, as she was set back one year in entering the workforce because of her failed year of university studies in an area CD recommended. She was entitled to recover tuition costs for this year as well as her counselling costs as special costs, but was not entitled to costs associated with the location of the university she chose out-of-province. A fair award of $20,000 for future care would provide AB with three years of weekly counselling. No punitive damages were warranted. |

**Statutes, Regulations and Rules Cited:**

Criminal Code, R.S.C. 1985, c. C-46, s. 150.1, s. 153(1), s. 153(1)(a), s. 486.4(2)

Sex Offender Information Registration Act, [*S.C. 2004, c. 10*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-WB21-F57G-S22C-00000-00&context=),

**Counsel**

Counsel for the Plaintiff: M.R. Ellis, Q.C.

The Defendant, C.D.: In Person.

Counsel for the Defendant, Board of School Trustees of District E.F.: R.J. Harper, S. Harbottle.

**Reasons for Judgment**

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| **V. GRAY J.** |

**1**   AB has sued CD, who is one of her former high school teachers, and the Board of School Trustees of District EF, which is the school board which employed CD at the material times.

**2**  There is an existing ban under s. 486.4(2) of the *Criminal Code*, R.S.C. 1985, c. C-46, prohibiting publication of AB's name, or any information that could identify her to the public. In addition, pursuant to my reasons for judgment dated October 29, 2011 and indexed at [*2010 BCSC 1530*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B32P-00000-00&context=), the style of cause was amended to refer to the parties by initials, and it was ordered that there shall be no publication of any information which would tend to identify AB, including the following:

1. the name of CD or information which would tend to identify him;
2. the name of AB's former high school ("GH School"); and
3. the name of the Board of School Trustees of District EF ("Board EF") or information which would tend to identify it.

**3**  AB alleges that CD is liable to her for sexual battery. She alleges that she has suffered psychological injury, and she claims general damages, aggravated damages, damages for lost future earning capacity, damages for cost of future care, and special damages. She alleges that Board EF is liable to her for ***negligence*** and breach of confidentiality and privacy, and on the basis that it is vicariously liable for the conduct of CD.

**4**  AB's claim proceeded to an 11-day trial. AB and Board EF were represented by counsel, while CD acted in person. CD did not testify. I am grateful to counsel for AB and Board EF for their efficient and focused presentation of the evidence, and their thorough submissions.

**5**  The issues are as follows:

1. Is CD liable to AB for sexual battery?
2. Is Board EF liable to AB for breach of a duty of confidentiality?
3. Was Board EF negligent in failing to stop CD from sexual battery of AB?
4. If CD is liable to AB for sexual battery, is Board EF vicariously for CD's conduct?
5. If AB is entitled to an award, what should she recover for:
6. non-pecuniary and aggravated damages;
7. lost earning capacity;
8. special damages;
9. costs of future care; and
10. punitive damages?

**FACTS**

**6**  I begin by setting out the relevant facts in chronological order. I will be intentionally vague about dates and other details in order to comply with the existing publication bans. Instead of using calendar dates, I will make reference to AB's academic years.

1. **Prior to sexual touching by CD of AB**

**7**  Throughout her schooling, AB excelled academically. She lived in a small community in British Columbia with her parents and two younger siblings. She went to GH School throughout her high school years. There were about 1,200 students in GH School at the material times, and about 250 in each grade.

**8**  In the summer following her grade 9 academic year, AB had unwanted sexual intercourse with a boy her age. She was initially interested in the sexual activity, but she withdrew her consent during the course of the encounter, and the boy persisted. AB later came to consider this event to have been a "date rape".

**9**  CD first taught AB when AB was in grade 10. CD was in his 50s, and had been a teaching for a long time. He was head of the English department. He was a charismatic individual who was passionate about writing and literature, and was both inspiring to and demanding of his students. His students performed well on provincial examinations. Neither Board EF nor GH School had ever received a complaint that CD had engaged in inappropriate relationships or sexual relationships with students. The only complaints about CD were to the effect that he could be harsh with students he considered to be performing poorly.

**10**  AB was a student in CD's grade 10 English class, which was for advanced English students. During classes, CD sometimes singled out AB for praise. AB enjoyed and excelled in writing and English literature. CD encouraged AB to develop her writing talent.

**11**  AB told her mother in the summer following her grade 10 year about the "date rape" the prior summer.

**12**  AB took both an English class and Writing 12 during her grade 11 year. CD did not teach either class. AB won the writing prize for the Writing 12 class.

**13**  Although AB did not take any classes with CD when she was in grade 11, she still considered CD to be her favourite teacher. She visited CD in his classroom around class hours about once a week. At that time, she usually discussed with him her current English studies and work and her educational plans. Other students would be in the classroom.

**14**  AB had a boyfriend through most of her grade 11 year.

**15**  Near the end of AB's grade 11 academic year, a teacher I will refer to as "Teacher YZ" was suspended from GH School. AB did not take any classes with Teacher YZ.

**16**  Teacher YZ was a new and young teacher in a non-academic discipline. He was suspended because the administration at GH School thought he was involved in a sexual relationship with a student. The inappropriate conduct was alleged to have occurred outside the school and outside school hours. The student who was allegedly involved had been taking a number of classes with Teacher YZ, and had been acting as his "peer tutor". The sexual relationship allegedly occurred shortly after the student stopped attending GH School.

**17**  GH School encouraged students to act as peer tutors. A peer tutor was a senior high school student who assisted a teacher in teaching more junior high school students. There were usually about a dozen peer tutors in GH School at any particular time. Peer tutors were often students who had a particular interest and aptitude in the subject area, although sometimes they were students who were otherwise having difficulty obtaining enough course credit.

**18**  GH School was on a semester system. Each day, there were four blocks of classes, each block lasting about one hour and 20 minutes. Classes were scheduled for day one or day two, and the days alternated. As a result, students could take up to eight different classes each semester. Students who had enough credit to graduate could take a "spare" during a class time block, and were not required to be at school at that time.

**19**  In her grade 12 fall semester, AB's eight blocks consisted of the following: two "spares", two for a college-transfer level English class with CD (which was one block each day, during the fall semester only), one block of English literature with a teacher who was not CD, two blocks of other academic courses, and one block of peer tutoring with CD.

**20**  AB was a peer tutor for one of CD's grade 8 classes in the fall semester of her grade 12 year. She would make photocopies, mark the multiple choice parts of exams, play videos for the class, and sometimes work individually with a student who was having difficulty with course material.

**21**  One of AB's "spare periods" in the fall semester corresponded with CD's preparation block, when he did not teach a class. AB typically spent that spare in CD's classroom. Most of the time AB and CD were the only people in CD's classroom during CD's preparation block. However, sometimes other students spent time alone or in groups with CD during CD's preparation block. It was not unusual at GH School for students to be in a teacher's classroom during the teacher's preparation block in order to catch up on missed classes or assignments, or for general assistance. CD's classroom door was usually open, and other students and teachers sometimes came into the classroom during that block. Most of the time AB and CD discussed what AB was studying, her educational plans, other school activities, and AB's friends.

**22**  CD's classroom was located near the main school exit. Windows of CD's classroom faced two fields used for school sports. Student lockers were located in the hall outside the classroom.

**23**  The door to CD's classroom was rarely shut. There were usually students in his classroom, and often groups of students. Other teachers sometimes dropped in during classes and between classes. In addition, the principal and vice principal occasionally dropped into CD's classroom both during and outside class hours. CD routinely ate his lunch in the teachers' lunchroom and left school around 3:30 to 4:00 p.m.

**24**  During the beginning of her grade 12 academic year, AB was preparing applications for university. At that time, AB was passionate about English literature and writing. She decided, with encouragement from CD, to pursue post-secondary education in journalism. She wanted to attend university outside British Columbia, and CD encouraged her to go to a particular university on the basis of the strength of its writing program.

**25**  Around October of her grade 12 year, AB broke up with a boyfriend. She discussed it with CD, who encouraged the breakup and said that the boy was not AB's intellectual equal.

**26**  CD praised AB both for her work and her appearance.

**27**  AB was strong academically in all the subjects she pursued. She was a confident young person. Her religious involvement was minimal, consisting of simply going to church on Christmas Eve. During the beginning of her grade 12 academic year, she was involved both romantically and sexually with several boys her own age.

1. **Sexual touching**

**28**  In the fall of her grade 12 year, AB flirted with CD, by studying or sitting near to him and brushing up against him. CD commented on AB's sexiness.

**29**  At one point, CD asked AB if she was flirting with him. Embarrassed, she cried. CD commented that if he were not her teacher, he would love to make love to her, but he could not get involved with her because she was still his student, and he would save her a dance at the graduation ceremony.

**30**  Literature that was part of the curriculum for CD's college-transfer English class explored sexual themes and the power of women's sexuality, such as the book *Of Mice and Men*.

**31**  CD suggested that AB explore other literature and films beyond the course curriculum. Some of these involved relationships between older men and younger women, such as the films *American Beauty* and *Lost in Translation*.

**32**  There were seven incidents of sexual touching by CD of AB. They occurred in the period of about November through March of AB's grade 12 year.

**33**  The first incident occurred in November. AB was in CD's classroom during a "spare". CD asked AB if he had ever given her a hug and she said no. He then closed the door, told her to come to an area of the classroom which was hard to see into, and touched her sexually for two to three minutes. He hugged her, kissed her neck, smelled her hair, and touched her back, shoulders, and bottom.

**34**  There was a second hugging episode in December which was similar to the first. AB told a friend about the hugging around the time it occurred.

**35**  The third sexual touching incident was in December, and occurred after AB and two other girls were visiting CD in his classroom. AB was sitting on a desk. After the two other girls left, CD came up behind her, massaged her shoulders, and put his hands down the front of her shirt, touching her bare breasts and nipples with his hands, for about one minute. CD moved in front of AB, and AB leaned towards him in preparation to kiss him. CD said he could not kiss AB while he was her teacher, and they did not kiss.

**36**  Around this time, CD told AB not to tell anyone what was happening between them because he was her teacher and could lose his job. He also told her not to drink at parties, on the basis that she might say something about the relationship if she were drinking. Despite that, AB told one friend that CD had hugged her, and she did drink at parties.

**37**  Around this time, AB was chatting with a friend on an instant messenger service. She typed that she had read from the Canadian Justice website that the age of consent is 18 years where the sexual activity involves exploitative activity, such as prostitution, pornography, or where there is a relationship of trust, authority, or dependency, and that for other sexual activity, the age of consent is 14 years.

**38**  AB wrote that she was trying to think of some way to get around the law. She typed that she thought if she denied it or refused to press charges she could get around it, and that no one would find out until she turned 18 and would have moved. She typed that CD was afraid that she would get mad at him and charge him. Her friend typed that AB should just keep reassuring CD that she would not press charges.

**39**  Around this time, AB learned about criminal proceedings against a former Vancouver teacher, Tom Ellison, relating to his sexual relationships in the 1970s with some of his high school students. AB made a comment to CD suggesting that Mr. Ellison was a sexual offender. CD asked her if she thought it was different from AB's relationship with him. AB responded that one is a lot different from 20, meaning that she was one student, while there were about 20 complainants in the proceedings against Mr. Ellison.

**40**  AB always called CD "Mr. D", not by his first name.

**41**  Also in the fall semester of her grade 12 academic year, AB and a friend of hers proposed to the principal that they would start a new volunteer club. The school required clubs to have a teacher sponsor. AB and her friend proposed CD, and the principal agreed.

**42**  One of the reasons AB started the club was that she thought it would look good on her résumé and scholarship applications, and an existing club doing similar work was heavily supervised by a teacher AB did not like. AB wanted the club to be student run. Although CD was the sponsor teacher, he did not attend club meetings.

**43**  The fourth event of sexual touching was during the class for which AB was the peer tutor. A movie was playing in the classroom, and AB and CD were sitting beside each other, behind CD's desk. CD put his hand up AB's skirt, and touched her lightly on her underwear. Later, she put her hand on his crotch over his clothes. Subsequently, CD made a comment to AB suggesting he had had an erection.

**44**  CD told AB that they would consummate their relationship once she was no longer his student. She thought that meant after the end of the first semester, but he later told her that he would take her away after her graduation and "ravish" her.

**45**  Near the end of the fall semester, AB and a different friend proposed to the principal that they start a school newspaper, also with CD as a sponsor. The principal agreed.

**46**  Also near the end of the fall semester, AB asked the school counsellor for permission to assist CD as a peer tutor in a second block of classes. Because AB was already receiving credit for one peer tutoring class, this required the principal's approval. The principal approved it, and AB obtained credit for an Applied Skills course.

**47**  In the spring semester, AB's eight blocks consisted of the following: three "spares", the second half of the English literature class and the two blocks of other academic courses, and two blocks of peer tutoring with CD, one of which was classified for credit as "Applied Skills".

**48**  Neither the school counsellor nor the school principal raised any concerns with AB about the fact that in the spring semester, she had two blocks of peer tutoring with CD, and that he was the teacher sponsor for two clubs that AB had initiated with friends.

**49**  Again in the spring semester, one of AB's "spares" corresponded with CD's preparation block, and AB and CD usually spent that time together in CD's classroom.

**50**  A further episode occurred when there was a power outage and GH School cancelled classes. AB spent the day in CD's classroom with other students. AB was sitting on a desk in the classroom in the presence of at least one student. CD put his hand up AB's skirt and left it there for about half an hour, although this was not apparent to anyone other than AB and CD.

**51**  Another episode of sexual touching occurred in a book room. AB and CD went into the book room during a spare to get books for the grade 8 class. AB and CD were alone in the room when CD pulled up AB's shirt and kissed her abdomen and touched her breast. AB squirmed because she was nervous someone would see, and because she was uncomfortable with CD kissing her lower abdomen.

**52**  The seventh and final touching episode occurred in early spring, when CD attempted to put his hand under AB's underwear. She pushed his hand away. CD asked AB if she was scared, and she told him that she had her menstrual period, which was not true. The reason she said that was because she did not want CD to touch her that way because it felt too personal.

**53**  AB agreed on examination for discovery that she had "consented" to what CD was doing in the touching incidents, although it would be more accurate to say she acquiesced in the touching. The legal effect of this admission is discussed below.

**54**  All of the incidents of CD touching AB took place at the GH School premises. Most occurred during class hours, and the others occurred close to class times, at times when it was not unusual for students to speak to teachers.

**55**  None of CD's fellow teachers observed anything that they thought was inappropriate in CD's relationship with his students generally or with AB in particular. The observations of the other teachers were consistent with their impression that CD was a popular and inspiring teacher who was passionate about his subject area.

**56**  It crossed the mind of another teacher at GH School ("Teacher ST"), that AB might have a "teacher crush" on CD. Teacher ST considers crushes to be common. Teacher ST thought CD could handle such a crush. She testified that if she had thought there was any real concern, she would have reported it to the administration.

**57**  Later, Teacher ST wrote a note that she had noticed that AB was spending a lot of time with CD and she felt slightly uneasy but did not think anything was really going on. She did not at the time of the events suspect that there was a sexual relationship between AB and CD. She was a new teacher and was developing her own style of contact with students. In discussion with her fiancé, who was also a teacher at GH School but had more teaching experience than she did, she questioned whether CD was overly familiar with his students. Her fiancé reassured her that the style was acceptable and she did not pursue the matter further.

**58**  In the early part of the spring semester of her grade 12 year, AB grew disenchanted with CD. She felt he was criticising the way she spoke and was attempting to take credit for her success as a writer. She did not feel that he was sharing his life with her. She thought that he was being controlling and was leading her on. She thought they had planned to have sex by the end of the first semester, and felt angry and rejected when that did not occur.

**59**  AB felt that she could not win an argument with CD because he was a mature adult while she was only a teenager. AB discussed the relationship with a second friend, who was also a student in CD's class. AB told this friend that CD was fondling her. The friend suggested that CD was manipulating AB and abusing AB, and that the relationship was wrong.

1. **Grade 12 academic year following sexual touching**

**60**  AB asked her mother to arrange counselling, saying she wanted counselling for the "date rape". In fact, AB wanted counselling regarding her relationship with CD, and she discussed that with the counsellor. AB decided to withdraw from any special relationship with CD.

**61**  AB started to distance herself from CD. She successfully withdrew from any physical relationship with CD. She stopped visiting CD in her "spare" or after school, and she stopped attending the classes for which she was a peer tutor.

**62**  CD asked AB if she was breaking up with him, and in response, AB laughed but did not say anything. CD told AB that he would mark her absent if she kept skipping her peer tutoring classes. AB attended only about half of those classes, but CD only recorded four absences during her three classes with him that year.

**63**  AB continued to succeed academically. She won awards at school, in English classes with both CD and another teacher, and in another subject area, and she completed a further edition of the school newspaper. Her interaction with CD was limited to seeing him for references, in connection with his supervision of a project, and for the peer counselling classes she attended. During the classes she was scheduled to peer tutor which she did attend, she usually spent her time doing other work.

**64**  AB wanted to go to university away from home, and accepted a position in a journalism program outside British Columbia.

**65**  Late in the academic year, AB made a partial disclosure to her mother about her relationship with CD. AB told her mother that she did not care what CD thought, and he had been "hitting on" her, meaning that he had made approaches to her of a sexual or romantic nature. AB told her mother that she did not wish to discuss it any further.

**66**  During the last part of her grade 12 year, AB had a boyfriend who remained her boyfriend, off and on, for about a year and a half.

**67**  Also around the end of AB's grade 12 year, another female student ("Student WX") began spending a lot of time with CD. Teacher ST thought it was unusual that CD was spending so much time with Student WX, and asked CD about it in the presence of Student WX. CD said that Student WX was having problems at home. Teacher ST did not pursue the matter further.

**d) Summer between high school and university**

**68**  AB heard the rumour that Student WX was having an affair with CD, and met with Student WX. AB came to believe that CD was treating Student WX similarly to the way he had treated AB. Later, AB met with Student WX, AB's boyfriend, and another friend.

**69**  AB told her mother and then reported to the police that CD had touched her sexually. The police told AB not to tell anyone else about it, and to discuss it only with people who already knew. AB felt isolated, and spent time primarily with people who already knew about the touching.

**70**  Late in the summer, CD was suspended from his teaching duties.

1. **First year of university**

**71**  AB went to a university outside British Columbia and enrolled in journalism. Her parents and siblings remained in British Columbia. Her boyfriend went to Europe, and the relationship was on and off. AB lived at the university residence.

**72**  AB's first university year was difficult. It had a rocky start. In the "frosh" week, AB was drinking significantly to excess. Shortly after the conclusion of that week, she joined a religious group and took part in related events most days.

**73**  Early in AB's first year of university, CD was charged with touching AB, a young person, for a sexual purpose, when he was a person in a position of trust or authority towards AB. That was a charge under s. 153(1)(a) of the *Criminal Code.*

**74**  AB slept through a midterm examination in a course and dropped it. She also dropped her writing course, and became a part-time student for her first semester. She worked part-time at a retail store. She hated her university studies generally and journalism in particular. Her dislike for journalism related in part to her view that the media coverage of the charge against CD was intrusive and may have enabled people to identify AB despite the media ban.

**75**  AB was significantly distressed during her first year of university. She lost about 15 pounds over the year. She spoke to her parents frequently by video-conference on "Skype". These conversations occurred almost daily, and lasted up to five hours at a time. AB became very upset if her parents did not answer a call immediately. When AB had been in high school, AB did not talk to her parents for such long periods.

**76**  AB did not form any friendships until late into her first semester at university. She became embarrassed about eating alone in the cafeteria, so began eating alone in her residence room. She had intended to return home only at Christmas break, but instead made three trips back to British Columbia to be with her family during her first year of university.

**77**  AB was uncomfortable both when she was alone with a male pastor, and when a male professor sat beside her. She did not participate in class discussions with male professors, although she did participate when the professors were female.

**78**  In March of AB's first year of university, CD entered a plea of guilty and was convicted of the charge under s. 153(1)(a) of the *Criminal Code*, of touching AB, a young person, for a sexual purpose, during the period October through March of her grade 12 year, when he was a person in a position of trust or authority towards AB.

**79**  AB completed her first year with grades which for many students would be good, but which were poor in comparison with her prior and subsequent grades. She achieved one B, one B+, two As, and one A+.

**80**  CD was sentenced shortly after the end of AB's first year of university. He was sentenced to 14 days in custody, reduced by two days in respect of pre-sentence custody, and one year of probation, and was also ordered to provide a DNA sample, to pay a victim fine surcharge, and to comply with the provisions of the *Sex Offender Information Registration Act*, [*S.C. 2004, c. 10*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-WB21-F57G-S22C-00000-00&context=).

1. **From summer between first and second year to summer between third and fourth year**

**81**  In the summer following her first year, AB had a well-paid full-time seasonal summer job.

**82**  AB attended university in British Columbia for her second year. She took a course of study unrelated to journalism. She lived with her parents and siblings.

**83**  AB broke up with the boyfriend she had had since grade 12. She commenced a new relationship with a boy who is a couple of years younger than she.

**84**  During her second year of university, AB commenced counselling with a B.C. psychologist.

**85**  In the summer between her second and third year, AB again had a well-paid full-time seasonal job. During that summer, Dr. Korpach, psychologist, interviewed AB.

**86**  In AB's third year, she changed subject areas. In the summer following her third year she became an unpaid research assistant in the new academic discipline she began to pursue.

1. **At the time of trial**

**87**  At the time of trial, AB was in her fourth year of university. She was pursuing an honours program and expected to require five years to complete the program.

**88**  At trial, AB seemed happy in the relationship with her boyfriend of about one and one-half years. He was pursuing a non-academic career. AB was achieving good grades.

**89**  One of AB's friends thought AB was less confident than she had been before CD's touching, but that she had significantly improved. AB's social circle is small, partly because she avoids seeing former classmates from GH School and situations in which she might be asked about CD.

**90**  AB resumed counselling a few months prior to trial, this time with a male psychologist. However, AB continued to struggle emotionally. She was generally comfortable in a school setting, but she became overwhelmed by minor things, such as a change in routine or problems with her car. AB was very dependent on her family, and was more emotionally dependent on them than she had been while in high school.

**EXPERT EVIDENCE**

**91**  Dr. Korpach is a registered psychologist who prepared a 21-page written report and testified at trial on behalf of AB. Dr. Korpach reviewed AB's educational, medical, and counselling records, conducted psychological tests on AB, and interviewed AB for four hours in the summer between AB's second and third years of university.

**92**  Dr. Korpach's report suggested that the prognosis for AB's psychological recovery in certain areas was good. In the year and a half between the date of Dr. Korpach's interviews and trial, it was apparent that AB had made significant recovery. For example, AB appeared relatively happy in her relationship with her boyfriend, and she continued to perform well academically.

**93**  I generally accept Dr. Korpach's conclusions, although I have taken into account both AB's apparent improvement since Dr. Korpach's interviews, and the fact that some of AB's reports to Dr. Korpach were exaggerated with hindsight.

**94**  I accept the following findings:

1. AB is suffering psychological symptoms including self-loathing, shame, embarrassment, anxiety, suspiciousness and interpersonal neediness. She manifests a chronic post-traumatic stress disorder ("PTSD"), including symptoms of arousal (anxiety, irritability, hyper-sexual arousal, crying, hypersomnia), and avoidance (feelings of detachment from others, efforts to avoid places or people associated with certain other people, skipping school, dropping out of journalism, withdrawing from the university), as a result of the abuse and related events by CD. Considering mitigating factors including AB's supportive family and high intelligence, the prospect for recovery from those symptoms is good.
2. AB has substantial difficulties in personal relationships. She tends to sexualize male relationships, and avoids people with intellectual characteristics similar to CD's. CD's abuse contributed to significant damage for AB in this area, and the prognosis for recovery is fair, with some of these difficulties likely to continue through her life.
3. AB is likely to continue to experience interpersonal difficulties including sexualization of male relationships and distancing and alienation of female relationships, which is likely to impact her employment.
4. AB's recovery would be enhanced by moving out of the community of the GH School.
5. AB is likely to have ongoing issues in an academic environment, including difficulty with courses involving writing, male instructors, English, and intellectual environments. Her prognosis to recover from these difficulties is good.

**ANALYSIS**

1. **Is CD liable to AB for battery?**

**95**  The tort of battery requires proof of touching. If the plaintiff consented to the touching, or a reasonable person in the position of the defendant would have thought the plaintiff did so, the tort has not been established. That was set out by McLachlin J. (as she then was), for the majority, 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=), [*[2000] 1 S.C.R. 551*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M44Y-00000-00&context=) at para. 2, as follows:

[2] As Goff L.J. (as he then was) stated in *Collins v. Wilcock*, [1984] 3 All E.R. 374 (Q.B.), at p. 378, "[t]he fundamental principle, plain and incontestable, is that every person's body is inviolate". The law of battery protects this inviolability, and it is for those who violate the physical integrity of others to justify their actions. Accordingly, in my respectful view, the plaintiff who alleges sexual battery makes her case by tendering evidence of force applied directly to her. "Force", in the context of an allegation of sexual battery, simply refers to physical contact of a sexual nature, and is neutral in the sense of not necessarily connoting a lack of consent. If the defendant does not dispute that the contact took place, he bears the burden of proving that the plaintiff consented or that a reasonable person in his position would have thought that she consented. ...

**96**  CD did not testify. As set out above, CD was convicted of sexual touching of a young person towards whom he was in a position of trust or authority, pursuant to s. 153(1)(a) of the *Criminal Code*. Section 150.1 of the *Criminal Code* provides that, where an accused is charged with an offence under, among other sections, s. 153(1): "it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge".

**97**  Ms. Harper, counsel for Board EF, argued that AB consented to the sexual touching. Ms. Harper argued that consent remains a defence in a civil action for sexual assault, although it was of no effect as far as the criminal proceedings were concerned.

**98**  In *Olsen v. Olsen*, [*2006 BCSC 560*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B1RJ-00000-00&context=), Madam Justice Stromberg-Stein reviewed the authorities dealing with the issue of consent by young people to sexual acts. In that case, the male plaintiff had sued his older brother for conduct which occurred when the plaintiff was five or six through twelve years of age. The brother was four years older than the plaintiff.

**99**  Stromberg-Stein J. held that the plaintiff was not able to consent to the sexual contact. She wrote as follows at paras. 37-39:

[37] In my view, there is no reason to depart from Bennett J.'s analysis in *M.(M.) v. M.(P.)*, [*[2000] B.C.J. No. 2235*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G27H-00000-00&context=). It is appropriate to apply the criminal age of consent in a civil action for sexual battery. The age of consent, set at fourteen, is a matter of public policy to protect children from sexual exploitation. That public policy can dictate the law with respect to the legality of consent was confirmed 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=), [*92 D.L.R. (4th) 449*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-607N-00000-00&context=) at para. 34, where the Supreme Court of Canada commented:

... in certain situations, principles of public policy will negate the legal effectiveness of consent in the context of sexual assault. In particular, in certain circumstances, consent will be considered legally ineffective if it can be shown that there was such a disparity in the relative positions of the parties that the weaker party was not in a position to choose freely.

[38] Because of their relative immaturity and susceptibility to influence, young children are in an inherently weak position vis-à-vis an older initiator of sexual contact. For that reason, children must be protected by a clear rule of public policy setting an age limit under which any apparent consent is not legally valid.

[39] Both the criminal and civil law share the common goal and responsibility of protecting children from sexual exploitation. The tort of battery is particularly suited to further that purpose because, as Chief Justice McLachlin emphasized in *Sansalone*, [*[2000] 1 S.C.R. 627*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M450-00000-00&context=), battery is a tort that is focused on the child's right to physical inviolability and personal autonomy. It would introduce an odd inconsistency in the law if children were considered legally incapable of consenting to sexual activity for the purposes of the criminal law, but were capable of giving such consent in a related civil action.

**100**  Ms. Harper referred to *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=). She argued that when considering a civil claim for battery, the Court must look at the circumstances of each case to determine if there is an overwhelming imbalance of power in the relationship between the parties.

**101**  In this case, AB was a very intelligent young woman who was approaching the age of 18. While she was mature in many ways, she was too young to appreciate the emotional and psychological impact of a relationship with a man who was in a position of trust and authority over her.

**102**  The *Criminal Code* provisions recognize that young people are inherently vulnerable to persons in positions of authority or trust. While such young people may think that they are making a free choice to engage in a relationship with a person in authority, the very nature of the relationship precludes a free choice.

**103**  Like Stromberg-Stein J., I conclude that it would introduce an odd and problematic inconsistency in the law if young people were considered legally incapable of consenting to sexual activity for the purposes of the criminal law, but were capable of giving such consent in a related civil action.

**104**  The public policy set out in the *Criminal Code* has the effect that a young person under the age of 18 cannot consent to sexual contact with a person in authority, as a matter of law, whether the applicable proceedings are criminal or civil.

**105**  As a result, CD is liable to AB for any damages she suffered as a consequence of the sexual battery.

1. **Is Board EF Liable to AB for breach of a Duty of Confidentiality?**

**106**  Ms. Ellis, counsel for AB, did not pursue this claim in argument.

**107**  In her statement of claim, AB pleaded that Board EF had breached a duty of confidentiality by what was said on behalf of Board EF to AB's aunt when she answered the telephone at AB's family home.

**108**  However, the evidence of the aunt was that the representative of Board EF told her that he wanted to speak to AB about charges relating to CD. The aunt did not recall what the caller said about charges, and she may have simply guessed that the charges related to sexual touching. The aunt telephoned AB to tell her about the telephone call from the representative of Board EF, and before the aunt provided any details, AB told the aunt about the situation with CD and the pending charges.

**109**  The evidence does not support a finding that Board EF breached the duty of confidentiality it may have owed to AB. Even if it had, AB did not suffer damages, because AB chose to disclose all the details to her aunt before she knew what the aunt had been told.

1. **Was Board EF negligent in failing to stop CD from sexual battery of AB?**

**110**  Board EF owes a duty of care to its students to protect them from unreasonable risk of harm at the hands of other members of the school community: see *H.(S.G.) v. Gorsline*, [*2001 ABQB 163*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9361-JW5H-X4FN-00000-00&context=), [*[2001] 6 W.W.R. 132*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9361-JW5H-X4FN-00000-00&context=) at para. 84, aff'd [*2004 ABCA 186*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9371-JKHB-62VR-00000-00&context=), [*[2005] 2 W.W.R. 716*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9371-JKHB-62VR-00000-00&context=), leave to appeal ref'd [*[2004] S.C.C.A. No. 385*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SF1-F1P7-B3JG-00000-00&context=), [2005] 1 S.C.R. xv.

**111**  The standard of care to be exercised by school authorities in providing for the supervision and protection of students for whom they are responsible is that of the careful and prudent parent. This was set out by the Supreme Court of Canada in *Myers v. Peel County Board of Education*, [*[1981] 2 S.C.R. 21*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M21F-00000-00&context=).

**112**  AB argued that Board EF breached the duty of a careful or prudent parent, and that expert evidence concerning the standard of care was unnecessary.

**113**  In her statement of claim, AB simply alleged, at para. 23, as follows:

Other employees of [Board EF] knew or ought to have known that [CD] was engaging in a sexually exploitative relationship with [AB] and negligently failed to take any steps or adequate steps to protect [AB] from [CD].

**114**  Ms. Ellis provided particulars of the alleged ***negligence*** in her argument. She argued that a careful or prudent parent would have done the following:

1. ensured that teachers and administrators were made aware of the conditions that gave rise to the situation with the teacher YZ specifically, and with cases of inappropriate teacher-student relationships generally;
2. required and encouraged teachers and administrators to share all concerns or suspicions about unusual teacher-student interaction or relationships;
3. made inquiries into Teacher ST's wondering whether AB had a "teacher crush" on CD;
4. provided close oversight in circumstances where a student is spending more than 25% of her or his school week with one teacher, particularly where that included peer tutoring; and
5. made very close inquiries in a situation where a student sought a second block of peer tutoring with the same teacher.

**115**  Ms. Ellis argued that Board EF ought to have learned from the events with Teacher YZ, and developed a policy that involved careful scrutiny whenever a student was spending a lot of time with a teacher, such as by being a peer tutor. Essentially, Ms. Ellis argued that allowing a student to take many classes with a teacher led to a risk that the teacher would touch the student sexually, and that a careful or prudent parent would take the steps suggested by Ms. Ellis.

**116**  There are several difficulties with this argument. First, Teacher YZ was acquitted of any charges relating to his conduct with the student. There was no admissible evidence at trial that Teacher YZ did anything improper. Board EF was concerned that Teacher YZ may have acted improperly outside school hours and off the school premises, and as a result Board EF suspended Teacher YZ from teaching. However, that does not establish that Teacher YZ had an improper relationship with a student who was his peer tutor.

**117**  The fact that a student spends more time with a teacher will increase the opportunity for a teacher to touch the student sexually. However, the single case of suspected but unproven student touching by Teacher YZ cannot be said to have established a trend.

**118**  The evidence shows that peer tutoring is a useful program for students who have a particular interest in a subject area. While CD sexually touched his peer tutor AB, and Teacher YZ is also alleged to have sexually touched his peer tutor, it is not clear that the time the relevant parties spent together because of peer tutoring was a significant factor in developing the inappropriate relationship. Peer tutoring occurs in a class with a group of students, as do all classes. Group classes do not put the student in the position of being likely to be abused.

**119**  I am not able to conclude that it is inherently dangerous for a student to act as a peer tutor.

**120**  Secondly, Ms. Ellis argued that Board EF should have required teachers to share all concerns and suspicions about unusual teacher-student interactions or relationships. This requires determination of what is the threshold of a teacher or administrator having a concern or suspicion. The evidence at trial was that teachers knew they had an obligation to advise the administration if they suspected an improper relationship, but none of them suspected that CD was behaving improperly with AB.

**121**  In this case, Teacher ST, with the benefit of hindsight, commented that she was uncomfortable with the nature of the relationship between AB and CD. However, the evidence did not show that Teacher ST thought there was anything inappropriate occurring. In fact, when she developed concerns about CD's relationship with Student WX, Teacher ST took steps to investigate. The evidence does not demonstrate that Teacher ST's concerns about the relationship between AB and CD were of such a nature or sufficiently strong to require her to take any further steps.

**122**  Similarly, Teacher ST is the only person who said that it crossed her mind that AB might have a "teacher crush" on CD. The fact that a student might have a crush on a teacher does not establish that the teacher would be likely to commit the criminal and unprofessional act of sexual touching.

**123**  In addition, the suggestion that Board EF ought to provide special oversight when a student spends a lot of time with one teacher and is that teacher's peer tutor, again is not borne out by the evidence.

**124**  AB's reputation among teachers and the administration at GH School was that of a very strong student academically and a very good writer. CD's reputation among those teachers and administrators was of an inspiring teacher who challenged his students to continue to excel. The fact that AB spent many class hours and time around classes with CD at GH School was not something that did cause or should have caused other teachers and administrators to suspect that CD was pursuing an inappropriate relationship with AB. School Board EF did not breach the standard of care.

**125**  In this case, AB was determined to keep her relationship with CD secret from her parents and people in authority while the relationship was underway. This is apparent from AB's discussion with her friend on the instant messenger service. AB knew that the law provided that the age of consent to sexual activity with a person in authority was 18. AB did not reveal the relationship to her mother, even in part, until after the relationship was over, and did not reveal all of the details to her mother until AB came to believe that another girl was receiving similar attention from CD.

**126**  As a result, it is probable that if AB had been approached before any sexual touching occurred, or during the period when CD was touching AB sexually, AB would not have revealed any details about an improper relationship. An inquiry would not have stopped or prevented the touching.

**127**  Similarly, it is probable that CD would not have revealed the relationship, and that an inquiry would not have stopped or prevented his touching AB. He knew that the relationship was wrong, as demonstrated by his initial comments to AB that he would not pursue the relationship until she was no longer his student. He also tried to keep the relationship secret, by touching AB only privately, and by telling her not to tell anyone what was happening between them.

**128**  The evidence does not establish that any omission by Board EF caused the sexual touching. To establish ***negligence***, AB must establish, on a balance of probabilities, that the injury would not have occurred but for the ***negligence*** of Board EF (*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. 14). AB's claim does not fall within the exceptions to the "but-for" test. The particulars of the alleged ***negligence*** refer to making "inquiries" or providing "oversight." Essentially, Ms. Ellis argued that Board EF ought to have asked AB or CD or both about the nature of their relationship.

**129**  However, even if Board EF had failed to act in the manner of a careful or prudent parent by failing to make inquiries of AB and CD about their relationship, such inquiries would not have had any effect on whether CD would have sexually touched AB. Making inquiries of AB and CD would not have revealed the nature of the relationship.

**130**  AB's claim of ***negligence*** against Board EF is dismissed.

1. **Is Board EF vicariously liable to AB for CD's sexual battery?**

**131**  Employers are sometimes held vicariously liable for the acts of their employees even when the employer did not act negligently. The question of vicarious liability for sexual assaults committed by employees has been the subject of several cases in the Supreme Court of Canada. Two companion cases are the starting point for the analysis: *Bazley v. Curry*, [*[1999] 2 S.C.R. 534*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M42M-00000-00&context=); and *Jacobi v. Griffiths*, [*[1999] 2 S.C.R. 570*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M42N-00000-00&context=) ("*Jacobi/Griffiths")*.

**132**  The Supreme Court of Canada confirmed that the test for vicarious liability is governed by the *Salmond* test, which provides that employers are vicariously liable for (a) employee acts authorized by the employer; or (b) unauthorized acts so connected with authorized acts that "they may be regarded as modes (albeit improper modes) of doing authorized acts".

**133**  The test is set out in paras. 10-11 of *Bazley* as follows:

[10] Both parties agree that the answer to this question is governed by the *Salmond* test, which posits that employers are vicariously liable for (1) employee acts authorized by the employer; or (2) unauthorized acts so connected with authorized acts that they may be regarded as modes (albeit improper modes) of doing an authorized act. Both parties also agree that we are here concerned with the second branch of the test. They diverge, however, on what the second branch of the test means. The Foundation says that its employee's sexual assaults of Bazley were not "modes" of doing an authorized act. Bazley, on the other hand, submits that the assaults were a mode of performing authorized tasks, and that courts have often found employers vicariously liable for intentional wrongs of employees comparable to sexual assault.

[11] The problem is that it is often difficult to distinguish between an unauthorized "mode" of performing an authorized act that attracts liability, and an entirely independent "act" that does not. Unfortunately, the test provides no criterion on which to make this distinction. In many cases, like the present one, it is possible to characterize the tortious act either as a mode of doing an authorized act (as the respondent would have us do), or as an independent act altogether (as the appellants would suggest). In such cases, how is the judge to decide between the two alternatives?

**134**  CD's sexual touching of AB was not authorized by Board EF. The question is therefore whether CD's unauthorized acts were so connected with the authorized acts that they may be regarded as improper modes of doing an authorized act.

**135**  The Supreme Court of Canada sets out a two-step process for determining when an unauthorized act is so connected to the employer's enterprises that vicarious liability should be imposed. This is set out in para. 15 of *Bazley* as follows:

[15] This review suggests that the second branch of the *Salmond* test may usefully be approached in two steps. First, a court should determine whether there are precedents which unambiguously determine on which side of the line between vicarious liability and no liability the case falls. If prior cases do not clearly suggest a solution, the next step is to determine whether vicarious liability should be imposed in light of the broader policy rationales behind strict liability. This Court has an additional duty: to provide guidance for lower tribunals. Accordingly, I will try to proceed from these first two steps to articulate a rule consistent with both the existing cases and the policy reasons for vicarious liability.

**136**  Ms. Ellis argued that there was a psychological intimacy inherent in CD's role as an English teacher and that his role was analogous to being a secular priest. Ms. Ellis argued that an adolescent studying literature will struggle with issues relating to how he or she will act in the world, including issues of sexuality, and that literature deals with those issues.

**137**  In this case, CD was passionate about his subject area and charismatic as an individual.

**138**  The first inquiry is to determine whether there are precedents which unambiguously decide on which side of the line between vicarious liability and no liability the case falls.

**139**  Board EF relies on the decision of Alberta Court of Appeal in *Gorsline.*

**140**  In *Gorsline*, a physical education teacher and coach employed by the defendant school district sexually assaulted a 12-year-old student in 1977 and 1978. The teacher was the plaintiff's track and field coach, and sometimes worked with her after school, on weekends, and during holidays, and would at times drive her to track meets. The teacher's duties at the school included both teaching and coaching. The sexual assaults took place in the teacher's office, the school nurse's office, the teacher's vehicle, his home, and in a park.

**141**  The Alberta Court of Appeal upheld the finding of the trial judge that there was no significant connection between the duties of the teacher and his wrongful acts, and that the school district was not vicariously liable for his sexual assaults.

**142**  The trial judge had considered that, while the teacher's work provided him with the opportunity to commit the offences and a measure of authority over the students, this was insufficient to impose vicarious liability. The judge noted that the teacher's duties did not require anything approaching intimate contact, and the risk of harm was not substantially increased by the school board's encouragement of teachers to act as mentors and role models. The encouragement of students to listen to and respect teachers did not substantially increase the risk of harm.

**143**  As in this case, the student in *Gorsline* lived with her parents, who retained control and authority over her. As in this case, the teacher in question was only one of several teachers who taught the student. The student also had interaction with other administrators and counsellors that would dilute any influence the teacher may have had. The trial judge in *Gorsline* wrote that "[w]hen the School Board encouraged teachers to be role models and to develop a relationship of trust with students, it did not thereby encourage sexual intimacy" [at para. 77, cited to W.W.R.].

**144**  The trial judge wrote at paras. 78-79 that:

[78] ... It was a series of independent acts by this abuser for his own gratification that led to the wrongs committed. He carefully cultivated his relationship with the plaintiff; he made her feel special; he crafted an aura of secrecy and then intimacy. ...

[79] The fact that this teacher found a way to carry out his abuse during the school year and even within the school building does not satisfy the "close connection" required between his *duties* and his acts. Again, to paraphrase [*Bazley*] at para. 42, it cannot here be said that the school board significantly increased the risk of harm by hiring a teacher to teach. [Emphasis in original.]

**145**  Ms. Ellis argued that *Gorsline* could be distinguished because it related to acts which occurred in 1977. She argued that the consciousness of the risk of sexual assault of students by teachers has increased dramatically since that time.

**146**  While it may be that consciousness of that risk has increased, the analysis in *Gorsline* focused on whether the school board's undertaking, and the duties imposed on the teacher, substantially increased the risks of sexual assault. In my view that analysis applies in 2011 as it did in *Gorsline* regarding events which occurred in 1977.

**147**  A trial court in Newfoundland declined to follow the analysis in *Gorsline*. In *Doe v. Avalon East School Board*, [*2004 NLTD 239*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-T8W1-F2F4-G1HB-00000-00&context=), [*244 Nfld. & P.E.I.R. 153*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-T8W1-F2F4-G1HB-00000-00&context=), the Newfoundland and Labrador Supreme Court imposed liability against the school board for the sexual assault of a student committed by a teacher in 1995. The teacher, a computer instructor, directed the grade 12 student to leave the classroom to study alone in a computer room. The teacher escorted the student to the computer room, where the teacher placed his hands under the student's clothes and fondled his chest and genitals. The court held that the relationship between the employer and employee was sufficiently close and the wrongful act was a manifestation of the risks inherent in the employer's enterprise.

**148**  Like *Gorsline*, the decision in *Avalon East* is not binding on this Court. The judge in *Avalon East* did not consider *Gorsline* to be an unambiguous precedent, and continued to the next stage of the analysis set out by the Supreme Court of Canada. The trial judge found that the power and authority exercised by teachers in the school, while not the type of intimate parental role referred to by the Court in *Bazley*, was closer to the *Bazley* model than to the *Jacobi/Griffiths* model. He found that the district gave teachers significant power and authority over the students. The judge commented that the employer's responsibility to educate young people was directly connected to the employee being authorized to place the student alone in a room with the teacher.

**149**  With respect to the judge in *Avalon East*, I have difficulty distinguishing the analysis in *Avalon East* from that in *Gorsline*.

**150**  In my view, *Gorsline* is an unambiguous appellate decision that a school board should not be held vicariously liable for the sexual battery by a high school teacher who does not have intimate contact with the student in the course of the teacher's employment. While not binding on this Court, it is persuasive.

**151**  However, because *Gorsline* is not binding on this Court, I will go on to consider whether liability should be imposed in light of the broader public policy rationales behind the concept of strict liability. This is set out in para. 41 of *Bazley* as follows:

[41] Reviewing the jurisprudence, and considering the policy issues involved, I conclude that in determining whether an employer is vicariously liable for an employee's unauthorized, intentional wrong in cases where precedent is inconclusive, courts should be guided by the following principles:

1. They should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of "scope of employment" and "mode of conduct".
2. The fundamental question is whether the wrongful act is *sufficiently related* to conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the *creation or enhancement of a risk* and the wrong that accrues therefrom, even if unrelated to the employer's desires. Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence. Incidental connections to the employment enterprise, like time and place (without more), will not suffice. Once engaged in a particular business, it is fair that an employer be made to pay the generally foreseeable costs of that business. In contrast, to impose liability for costs unrelated to the risk would effectively make the employer an involuntary insurer.
3. In determining the sufficiency of the connection between *the employer's creation or enhancement of the risk* and the wrong complained of, subsidiary factors may be considered. These may vary with the nature of the case. When related to intentional torts, the relevant factors may include, but are not limited to, the following:
4. the opportunity that the enterprise afforded the employee to abuse his or her power;
5. the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);
6. the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
7. the extent of power conferred on the employee in relation to the victim;
8. the vulnerability of potential victims to wrongful exercise of the employee's power.

[Emphasis by McLachlin J.]

**152**  The Court stressed the importance of finding a "strong connection" or "material increase in the risk" as a consequence of the employer's enterprise. This is set out in paras. 42 and 46 of *Bazley* as follows:

[42] Applying these general considerations to sexual abuse by employees, there must be a strong connection between what the employer was asking the employee to do (the risk created by the employer's enterprise) and the wrongful act. It must be possible to say that the employer *significantly* increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks. The policy considerations that justify imposition of vicarious liability for an employee's sexual misconduct are unlikely to be satisfied by incidental considerations of time and place. For example, an incidental or random attack by an employee that merely happens to take place on the employer's premises during working hours will scarcely justify holding the employer liable. Such an attack is unlikely to be related to the business the employer is conducting or what the employee was asked to do and, hence, to any risk that was created. Nor is the imposition of liability likely to have a significant deterrent effect; short of closing the premises or discharging all employees, little can be done to avoid the random wrong. Nor is foreseeability of harm used in ***negligence*** law the test. What is required is a material increase in the risk as a consequence of the employer's enterprise and the duties he entrusted to the employee, mindful of the policies behind vicarious liability.

...

[46] In summary, the test for vicarious liability for an employee's sexual abuse of a client should focus on whether the employer's enterprise and empowerment of the employee materially increased the risk of the sexual assault and hence the harm. The test must not be applied mechanically, but with a sensitive view to the policy considerations that justify the imposition of vicarious liability -- fair and efficient compensation for wrong and deterrence. This requires trial judges to investigate the employee's specific duties and determine whether they gave rise to special opportunities for wrongdoing. Because of the peculiar exercises of power and trust that pervade cases such as child abuse, special attention should be paid to the existence of a power or dependency relationship, which on its own often creates a considerable risk of wrongdoing.

[Emphasis by McLachlin J.]

**153**  In *Bazley*, the Supreme Court of Canada held the institutional defendant vicariously liable for sexual assaults by an employee. The defendant was a non-profit residential care facility for emotionally troubled children between the ages of 6 and 12. The employees were required to perform intimate duties like bathing the children and putting them to bed. The enterprise was held to have fostered a power dependency relationship.

**154**  In contrast, in *Jacobi/Griffiths*, the Supreme Court of Canada did not hold the institutional employer vicariously liable for sexual assault by a recreational director. The program was for group activities for children to occur after school and on Saturdays. The abuse occurred off the premises, after hours, and the employee used bait, such as video games, to lure the children to his home.

**155**  The Court concluded that acting as a positive role model did not equal intimacy, and mentoring does not put an employee on the slippery slope to sexual abuse. Binnie J., for the majority, wrote as follows at paras. 82-83:

[82] My colleague finds that because the Club's formal constitutional objectives include the provision of "behaviour guidance and to promote the health, social, education, vocational and character development of boys and girls" (para. 16) it must be taken to have "encouraged an intimate relationship to develop between Griffiths and his young charges" (para. 17). With respect, using words like "intimate" and "trust and power" to describe the ordinary relationship between recreational directors and their after-school participants robs these words of their capacity to differentiate situations where vicarious liability may be appropriate from those where it is not. As noted by Professor H.J. Laski over 80 years ago in "The Basis of Vicarious Liability" (1916), 26 Yale L.J. 105, at p. 114:

The real problem in vicarious liability, in fact, is not so much the rectitude of its basal principles, as *the degree* in which they are to be applied.

I do not accept that an enterprise that seeks to provide a positive role model thereby encourages intimacy. Nor do I believe that "mentoring", as such, puts one on the slippery slope to sexual abuse. If it did, any organization that offered "role models" would be looking at no-fault liability. Most organizations dealing with children inevitably involve role models, from the neighbourhood soccer league to Girl Guides to the Duke of Edinburgh awards programs. "Mentoring" is characteristic of everything from Air Cadets to Big Sisters. I can find in the evidence nothing to suggest that Griffiths' own role required anything more than the establishment of a "rapport" with the children. There is no suggestion that physical intimacy would be either necessary or desirable. Intimacy between Griffiths and one or more of the members, even if maintained on a wholly non-sexual level, would have been destructive of the Club's program, leading to problems of favouritism, feelings of exclusion, and dissension.

[83] The Club did not confer any meaningful "power" over the appellants. They were free to walk out of the Club at any time. They went home to their mother every night. In the circumstances I agree with the point made by Newbury J.A. in the British Columbia Court of Appeal in the *Children's Foundation* case [*(1997), 30 B.C.L.R. (3d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21WB-00000-00&context=) (*sub nom. B. (P.A.) v. Curry*), at pp. 39-40:

Where, for example, a teacher uses his or her authority to develop a relationship with a pupil in his or her class and then abuses that relationship by approaching the child at a park during the summer holidays, it may be said that by employing the teacher and giving him or her some authority (albeit not parental authority) over the child, the teacher's employer "made the wrong more probable". But it is likely vicarious liability would not be imposed on the employer given the absence of a close connection between the teacher's duties and his or her wrongful acts. To put the matter another way, *the fact that the teacher took advantage of his opportunity at the school to develop a relationship with the child is not enough: something more is required -- a close connection between the teacher's duties and his or her wrongful acts -- to render the school board liable without proof of* ***negligence*** *or other fault on its part.*

[Emphasis added by Binnie J.]

**156**  Board EF provided CD with the opportunity to spend time with AB. The fact of being a teacher gave CD some power over AB, because CD was responsible to give her grades and recommendations.

**157**  The factors discussed in para. 41 of *Bazley* as they apply here can be analyzed as follows:

1. While Board EF gave CD opportunity to spend time with AB, this opportunity was modest. The contact arranged by Board EF was for group teaching, with some opportunities for individual work around class hours and during spare periods. This is not a case of overnight visits or a case where there was intimate physical care such as bathing.
2. It would not further the aims of Board EF for CD to touch AB sexually.
3. The relationship between an English teacher and a student is not inherently intimate. The teaching of English can involve discussing issues of sexuality and life, but that does not inherently lead to physical intimacy. Students and teachers can share interests in many subjects, including music, sports, and science. That does not inherently lead to physical intimacy.
4. The power conferred by Board EF on CD was to provide grades, and maintain classroom discipline.
5. AB's vulnerability in the situation was limited, because there were many teachers and administrators available, and AB was under the care of her parents.

**158**  As a result, Board EF is not vicariously liable for CD's sexual touching of AB.

1. **If AB is entitled to an award, what, if anything, should she recover for:**
2. **non-pecuniary and aggravated damages;**
3. **future wage loss;**
4. **special damages;**
5. **costs of future care; and**
6. **punitive damages.**
7. ***non-pecuniary and aggravated damages***

**159**  The purpose of an award for non-pecuniary damages is to provide solace to AB for such things as pain, suffering, inconvenience, and loss of enjoyment of life. Non-pecuniary losses are the personal injury losses that have not required an actual outlay of money. One purpose of an award for damages for non-pecuniary losses is to substitute other amenities for those that AB has lost. The award must address losses AB suffered not only to the date of trial, but also those that AB will suffer in the future.

**160**  Non-pecuniary losses have no objective ascertainable value, because there is no market in health and happiness. It is generally not possible to put a claimant back in the position she would have been in had the injury not occurred, and this is especially true of non-pecuniary loss. The Court must fix a sum that is tailored to AB, and that is moderate but fair and reasonable to both parties, keeping in mind that AB will be fully compensated for her future care needs and other pecuniary losses. The Court does not try to assess a sum for which AB would have voluntarily chosen to suffer such pain, inconvenience, and loss of enjoyment of life.

**161**  Awards in other cases can provide some assistance, but each case varies depending on its facts.

**162**  Ms. Ellis argued on behalf of AB that an appropriate award for non-pecuniary and aggravated damages would be $65,000. She relied on these cases: *Y.(S.) v. C.(F.G.),* [*[1997] 1 W.W.R. 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-FJM6-61BF-00000-00&context=), [*26 B.C.L.R. (3d) 155*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-FJM6-61BF-00000-00&context=) (C.A.); *P.(J.) v. Sinclair*, [*[1999] B.C.J. No. 1230*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F7ND-G4D2-00000-00&context=), [*1999 CarswellBC 1207*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F7ND-G4D2-00000-00&context=) (S.C.); *W.M.Y. v. Duncan Scott, B.C. Soccer Assoc. et al*, [*2000 BCSC 1294*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B175-00000-00&context=); *Gorsline;* and *B.M.G. v. Nova Scotia (Attorney General),* [*2007 NSSC 27*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-XPY1-JP9P-G2W8-00000-00&context=), aff'd [*2007 NSCA 120*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-XPY1-F7G6-64SK-00000-00&context=).

**163**  Ms. Harper argued on behalf of Board EF that an appropriate award would be $35,000. She referred to these cases: *M.(L.N.) v. Green Estate*, [*[1996] B.C.J. No. 8*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F2F4-G2BH-00000-00&context=), 1996 CarswellBC 23; *D.(M.) v. D.(C.)*, [*[2004] J.Q. no 11919*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-JGY1-FFMK-M2Y8-00000-00&context=), 2004 CarswellQue 4105 (S.C.); and *Stanford Estate v. Roy*, [*[2005] O.J. No. 987*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDP1-JJ1H-X1M4-00000-00&context=), 2005 CarswellOnt 967 (S.C.).

**164**  The Court of Appeal commented on the limited assistance provided by considering other cases, and the difficulty of making a fair assessment of damages for harm caused by sexual abuse, as follows in *Y.(S.)* at paras. 50, 55-57 [cited to W.W.R.]:

[50] The foregoing cases present a variety of circumstances, and describe differing degrees of harm caused by sexual abuse. They exemplify the difficulty of giving solace or satisfaction to a person who has been abused by one he or she was entitled to trust, and who may suffer from the psychological impact of that abuse for years to come. What amount of money is sufficient as a substitute for lost pleasures and amenities, and as compensation for what yet remains to be suffered? Prior to 1990 a respected judge thought $40,000 to be sufficient. Within about five years other judges of the same Court thought $80,000 - $85,000 to be fair. Now awards by judges appear to range from about $100,00 to $175,000. It is understandable that juries, without guidance as to the range of awards in comparable cases, may have more difficulty than judges in keeping their emotions under control, and in making awards as a result of reasoned analysis.

...

[55] What is fair and reasonable compensation for general damages, including aggravated damages, in this case is not easy to say. This is an evolving area of the law. We are just beginning to understand the horrendous impact of sexual abuse. To assess damages for the psychological impact of sexual abuse on a particular person is like trying to estimate the depth of the ocean by looking at the surface of the water. The possible consequences of such abuse presently are not capable of critical measurement.

[56] Comparison with the awards made in similar cases is helpful in maintaining consistency, and therefore giving fair and equivalent treatment to all victims. But the impact on individuals in particular circumstances of sexual abuse is so difficult to measure that other cases can only provide a rough guide for assessment in this case.

[57] Critical to any assessment is the view which the trier of the facts takes of aggravating features. In this case the jury was entitled to consider a number of very significant aggravating factors. The defendant occupied a position of trust with respect to this child. Instead of providing an environment for a happy childhood, and for normal development of character, he made her childhood a nightmare. After seven years she told her mother. His response was not remorse. It was anger at being exposed. In different ways, he continued the abuse until life became so unbearable that the girl left home. The psychiatric evidence indicated the extent of the impact on the plaintiff, and on her relationships with others. She needs a great deal of help in dealing with the psychological trauma she has suffered. Another aggravating feature is the defendant's response to the claims made by the plaintiff. He did not admit liability. His response was to threaten the plaintiff, her mother, and the family doctor. The jury may have taken into account that he did not testify in order to mitigate his conduct, or to apologize.

**165**  The factors to be considered in making awards for damages in sexual assault include the following:

1. the frequency of assaults;
2. the nature of the assaults;
3. the age of the complainant at the time;
4. the vulnerability of the complainant;
5. the relationship between the parties;
6. whether force or violence was used;
7. the effect and consequence on the victim; and
8. whether aggravated damages are included.

**166**  The factors in this case are as follows:

1. The assaults consisted of seven incidents over a period of about five months.
2. The nature of the assaults was hugging, kissing, and touching, with touching of AB's breasts and nipples under her clothes, and touching her lower body over her clothes.
3. At the time of the assaults, AB was 17 years old.
4. AB was vulnerable to CD because of her high regard for him and because he had the power to give her grades and recommendations. However, in contrast to some of the cases cited, AB was not vulnerable to being forced to spend time alone with CD. She was able to limit her contact with CD to group situations. She was capable of turning to her parents or other teachers and the school administration if she chose to do so.
5. The relationship between the parties was a teacher-student relationship, which is a relationship of trust, and one where the teacher has power over the student. CD also had power because he was in his 50s, while AB was an adolescent.
6. CD did not use any physical force or violence beyond that inherent in the touching.
7. The effect and consequences on AB can be summarized as serious distress in her first year of university, with chronic PTSD, continuing difficulties in interpersonal relationships, including sexualisation of relationships with males, and difficulties with intellectual environments. This is discussed in more detail above regarding Dr. Korpach's evidence.
8. The aggravating feature is that the conduct occurred within a relationship of trust.

**167**  This is a case in which the touching itself was not particularly invasive, and CD did not use force or threats of physical harm. However, AB has suffered significantly on a psychological level, and is likely to suffer on an ongoing basis.

**168**  In all the circumstances, an appropriate award is $50,000.

1. ***future wage loss***

**169**  AB claims $30,000 for future wage loss. She argues that she is likely to be delayed a year in entering the workforce because of the year she spent outside of British Columbia studying the subject area recommended by CD.

**170**  Ms. Harper argued that AB should not recover any award for future wage loss. Ms. Harper argued that any delay in AB entering the workforce arose because AB has chosen to pursue an honours program and switched the discipline of her studies.

**171**  AB was significantly distressed in her first year of university. She did not achieve the grades she would have achieved but for CD's abuse.

**172**  Many first year students struggle with the transition to the larger university environment and with moving away from their parents and home. However, few suffer the degree of distress that AB suffered. AB's distress was apparent from the fact she lost 15 pounds, stopped eating in the cafeteria, and spoke on a daily basis for up to five hours to her parents.

**173**  If the abuse had not occurred, AB may well have continued in her journalism studies. Alternatively, she might have chosen to change her area of focus.

**174**  AB's decision to drop out of courses in journalism and courses relating to that program were the result of the abuse by CD. Had AB not dropped out of those courses, with the benefit of taking summer programs, she would likely have been able to complete an honours degree in four years even if she had chosen to change her area of emphasis.

**175**  It is a real possibility that AB will be delayed a year in entering the workforce. In addition, there is a real possibility that AB will suffer problems in future employment dealing with male supervisors and coworkers.

**176**  In all the circumstances, it is fair to assess the impact of the abuse on AB's future earnings at $30,000. That is a fair assessment of what she would be likely to earn in a year at the start of her career. AB is entitled to an award of $30,000 for future wage loss.

1. ***special damages***

**177**  AB claims $16,453.90 in special damages, consisting of $12,808.90 in respect of her expenses for her first year of university, and $3,645 for her past counselling expenses.

**178**  Ms. Harper argued that AB should not recover anything in respect of her costs for university, because she obtained university transfer credits for the courses she completed.

**179**  With respect to the counselling expenses, AB has established that she incurred those expenses for counselling and that they related to the sexual touching by CD. While a portion of the expenses were paid directly by the Crime Victims Assistance Program, AB is required to repay that program for any part she recovers through litigation. AB is entitled to an award for the full amount of her counselling expenses.

**180**  Analysis of AB's claim for her first year university expenses is more difficult. As discussed above, AB is likely to require an extra year to complete her university program, which she would not have required but for CD's sexual touching. However, AB had wanted to attend university outside of British Columbia, and so she is not entitled to her extra expenses relating to the location of the university.

**181**  AB returned to her parent's home three times during her first year of university. She likely would have returned only once if she had not suffered psychological distress arising from CD's sexual touching. AB claimed about $2,300 for travel home. She is entitled to $1,600 in respect of the two extra trips from her university to British Columbia.

**182**  AB claimed about $10,500 in respect of her tuition and accommodation, which is the amount net of her scholarship. Of that, about $4,800 related to tuition, and the balance was for accommodation and other university charges. The accommodation charges arose because she chose to go to university outside B.C., and are not recoverable. She is entitled to an award for the $4,800 she paid for tuition in the program she chose not to pursue.

**183**  AB is entitled to special damages of $10,045 consisting of $3,645 in counselling costs, and $6,400 for lost tuition and travelling expenses related to her first year of university.

1. ***costs of future care***

**184**  AB claims $43,750 for the costs of future counselling for herself and her family. Dr. Korpach recommended a total of 4 1/2 years of therapy for AB, and suggested consideration of therapy for AB's parents and siblings. AB's calculations use the figure of $175 per hour, which is the amount AB was paying her male therapist at the time of trial, and the figure of 40 sessions per year.

**185**  Ms. Harper argued that an award should be only $10,000, on the basis that AB has chosen to leave a number of counsellors, and has had significant periods during which she was not receiving counselling. For example, despite the recommendations in Dr. Korpach's report, AB did not receive any counselling for about nine months following the report.

**186**  AB made significant improvement following Dr. Korpach's report, even though she did not undergo counselling for many months. AB was obtaining counselling at the time of trial, and is likely to receive further counselling. She has recovered significantly since the time of Dr. Korpach's report, and she is not likely to require all of the counselling suggested by Dr. Korpach.

**187**  AB and her family are likely to require a total of 3 years of weekly counselling. At the rate of $175 per hour, for 40 sessions per year, that would cost about $21,000 over 3 or more years.

**188**  In these circumstances, a fair award for AB's cost of future care is $20,000.

1. ***punitive damages***

**189**  Although AB included a plea for punitive damages in her pleadings, she did not pursue this claim at trial. While that was not explained, it is likely because CD was sentenced for his crime, and there was nothing in the conduct of Board EF which would attract punitive damages.

**190**  AB is not entitled to punitive damages.

**SUMMARY**

**191**  AB is entitled to an order against CD for $110,045, consisting of the following:

1. Non-pecuniary damages of $50,000;
2. Damages for loss of future earning capacity in the amount of $30,000;
3. Special damages of $10,045; and
4. Cost of future care damages of $20,000.

**192**  AB's claims against Board EF are dismissed.

**193**  If the parties are unable to agree on costs, they should arrange a hearing before me through the Registry.

1. GRAY J.

**End of Document**

[***Granja v. Jozsef, [2016] B.C.J. No. 1766***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5KK5-B2W1-JF1Y-B0VM-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

M.M. Devlin J.

Heard: April 27-May 1, 4-8, December 7-11

and 14-18, 2015; June 27 and 28,

2016.

Judgment: August 19, 2016.

Docket: M142449

Registry: New Westminster

**[2016] B.C.J. No. 1766** | [*2016 BCSC 1531*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5M5T-MHY1-DYV0-G00M-00000-00&context=)

Between Jose Granja, Plaintiff, and Csaba Jozsef, Defendant, and Insurance Corporation of British Columbia, Third Party

(201 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Body injuries — Back and spine — Neck — Soft tissue — Fibromyalgia or chronic pain — Psychological injuries — Depression — Considerations impacting on award — Age of claimant — Pre-existing injury — Action by 59-year-old plaintiff for damages for personal injuries sustained in motor vehicle accident in 2010 allowed in part — Plaintiff sustained injuries to neck and back and suffered chronic pain and depression — Had pre-existing wrist injury and was on disability at time of accident — Did not return to work post-accident — Accident caused plaintiff's physical and psychological injuries — Awarded $125,000 in non-pecuniary damages, $70,450 for past wage loss, $85,000 for loss of future earning capacity, $5,100 for cost of future care, and special damages of $4,500 — Defendants did not establish plaintiff failed to mitigate.**

**Damages — Types of damages — General damages — For personal injuries — Considerations — Employment status — Cost of future care — Loss of earning capacity — Special damages — Past loss of income — Employment income — Expenses and expenditures — Non-pecuniary loss — Pain and suffering — Affecting social relationships — Action by 59-year-old plaintiff for damages for personal injuries sustained in motor vehicle accident in 2010 allowed in part — Plaintiff sustained injuries to neck and back and suffered chronic pain and depression — Had pre-existing wrist injury and was on disability at time of accident — Did not return to work post-accident — Accident caused plaintiff's physical and psychological injuries — Awarded $125,000 in non-pecuniary damages, $70,450 for past wage loss, $85,000 for loss of future earning capacity, $5,100 for cost of future care, and special damages of $4,500 — Defendants did not establish plaintiff failed to mitigate.**

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| Action by the 59-year-old plaintiff for damages for personal injuries sustained in a motor vehicle accident in 2010. The plaintiff was removing his grand-daughter from her car seat when the intoxicated defendant deliberately rammed into the passenger side of the plaintiff's parked vehicle four times. The force of the impact tossed the plaintiff around in the back seat, hitting the hard plastic of the front seat and the center console. The defendant, while screaming at the plaintiff, then attempted to punch the plaintiff but only managed to hit the plaintiff's open hands and kick him in the leg. In 2008, while working as a cement finisher, the plaintiff sustained a work place injury to his wrist and was off work on disability at the time of the accident. He had been set to commence a vocational rehabilitation program to retrain as a building service worker. The plaintiff continued to experience neck and back pain and depression at trial as well as frequent headaches. He attempted to return to work as a milker but had been unable to continue due to his pain. His marriage broke up after the accident and he had been expelled from his Columbian community group.  HELD: Action allowed in part.  There was no evidence to establish the plaintiff was exaggerating his pain. The medical evidence supported the plaintiff's description of his pain and suffering and established that prior to the accident the plaintiff was a healthy and happy person with only a pre-existing injury to his wrist. The accident caused the plaintiff's physical and psychological injuries and had resulted in chronic pain. The assault by the defendant did not cause the plaintiff's physical injuries. The plaintiff's depression and anxiety were non-divisible injuries caused by the accident and the assault. The defendant was 25 per cent at fault for the psychological injuries. The plaintiff's injuries contributed to the failure of his marriage and had significantly reduced all aspects of his life. The plaintiff was awarded $125,000 in non-pecuniary damages. After deductions for social assistance received and factoring in the plaintiff's age and limited English, his past wage loss award as a building services worker was set at $70,450. The capital asset approach was appropriate to calculate the plaintiff's loss of future earning capacity, which was calculated to 70-years-old at $85,000. The plaintiff was awarded $5,100 for cost of future care, including psychological counselling, an exercise program and pain medications. He was awarded special damages of $4,500. Total damages of $290,350 were awarded. The defendants failed to establish the plaintiff did not properly mitigate his losses. |

**Statutes, Regulations and Rules Cited:**

Insurance (Vehicle) Regulations, [*BC Reg 447/83, s. 106*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F97-RC81-FD4T-B2DD-00000-00&context=)

**Counsel**

Counsel for the Plaintiff: Patrick Yearwood.

Appearing on his own behalf: Csaba Jozsef.

Counsel for the Third Party, ICBC: Brendan Home.

**Reasons for Judgment**

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| **M.M. DEVLIN J.** |

**INTRODUCTION**

**1**  The plaintiff, Jose Granja, claims damages for injuries sustained as a result of a motor vehicle collision on June 5, 2010, in the parking lot of his condominium complex in Surrey, British Columbia. At approximately 7:30 that evening, Mr. Granja was removing his grand-daughter from her car seat when the defendant, Csaba Jozsef, deliberately rammed his car into the passenger side door of the parked car. Mr. Jozsef hit the car on the passenger side twice and then proceeded to ram into the rear bumper twice. The force of the impact tossed Mr. Granja around in the back seat hitting the hard plastic of the front seat and the center console. Mr. Jozsef then got out of his car and approached the driver, Ms. Patrycia Arana, while screaming obscenities at her and punched her in the face. Mr. Jozsef then attempted to punch Mr. Granja but due to Mr. Jozsef's highly intoxicated state he only managed to hit Mr. Granja's open hands and kick him in the leg. Mr. Jozsef was subsequently arrested and charged with impaired driving and assault. He disposed of those criminal charges by way of a guilty plea.

**Position of the Parties**

**2**  The parties agree that the collision was caused by the ***negligence*** of the defendant. The defendant, Mr. Jozsef, maintains that due to his physical state of intoxication he was incapable of injuring the plaintiff. Further, he submits the plaintiff is exaggerating the nature and extent of his injuries. Mr. Jozsef submits that the cause of Mr. Granja's physical and psychological complaints is a result of pre-existing factors or other factors unrelated to the accident. In all other respects, Mr. Jozsef's submissions mirror that of the third party. The third party, the Insurance Corporation of British Columbia ("ICBC") admits that the defendant was negligent but any injury sustained by the plaintiff was caused by the assault on the plaintiff by the defendant following the collision. They maintain the plaintiff sustained no injury as a result of the collision.

**3**  The plaintiff is seeking damages for the physical and psychological injuries which he has suffered as a result of the collision. The plaintiff is not seeking damages for the slight injury caused when the defendant assaulted him.

**The Issues**

**4**  Mr. Granja claims for non-pecuniary damages, past and future wage loss, special damages and the cost of future care. The issues to be determined are causation, nature and extent of injuries and quantum of damages.

**The Facts**

**Plaintiff's Pre-Accident History**

**5**  Mr. Granja was born March 8, 1956 in Colombia. He was 54 years old at the time of the accident, and 59 years old at the time of trial.

**6**  Mr. Granja was the youngest of 12 children raised on a mixed farm in Colombia. He completed high school and had taken some university level courses in Colombia. He was employed in a number of positions within the government including as secretary to a mayor and a senator's assistant. As a result of Mr. Granja's political activity in Colombia he was directly exposed to the consequences of the Colombian political unrest. Mr. Granja was the unfortunate witness of the assassination of two of his colleagues. He was also subject to direct attempts on his own life. His personal safety and that of his family was in jeopardy. Due to the threats on his life, Mr. Granja moved his wife and young children into hiding in Colombia until they eventually moved to Canada as refugees in 2003.

**7**  Despite the initial challenges of settling in a new country and his inability to speak English, Mr. Granja and his family adapted well and were happy in Canada. Shortly after arriving in Canada, Mr. Granja acquired a job as a milker at a dairy farm. In order to make a better living for himself and his family, Mr. Granja obtained a better paying position as a cement finisher and worked on various construction projects. Mr. Granja enjoyed the construction work and according to his immediate supervisor he became skilled as a cement finisher and was regarded as a dependable and reliable employee who was pleasant to have at the work site. Due to his reputation as a good employee, Mr. Granja had steady work in the construction field for about four years. The Granjas were able to purchase the condominium which Mr. Granja continues to reside in.

**8**  Mr. Granja enjoyed a good life in Canada. He had a good job and was able to provide for his family. His family life was happy. He had a good relationship with his wife and their children and they had a number of friends especially among the Colombian community in the lower mainland. The Granjas liked to entertain at their home and would often cook traditional Colombian meals for those who gathered at their home. Overall, the move to Canada was a positive development for Mr. Granja. He had an optimistic outlook for his future and that of his family in their new home.

**9**  Unfortunately, in March 2008 while working as a cement finisher, Mr. Granja suffered a work place injury to his right wrist and was off work on disability at the time of the June 2010 motor vehicle accident. In fact, Mr. Granja was scheduled to commence a vocational rehabilitation program in July 2010 with WorkSafeBC geared towards obtaining new employment as a building service worker/janitor. WorkSafeBC had determined that due to the right wrist weakness, stiffness and pain it was not feasible to expect Mr. Granja to return to work as a cement finisher. While his wrist injury was a set-back, Mr. Granja was looking forward to the opportunity to resume working in a new capacity and providing for his family. He remained hopeful that overtime he would be able to return to work as a cement finisher or as a milker.

**10**  Mr. Granja had follow-up surgery on his right wrist in November 2010 and received hand therapy from November 22, 2010 to January 5, 2011, and from January 31, 2011 to March 21, 2011.

**11**  Other than the work place injury, Mr. Granja enjoyed good health. He had a dated hand injury from 1988 which had no lingering effects on his mobility and certainly did not hinder his ability to fulfill the physical demands of his cement finisher job. There was no medical history of problems with his neck, back, hip or legs. Nor was there any history of headaches.

**The Accident**

**12**  Despite the use of the term "accident" in these reasons, I am mindful that the events of June 5, 2010, were not purely accidental and very much intentional. The collision occurred at around 7:30 p.m. on June 5, 2010. That evening, the plaintiff and his wife were scheduled to babysit their young grandchild who was to be dropped off at their home by her mother, Patrycia Arana. After he received a phone call from Ms. Arana advising she was on her way over to his residence to drop off her daughter, the plaintiff proceeded to the front entrance of the building where the visitors parking is located. As he approached the front door, the plaintiff saw that the visitors' parking spots in the front of the building were full and Ms. Arana had stopped her car on an angle behind the other parked cars. The plaintiff also noticed the defendant's car against the door to the entry of the underground parkade. The plaintiff opened the back door of the driver's side and reached in to remove his grandchild from her car seat. As he was leaning into the car near the car seat and about to release the child's seatbelt he felt the impact from the defendant's car hitting the passenger side door of Ms. Arana's car. The plaintiff collided into the back of the front seat and hit his head on the door. As he was tossed around he also hit his right hand on the door frame. As he tried to find his balance to stand up, the car was hit a second time. Once again, the plaintiff was tossed around in the back seat of the car, hitting his body against the back of the front seat and the door frame. As the plaintiff got out of the car he saw the defendant proceed to hit the rear bumper of Ms. Arana's car two times and the car moved towards the curb. During this time, the defendant was yelling obscenities towards the plaintiff and Ms. Arana.

**13**  There is some discrepancy as to the order of the next sequence of events regarding the assaults on Ms. Arana and the plaintiff. The plaintiff testified the defendant approached him first and tried to punch him but Ms. Arana testified that the defendant approached her car and punched her directly in the face. The sequence does not detract from the nature of the assault nor the credibility of the witnesses.

**14**  The plaintiff testified that after the defendant hit Ms. Arana's car for the fourth time, he got out of his car and came towards Mr. Granja shaking his hands and yelling and cursing at him to move. Anticipating that the defendant might try to hit him, the plaintiff stood in a defensive position, relying on what he had learned from his boxing experience as a youth. As the defendant began to punch the plaintiff, Mr. Granja put his arms up in front of his face with his palms out towards the defendant. The defendant hit the plaintiff several times on his forearms and palms of his hands and kicked him once below the right knee. The next thing the plaintiff recalled was Ms. Arana approaching and placing herself between the plaintiff and the defendant with her hands up. The defendant punched Ms. Arana in the face. It was at this point that a man who was nearby came to assist them and shortly thereafter the emergency responders attended. Ms. Arana was taken by ambulance to the hospital and the plaintiff went back to his residence.

**15**  Ms. Arana also testified about the incident and while there were a few discrepancies in her description of the sequence of events she confirmed that her car had been hit four times by the defendant and then both she and Mr. Granja were assaulted. Clearly, the incident was a traumatic experience for both Ms. Arana and Mr. Granja.

**16**  The defendant also testified but due to his level of intoxication he had no recollection of the incident. He could not explain his actions on that evening. RCMP Constable Doke testified about his dealings with the defendant at the scene. Cst. Doke testified the defendant was swaying, unsteady on his feet and unable to stand without assistance. The defendant was cursing and was verbally aggressive with the officer before he was placed inside the police vehicle. Cst. Doke described the defendant as "grossly intoxicated" as was reflected in the high reading of alcohol in his breath samples.

**Plaintiff's Post-Accident Condition**

**17**  Immediately after the incident Mr. Granja experienced some slight pain in his hands and right knee. The pain in his right hand was more pronounced because he had a pre-existing work place injury. Emotionally, he was very distraught and confused as he could not comprehend why someone would act in such a way towards him in Canada. Overall, the encounter was devastating for him as he considered Canada a safe haven from the violent activity he experienced in Colombia. Mr. Granja was, and continues to be, very angry about the assault and the injuries. He claims to continue to suffer both physically and emotionally as a result of an unprovoked assault on himself and Ms. Arana.

**18**  A few days after the accident he began to notice increasing physical discomfort and he went to see Dr. Benitez-Lazo, his family doctor. Dr. Benitez-Lazo prescribed medication for his pain and gave him some anti-inflammatory medication. Dr. Benitez-Lazo also ordered some x-rays and recommended Mr. Granja attend a physiotherapy clinic. Eventually, Dr. Benitez-Lazo referred Mr. Granja to a specialist in physical medicine.

**19**  With respect to his physical injuries, Mr. Granja suffers from various ailments. He has persistent neck pain which tends to radiate up into his head and cause frequent headaches. He experiences pain in his middle and lower back, which restricts his range of motion and activity. On a scale of 1 to 10, he described his back pain in the 5-6 range although sometimes it is worse than others. He has a lump or bulge on his left shoulder, which also causes pain. On occasion, he has had medical injections directly into that area to try and relieve some of the pain. He also has pain in his left hip and left leg which is exacerbated by long walks. In addition, he has difficulty sleeping and is emotionally very fragile. Mr. Granja has been prescribed a wide variety of medications to deal with his headaches, pain, sleep disorder and depression.

**20**  As mentioned earlier, at the time of the incident Mr. Granja was on disability due to an injury to his right wrist which occurred while working in construction as a cement finisher. Mr. Granja was meeting with WorkSafeBC and was intending to commence a retraining program to become a building manager/janitor. While he was disappointed that he could not continue to work as a cement finisher his intention was to pursue the WorkSafeBC job opportunity and when his right wrist healed sufficiently he hoped he could return to the more lucrative work on a dairy farm or in construction.

**21**  Unfortunately, the injuries Mr. Granja sustained on June 5, 2010, have prevented him from returning to any type of employment. His WorkSafeBC rehabilitation retraining program was suspended as he was unable to attend the program due to his injuries. While Mr. Granja did receive some financial compensation from WorkSafeBC, eventually his payments were reduced to a monthly payment of $992. Because of his ongoing pain issues, it was not feasible for Mr. Granja to pursue employment as either a cement finisher or milker. In fact, when Mr. Granja tried to work as a milker in 2013, he could not perform the necessary tasks because of his pain.

**22**  The inability to work and the financial strain it has placed on Mr. Granja contributed to his increased stress, depression and overwhelming sense of failure. It has also had a detrimental impact on his family life. Harley Granja described how his father's disposition dramatically changed after the accident and this resulted in tension in the family. The situation deteriorated to the point that in early 2013, Mr. Granja's wife moved out of the family home and there is no chance of reconciliation. In addition, Mr. Granja was expelled from the Colombian community group that participated in the Fusion Festival, a cultural event held annually in Surrey.

**23**  Finally, since Mr. Granja and Mr. Jozsef live in the same condominium complex they occasionally encounter one another in the neighbourhood. These encounters are upsetting for Mr. Granja as they remind him of the event which has so drastically changed his life.

**CIVILIAN WITNESSES**

**24**  Mr. Granja led evidence from a number of friends and acquaintances as well as from some family members - his son Harley and Ms. Arana. The testimony from these witnesses collectively was very helpful to the court as they provided a picture of Mr. Granja pre and post June 2010. Although their dealings with Mr. Granja varied in frequency and duration, they all testified that they noticed a significant deterioration in Mr. Granja's physical and emotional well-being after the incident.

**Evidence of Fernando Garcia**

**25**  Mr. Garcia was born in Colombia and came to Canada in 2002 as a refugee. Like, Mr. Granja he moved to Canada to distance himself from the problems with the guerilla fighters in Colombia. While they did not know each other in Colombia, they met while both attending a Spanish speaking doctor in 2003. They became friends and their families would spend time together including time at Mr. Garcia's farm in Chilliwack.

**26**  During the beginning of 2003, Mr. Granja visited Mr. Garcia at his work for two months and was trained on how to milk cows and then obtained employment as a milker. Eventually, Mr. Granja left the milking job for a better paying job working in construction. However, Mr. Garcia and Mr. Granja continued to be friends.

**27**  When Mr. Garcia first met Mr. Granja he said he was a motivated and energetic person who always assumed the role of a leader. After Mr. Granja incurred the wrist injury working in construction, Mr. Garcia said his activities decreased and his mood changed a little but he was motivated due to an expectation of recovery. Mr. Granja continued to engage in social activities and outings with his friends.

**28**  According to Mr. Garcia, Mr. Granja's problems began after the motor vehicle incident. Mr. Granja felt that his body was very weak and Mr. Garcia noticed limitations in his movements. Mr. Granja told Mr. Garcia that upon impact in the accident, he thought that he could have died. Mr. Garcia tried to assist Mr. Granja by giving him an opportunity to work with him as a milker at Kloot farms in Chilliwack in 2013. Before Mr. Granja visited Columbia in December 2013, he went to the farm and worked with Mr. Garcia but it was soon obvious that Mr. Granja could not do the work because of pain. Mr. Garcia provided a detailed account of the steps required to milk cows and clean their stalls. While the milking process is fully automated there remains a requirement for physically demanding work for the milker including when cleaning the stalls.

**Evidence of Alvaro Garzon**

**29**  Mr. Garzon was born in Colombia and immigrated to Canada in August 1998. He is employed as an accountant for the RCMP in Surrey, B.C. Mr. Garzon first met the plaintiff in 2003 when the Granja family moved to Canada. Mr. Garzon was a volunteer at a Welcome House and he became friends with the Granja family and saw them socially. Mr. Garzon described the plaintiff as a very resourceful person who was able to obtain employment shortly after arriving in Canada even though he did not speak English. Before the June 2010 incident, Mr. Garzon said Mr. Granja was happily married and had a good relationship with his wife and two children. Mr. Garzon became particularly close to the plaintiff during the period when Mrs. Granja had surgery and acquired a life-threatening infection. Mr. Granja was a good chess player and he and Mr. Garzon often played chess together. Mr. Garzon testified that the Granjas would often host dinners for their friends at their home and the plaintiff was known for his ability to prepare Lechona, a traditional Colombian dish. The plaintiff assisted Mr. Garzon with some home renovations including the installation of a new floor.

**30**  Mr. Garzon testified that after the work place accident in 2008, the plaintiff did struggle but despite the set-back and the financial strain from being on disability, he did not agree with the suggestion that the plaintiff was depressed. Rather, he described him as someone who was coping with the situation. However, after the June 2010 incident, he said the plaintiff's behaviour significantly changed. He was no longer a happy, engaged person. He became very withdrawn, socially isolated and his relationships with family and friends deteriorated. He appeared to suffer from constant pain in his neck and back. Mr. Garzon was aware that the plaintiff had declared personal bankruptcy and he said that was devastating to the plaintiff's self-esteem particularly given the importance of self-sufficiency within the Colombian culture. Mr. Garzon testified that despite his best efforts he could not convince the plaintiff to play a game of chess as they had often done in the past. Although he did see the plaintiff at the Fusion Festival held in 2011 or 2012, he was not aware of what his role was.

**31**  Mr. Garzon continues to visit with the plaintiff but finds it difficult to see his good friend in such pain.

**Evidence of Jose Gonzalez**

**32**  Mr. Gonzalez first met the plaintiff in approximately 2006 when they were both working at a construction site. Mr. Gonzalez was the plaintiff's foreman and provided a detailed description of the physical demands related to the job of a cement finisher. Mr. Gonzalez described the plaintiff as a really good worker who was reliable, conscientious, enthusiastic, pleasant and intelligent. They had an opportunity to work on other construction sites together and the plaintiff was very good at his job as a cement finisher. They kept in contact with each other after the plaintiff injured his wrist at work and the plaintiff would provide Mr. Gonzalez with names of other people who needed work. Mr. Gonzalez would call the plaintiff if there was a job opportunity and would have considered hiring him again once he recovered from the wrist injury. The plaintiff always expressed a desire to return to work as soon as he was able. However, after the car accident he eventually stopped contacting the plaintiff about returning to work because the plaintiff always complained of the pain he was suffering. Mr. Gonzalez explained that because of the physical demands of the job, the scope of the plaintiff's injuries and the risk to the safety of other employees it was no longer viable to consider him for a job in construction.

**33**  Mr. Gonzalez did not socialize with the plaintiff but did invite him to a dinner to celebrate the completion of a large construction project. However, he did not have an opportunity to speak with the plaintiff on that evening. He also encountered the plaintiff at the Fusion Festival a couple of times after the June 2010 accident, but other than greeting each other they did not have a conversation.

**Evidence of Omar Garcia-Garzon**

**34**  Mr. Garcia-Garzon was born in Colombia and came to Canada as a refugee in 2002. He first met the plaintiff when they were both living in Colombia because Mr. Garcia-Garzon was a reporter and the plaintiff was engaged in a community movement which Mr. Garcia-Garzon was reporting on. Their professional relationship developed into a friendship, which continued when they re-united in Canada.

**35**  Mr. Garcia-Garzon testified that the plaintiff was a physically fit, happy, social person when he first met him in Colombia and he seemed to be happy in Canada. Since settling in Canada, their two families became very close and would frequently see each other including spending time together at holidays. The plaintiff was employed and providing for his family. According to Mr. Garcia-Garzon, the plaintiff had managed to save enough money to place a down payment on a second apartment.

**36**  He said after the work place accident in 2008, the plaintiff was disappointed that he could not work, but was enrolled in treatment and was doing well. However, after the June 2010 motor vehicle incident, he saw a radical change in the plaintiff. Physically, the plaintiff could no longer sit, stand or walk for any period of time. He was also taking a large number of medications. Before the accident, they would go to parks and kick the soccer ball around and the plaintiff enjoyed dancing at their parties. Now, he says all the plaintiff does is sit due to the constant pain.

**37**  He also described the dramatic change in the plaintiff's personality. The once jovial, positive person became argumentative, angry and unpleasant to be around. He noticed the strain this change had on the plaintiff's wife and children. He was aware that Mrs. Granja had left the plaintiff and explained that after the June 2010 accident, the plaintiff had become insulting and aggressive towards her. Mr. Garcia-Garzon described this as a complete change from their relationship before the accident.

**38**  Financially, the plaintiff also suffered. He had to withdraw his investment in the second apartment.

**39**  Mr. Garcia-Garzon provided details about the plaintiff's role in the planning of the Fusion Festival. He testified that about five families were involved in the planning and funding of the project including himself, the plaintiff and other Colombian families in the lower mainland. He said they started planning for the festival before the June 2010 accident and by the time the festival was held in the summer of 2010, the only role the plaintiff had was to simply monitor the activities and keep an eye on the children. However, after 2011, the plaintiff stopped participating in the festival. In 2014, the other organizers, including Mr. Granja's wife and daughter, voted to expel the plaintiff from the organizing group. They did not want him to be involved with the project any longer because he was too difficult to get along with and was causing too many conflicts. Needless to say, Mr. Granja was very upset with this turn of events, but grateful to Mr. Garcia-Garzon for supporting him.

**40**  Since the June 2010 motor vehicle incident, his relationship with the plaintiff has changed. The plaintiff is angry, irrational and does not see a way out of his present situation.

**Evidence of Helmuth Leuro**

**41**  Mr. Leuro was born in Colombia and came to Canada as a refugee in 2002. He did not know the plaintiff in Colombia but was introduced to him shortly after he arrived in Canada by their mutual friend Omar Garcia-Garzon. Since then Mr. Leuro has been a close friend of the plaintiff and continues to see him at least once per week.

**42**  Mr. Leuro and the plaintiff became good friends as they would see each other every day at their ESL course. He described the plaintiff as someone who was very social and popular. The plaintiff liked to cook and would often have people over to his home for dinner. He was a good host and a happy person who always welcomed people into his home. He described the Granja family as friendly, warm and loving.

**43**  Mr. Leuro testified that after the work place accident the plaintiff was looking forward to his return to work. He planned to eventually return to work as a cement finisher once his hand recovered. The plaintiff was a very proud man and providing for his family was very important to him.

**44**  After the June 2010 motor vehicle incident, there was a dramatic change in the plaintiff. He became a bitter person who used coarse words and profanities when speaking to friends and family; he was upset and ashamed that he could no longer provide financial support to his family. Marital tension developed between the plaintiff and his wife. She left him permanently in 2014. Mr. Leuro acknowledged that the plaintiff's mood deteriorated further after his wife left.

**45**  Physically, the plaintiff was constantly complaining about the pain in his back and neck. Mr. Leuro could see the plaintiff had difficulty moving his head and back and took medications to try and control the pain. Mr. Leuro testified that he could see the pain in his friend's face.

**46**  Mr. Leuro testified that he spent some time with the plaintiff at the Fusion Festival, but they were not actually working there. Rather, the plaintiff was at the Colombia exhibit stand just talking to people. Mr. Leuro testified he remains in contact with the plaintiff and during the most recent visit the plaintiff was in tears because he feels he is all alone and useless.

**Evidence of Patrycia Arana**

**47**  Ms. Arana was born in Peru and moved to Canada in 1992. She first settled in Montreal and then moved to British Columbia in 2002. She has two daughters including Angela, who she had with Oscar. Oscar is Mrs. Granja's son from a previous relationship. She first met the plaintiff in 2005 when Mrs. Granja was in the hospital. Because Mr. Granja was working long hours and Ms. Arana was on maternity leave, at the time, she spent a lot of time with Mrs. Granja and would see the plaintiff when he came to the hospital after work. Even though Ms. Arana's relationship with Oscar ended, she continued to spend time with the Granjas and they assisted her with her two children.

**48**  When she first met the plaintiff he was a happy person, very social and friendly. Although worried about his wife's health, he was optimistic and ambitious; always wanting to improve his situation for his family. Even after he was injured at the work place and on disability he remained optimistic and looked forward to returning to work.

**49**  The June 2010 accident had a drastic impact on both Ms. Arana and the plaintiff. She personally suffered injuries to her neck and middle back and was off work for five months. She settled her lawsuit with ICBC. It was evident in her testimony that the events on June 5, 2010 were traumatic for her especially considering her young daughter was in the car. Not surprisingly, Ms. Arana was very emotional when testifying about the details of the accident and the assault. In cross-examination, she admitted that her testimony at the examination for discovery described the accident in a different sequence. I note that her testimony at trial was consistent with the statement she provided in November 2010. Regardless of the order of events, there is no dispute that Ms. Arana's car was hit four times by the defendant who then proceeded to physically assault both her and the plaintiff. I pause to note that I do not regard her confusion over the sequence of events of any consequence. It most certainly does not cause me to be concerned with either her credibility or reliability.

**50**  After the June 2010 accident, she noticed a significant change in the plaintiff. He was no longer the happy, social man he once was. He became increasingly isolated socially and depressed without an ability to work and provide for his family. His relationships with his family also suffered which eventually resulted in his marital breakdown.

**Evidence of William Harley Granja**

**51**  Harley Granja was born in Colombia and is the only son of the plaintiff. When he was seventeen years old he moved to Canada with his parents and sister. He graduated from grade 12 and eventually obtained a diploma as a Community Health Worker. He worked in Toronto for a year and then returned to British Columbia where he has been employed in the community health worker field in a variety of positions. Although he lived in his own apartment, he would visit with his parents at least once a week. In September 2014, he returned to live with his father full time.

**52**  Harley Granja testified that his father was very happy and sociable. He was involved in a lot of activities including cooking and fishing and was a very hard working person. The plaintiff was very proud of his Colombian heritage and the entire family was involved with the Colombian community in the lower mainland. He was a good provider and they were a happy family. After the injury to his father's right hand at the construction job, he said his father slowed down a bit in terms of his activities but was looking forward to the job training and getting a job.

**53**  After June 2010 everything changed. His father was in constant pain in his neck, back and hip and was very miserable. He was no longer optimistic about his future employment prospects and acquired a very negative outlook on life. The various medications did not seem to be assisting him and his physical and mental state seemed to be declining. As a result, his relationship with his family suffered. There were more frequent fights between his parents and eventually his mother left his father. His father also isolated himself socially and lost contact with many of his friends. The family home went from being a happy, warm, welcoming place for everyone to gather to a place that people chose to avoid.

**54**  Before his parents separated, his mother travelled to Colombia in late 2013. In an effort to try and have their parents reconcile, Harley and his sister convinced the plaintiff to travel to Colombia in December 2013. The plaintiff remained in Colombia till June 2014, but the reconciliation was not successful

**55**  In September 2014, Harley moved back home to live with his father in order to assist his father and provide him some company. Harley assumed responsibility for many of the financial obligations of his father including the monthly strata fees, medications, cell phone, bus pass, food and recreation centre fees. He would also give his father some spending money. Harley encouraged his father to attend ESL classes and go to the recreation centre to use the pool as he believed it would help him become more optimistic and self-sufficient if he could focus on other activities rather than on his pain.

**56**  In March 2015, Harley took his father on a three day trip to Las Vegas in an attempt to relieve some of his father's stress and give him a pleasant distraction. Before they left on their trip, Harley told his father he wanted them to leave all their troubles behind and focus on the trip. Although his father seemed to enjoy the trip, after one day of sightseeing, he was in too much pain to enjoy the rest of the trip.

**57**  Harley testified that living with his father has been difficult but he cannot leave his father on his own. He said that they never discuss the ICBC claim or his mother - both are off topic as they only make his father more agitated. He testified that his father wants to return to the work force but continues to struggle with the persistent pain.

**EXPERT EVIDENCE**

**Plaintiff's Medical Evidence**

**58**  The plaintiff led evidence from a number of medical experts. While I have read the experts' reports and considered their *viva voce* testimony, I will not review the medical evidence in detail. I will however detail the key findings and opinions of the medical experts.

**Evidence of Dr. Benitez-Lazo**

**59**  Dr. Benitez-Lazo is a family practitioner who was called as an expert in family medicine. Dr. Benitez-Lazo was the plaintiff's family doctor at the time of the accident. Dr. Benitez-Lazo's clinical records were admitted into evidence, together with his medical legal report dated March 10, 2013.

**60**  Dr. Benitez-Lazo's report contains a summary of his clinical notes and results of his examinations as well as reference to assessments performed by other physicians. Beginning on June 11, 2010, Dr. Benitez-Lazo examined Mr. Granja on a frequent basis up until the date of the report. At their first meeting, Mr. Granja, informed Dr. Benitez-Lazo of the details of the accident and assault. Mr. Granja reported that by June 7, 2010 he noticed pain in his lower back and stiffness. Upon physical examination of Mr. Granja, Dr. Benitez-Lazo diagnosed neck strain related to the injury, thoracic and lumbar strain as well as a contusion and strain on his left arm. He prescribed Celebrex, an anti-inflammatory, and Flexeril, a muscle relaxant. The plaintiff was instructed to ice affected areas every four hours and seek physiotherapy. He also recommended Mr. Granja stay off work/school for the next month due to both the physical and psychological pain caused by the incident.

**61**  Over the three year period the plaintiff saw Dr. Benitez-Lazo, he continued to display prominent neck pain with associated stiffness. Despite the use of multiple medications to control pain, physiotherapy, kinesiology, home exercises, regular stretching and swimming, his pain continued to persist.

**62**  Dr. Benitez-Lazo's opinion is that the plaintiff suffers from chronic pain. Further, he has myofascial pain syndrome and that his overall prognosis is uncertain. Myofascial pain is a condition characterised by tight and painful muscles. In his opinion, Mr. Granja has achieved approximately 80% healing of his neck and 50% healing of his lower back and further improvement is possible, but after three years post incident, this is increasingly difficult and unlikely. In his opinion, the June 2010 motor vehicle incident has been "instrumental in the perpetuation of his lower back pain". Dr. Benitez-Lazo recommends at least 30 sessions of kinesiology treatment, followed by a personal training program in combination with medications to treat chronic pain such as Lyrica and/or Cymbalta. Overall, his prognosis is uncertain.

**63**  Dr. Benitez-Lazo is also of the opinion that the plaintiff has developed prominent depressive symptoms in keeping with major depression, anxiety and features of post-traumatic stress disorder. He recommends psychological support and medications for two continuous years.

**64**  With respect to his pre-existing wrist injury, Dr. Benitez-Lazo was of the opinion that his wrist had improved and, after his surgery on November 10, 2010 to remove some hardware in his wrist, the disability period would have been about a month. If he did not have the motor vehicle incident injuries he could have returned to work by April 2011 on a graduated basis. In comparing his pre and post-accident condition, there is a significant difference in his abilities; he was well on his way to recovery from his previous hand injury before the motor vehicle incident and could have been retrained and began work through the help of WorkSafeBC.

**65**  When challenged in cross-examination about the plaintiff's report of pain, Dr. Benitez-Lazo stated he did not think that Mr. Granja is exaggerating the level of pain he is experiencing.

**Evidence of Dr. Anibal Bohorquez**

**66**  Dr. Bohorquez is a specialist in physical medicine and rehabilitation who saw the plaintiff on March 5, 2012 and then again on April 18, 2013 at the request of his family physician, Dr. Benitez-Lazo. Dr. Bohorquez's two medical legal reports were admitted into evidence.

**67**  Dr. Bohorquez diagnosed the plaintiff with myofascial pain affecting the left trapezius, left levator scapulae, the left cervical paraspinal muscles as well as the lumbar paraspinal muscles and the right tensor fascia latae muscle. Dr. Bohorquez also diagnosed cervicogenic headaches which related to muscle pain and tension.

**68**  He recommended outpatient physiotherapy consisting of stretching, strengthening of the affected muscles, and pool exercises. In addition, he recommended the plaintiff see a kinesiologist. Various medications were also recommended including gabapentin to dampen pain experience in those with diffuse chronic pain and nortriptyline for muscle pain and headaches. He also recommended the plaintiff attend a pain clinic. Unfortunately, neither Dr. Bohorquez nor Dr. Benitez-Lazo followed up with Mr. Granja regarding this recommendation. Dr. Bohorquez acknowledged that Mr. Granja probably would have benefitted from attending a pain clinic three years ago when he made the recommendation. Further, he is not surprised that Mr. Granja describes the pain is now worse because Mr. Granja suffers from chronic pain.

**69**  In addition, he also recommended the use of psychological counselling to improve his mood and how he handles pain. He would never be symptom free, but he could have some improvements with some of the recommendations.

**70**  Dr. Bohorquez knew that Mr. Granja had a previous forearm injury and considered that with his hand injury and the persistent neck and back problems it would be difficult for Mr. Granja to work at physical jobs, such as a janitor. While it would be emotionally and psychologically beneficial for Mr. Granja to work in some capacity, he opined he would need some kind of graduated return to work. With respect to vocational disability, Dr. Bohorquez did not feel that Mr. Granja could return to work as a cement finisher because of the lack of range of motion in his neck and in his back. He felt that office type work would be most appropriate, which would allow for frequent breaks.

**71**  Dr. Bohorquez opined that given Mr. Granja's lack of symptoms prior to the motor vehicle incident and the development of the symptoms after the incident, there is a direct relationship between the accident and his symptoms of left-sided neck pain and right low back pain. While Dr. Bohorquez was not aware of the subsequent assault by Mr. Jozsef, he maintained his view that the problems with Mr. Granja's lower back and neck were clearly not a consequence of an assault to Mr. Granja's lower legs.

**72**  Dr. Bohorquez acknowledged that he is not qualified to provide an opinion on Mr. Granja's mental state; he did explain that in his experience depression is common among these patients that were once active and productive, yet then face a lack of self-worth in being unable to work.

**73**  Dr. Bohorquez recommended that Mr. Granja try and work through the pain, to stay active and not be afraid of further injuring himself. Dr. Bohorquez was not optimistic that he would be symptom free in the future.

**Evidence of Dr. Laura Chapman**

**74**  Dr. Chapman is psychiatrist who saw the plaintiff on December 10, 2012 at the request of his counsel. The results of her examination are set out in her report dated January 4, 2013, which has been admitted into evidence. Before meeting the plaintiff she had reviewed the clinical records of Dr. Benitez-Lazo, the WorkSafeBC records and Pharmanet and MSP printouts pertaining to his history of prescriptions.

**75**  The meeting with the plaintiff took place in her office in Victoria, B.C. and lasted two and a half hours. Mr. Granja told her that at the time of the motor vehicle accident he was supposed to complete the WorkSafeBC vocational rehabilitation program to find work as a janitor; he was looking forward to it and optimistic. She did not find any evidence that he was suffering from depression prior to the motor vehicle accident.

**76**  He said that he was very frightened by the motor vehicle accident, he thought he might have been killed, and the subsequent assault took him by surprise; the whole experience was very alarming. Within a month or so, he became discouraged and sad especially because he was unable to continue with the WorkSafeBC program and he struggled to meet his expenses.

**77**  During the two and a half hour interview, she noted Mr. Granja shifting in his seat a few times, which was consistent with musculoskeletal pain in his back and neck. His body movements were slow driven perhaps by psychological processes and his pain. His eye contact was limited, which is consistent with depression. His speech was monotone, slowed and his responses slightly delayed. His thought process was a bit slow. He was quite tearful.

**78**  Dr. Chapman diagnosed Mr. Granja with major depressive disorder of moderate severity. Dr. Chapman opined that the motor vehicle accident of June 5, 2010 was a significant factor contributing to the development of the plaintiff's major depressive disorder. It was her opinion that the plaintiff's symptoms did not meet the criteria for post-traumatic stress disorder, but his symptoms were on that spectrum. She also opined he has psychosocial and environmental problems in the moderate to severe range due to his chronic pain condition, limited support network, inability to work and financial strain.

**79**  Dr. Chapman strongly recommended 16-20 sessions of cognitive behavioural therapy to target his depressive symptoms, sleep disturbance and residual post-traumatic stress symptoms. She also recommends these sessions be conducted with a Spanish speaking psychologist (therapist).

**80**  With respect to pain management, Dr. Chapman was of the opinion that the plaintiff would benefit from a referral to a multidisciplinary pain management program.

**81**  With respect to medications, Dr. Chapman opined that he would benefit from further psychiatric medications. She recommended a gradual increase in the dosage of Cipralex as well a combination with Cymbalta to treat both his depression and pain, and continuation of Abilify to deal with his sleep issues and nightmares.

**82**  Dr. Chapman's prognosis for the plaintiff's recovery from major depression was guarded because of the multiple factors contributing to his condition, including ongoing pain.

**83**  In cross-examination, Dr. Chapman stated that the plaintiff's marital discord would not have been sufficient to cause his moderately severe major depressive disorder. In addition, Dr. Chapman noted from her review of the clinical records there was an absence of evidence of symptoms of a major depressive disorder prior to the motor vehicle accident.

**84**  She disagreed with the suggestion by ICBC counsel that the plaintiff had been diagnosed with major depressive disorder in 2009. She explained the difference between tools used such as the Beck Depression Inventory report, which is a way to get a semi-quantitative rating of the degree of symptoms, and the actual diagnosis which is done by a physician based on a consideration of a patient interview and a patient's entire history. As she stated, it is the physician who makes the diagnosis, not the results in a report.

**85**  Finally, Dr. Chapman was of the opinion if the motor vehicle accident had not occurred and the plaintiff would have been able to continue with the WorkSafeBC retraining program, it is unlikely that he would have developed major depression.

**Evidence of Marianna Barber-Starkey**

**86**  Ms. Barber-Starkey is a vocational rehabilitation consultant with WorkSafeBC. In 2013, she was assigned Mr. Granja's file to complete the preparation of the vocational rehabilitation plan for Mr. Granja. Although Mr. Granja had been dealing with WorkSafeBC since his 2008 accident, a formal plan had not been prepared. The goal of the plan was to identify suitable employment options for Mr. Granja following his 2008 work place accident which resulted in his wrist injury.

**87**  Ms. Barber-Starkey's plan was to retrain Mr. Granja as a building service worker or janitor. The plan consisted of a three week course provided by WorkSafeBC, to be followed by a 12 week job placement program. The job placement program could be extended if a job is not secured in the 12 week period. Ms. Barber-Starkey testified that WorkSafeBC has a 70% success rate for obtaining work placements.

**88**  Ms. Barber-Starkey identified several barriers to employment for Mr. Granja similar to those identified by Dr. Powers. At the time of her report, she noted the physical limitations due to the reduced wrist strength as well as his age and lack of English language skills. Ms. Barber-Starkey also noted that Mr. Granja may have other health issues given June 2010 accident.

**89**  Ms. Barber-Starkey also explained the financial support provided to Mr. Granja from WorkSafeBC. The gross wage loss established by WorkSafeBC for Mr. Granja was $53,590.00 per year. Mr. Granja received a 3.5% permanent functional award for his wrist injury as a lump sum payment. Following the finalizing of the vocational rehabilitation plan, an earnings loss pension was established. Mr. Granja received a lump sum payment as well as a monthly pension of $992 which commenced at the end of November 2013 and will continue till Mr. Granja turns 65.

**90**  Ms. Barber-Starkey explained that the vocational rehabilitation plan is still available to Mr. Granja when he feels physically able to participate.

**Evidence of Maria Undurraga**

**91**  Ms. Undurraga is a registered psychologist who met with Mr. Granja on referral from Dr. Benitez-Lazo. Ms. Undurraga is an expert in clinical psychology. Ms. Undurraga prepared a report dated October 13, 2015 and provided a copy of her clinical records on December 8, 2015. I declined the plaintiff's request to have the report marked as an exhibit at trial due to its late production.

**92**  At the time of trial, Ms. Undurraga had met with Mr. Granja 19 times and had one final session under the treatment plan provided through ICBC. Ms. Undurraga recommended 20 treatments consisting of weekly sessions for another three months and then biweekly session for an additional three months. Sessions should then be reduced to one per month for six months and then re-evaluated.

**Evidence of Dr. Dean Powers**

**93**  Dr. Powers is a Vocational Rehabilitation consultant and Vocational Expert with Harbourview Rehabilitation Ltd. Dr. Powers conducted a vocational assessment of Mr. Granja, the results of which are set out in a report dated February 11, 2013. The assessment involved an interview with Mr. Granja and various vocational tests, both of which took place on January 18, 2013, and a review of background information provided by Mr. Granja.

**94**  Based on his assessment, Dr. Powers was of the opinion that Mr. Granja is not physically capable of fulfilling the demands of a cement finisher or working in the renovation field due to his unresolved medical condition. After the accident Mr. Granja's employment prospects were significantly diminished and the number of occupations available to Mr. Granja is now reduced due to his physical limitations in addition to his age and lack of English language skills.

**95**  Based on his assessment, Dr. Powers opined that Mr. Granja's employability "will be limited to a narrow job market where the employer and co-workers and customers speak his language of origin and where the work demands are in the sedentary to light duty positions and likely part-time". In Dr. Powers' opinion, it will be very difficult for Mr. Granja to secure employment in the current job market. Dr. Powers concludes that Mr. Granja may find it difficult to find suitable employment, and if he does, it may only offer him part-time hours.

**96**  Dr. Powers recommended that Mr. Granja participate in vocational rehabilitation services to assist in exploring occupations suited to his medical conditions. Dr. Powers testified that 50 hours of vocational rehabilitation services at $150/hour with a "job coach" would assist Mr. Granja in his efforts to obtain employment. Dr. Powers opined that the first step was to get Mr. Granja re-engaged with society as a volunteer which would assist with his psychological issues and assist in his reintegration into the workforce. Dr. Powers expected that Mr. Granja could obtain a minimum wage job as a light duty cleaner.

**Evidence of Curtis Peever**

**97**  Mr. Peever is a labour economist who provided opinion evidence concerning Mr. Granja's loss of past and future earnings based on various scenarios. Mr. Peever prepared two reports, the first dated June 27, 2013 and the second January 21, 2015, in which he calculated the past and present values of future wages and benefits using statistical evidence and certain assumptions. In a supplemental report filed at trial, Mr. Peever adjusted his calculations from April 2015 to December 15, 2015. I will return to Mr. Peever's evidence when considering those claims.

**EVIDENCE OF DEFENDANT and ICBC**

**98**  Mr. Jozsef was the only witness called on his behalf. Four additional witnesses were called by ICBC - Alfred Kloot, a dairy farmer from Chilliwack, Mathew Smith, a nurse and two estimators from ICBC, Jim Holman and John Hanson.

**Evidence of Mr. Jozsef**

**99**  As set out earlier, due to Mr. Jozsef's intoxication level he was not able to provide much detail regarding the incident. He was clearly remorseful over the incident and had no explanation for his actions. He testified that he had immigrated to Canada years ago and had made his living as a photographer until digital cameras reduced the demand for his services. Prior to his retirement, he worked at a variety of jobs after his photography business closed.

**100**  Mr. Jozsef adamantly denies that his physical encounter with Mr. Granja resulted in any injuries because he was extremely intoxicated and unable to stand up without assistance thus incapable of inflicting any amount of physical force upon Mr. Granja.

**Evidence of Alfred Kloot**

**101**  Mr. Kloot is a dairy farmer who owns Kloot Dairy farm in Chilliwack, B.C. He was called by ICBC to describe the job requirements of a milker working on his farm. According to Mr. Kloot, the job of milker is the easiest job on the farm because it is highly automated although the task of cleaning the stalls was physically demanding. Mr. Kloot testified that he did not have a detailed recollection of Mr. Granja other than he knew he was a friend of Mr. Garcia, who worked on his farm.

**Evidence of Matthew Smith**

**102**  Mr. Smith is a registered nurse at the Jim Pattison Chronic Pain Clinic. He explained how the Pain Center operated and the composition of the staff which included five physicians, a nurse, a physiotherapist, an occupational therapist, a psychologist, a psychiatrist, a social worker and a pharmacist. However, none of the treatment team works full-time at the clinic and they tend to rotate through the clinic.

**103**  Mr. Smith testified that the wait list for patients is currently between six to nine months which is an improvement from 2012-2013 when the wait was anywhere between 6 and 24 months. There is no cost to attend the clinic as it is publicly funded.

**104**  Mr. Smith testified that the focus of the clinic is on functionality and quality of life for the patient. While there are a variety of patients who attend the clinic they all suffer from chronic pain. The clinic does not provide long term care as it does not have the capacity. Rather, the clinic will eventually refer the patient back to their primary care physician for further treatment.

**Evidence of John Hanson**

**105**  Mr. Hanson is employed with ICBC as an estimator and was responsible for examining Ms. Arana's 2009 Honda Civic after the accident on June 5, 2010. Mr. Hanson noted damage to the rear bumper cover and the right front door on the passenger side. Due to the extensive damage the entire right front door had to be replaced.

**106**  Mr. Hanson explained that the "B pillar" which is the middle structure of the vehicle, between the front and back passenger side doors, was made out of hard metal as was the door attachment. Essentially, hard plastic material covered the pillar making the area very firm. Mr. Hanson testified it took three hours to straighten out the pillar.

**107**  Mr. Hanson also explained that the driver seat was made out of a steel frame which was covered by fabric and a foam cushion on the seat. Both the lower part of the driver seat and the section between the seats was made out of hard plastic.

**Evidence of James Holman**

**108**  Mr. Holman was responsible for accessing the damage to Mr. Jozsef's 2002 Chrysler Sebring following the accident on June 5, 2010. Mr. Holman had no recollection of his examination of the vehicle and relied on photographs to assist his memory. According to Mr. Holman there was a small scrap to the right rear bumper. However, the photographs were of such poor quality it was difficult to ascertain if there was indeed any damage to the vehicle. If so, it was most certainly minimal. Mr. Holman did not make any estimate as to the value of the damage.

**ANALYSIS**

**Credibility and Reliability of Evidence**

**109**  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.); *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).

**110**  In addition, the principles to be applied in assessing credibility in relation to the assessment of damages where few or no signs of objective injury exist were recently summarized by Mr. Justice Silverman in *Dhaliwal v. Greyhound Transportation Corp.*, [*2015 BCSC 2147*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HHT-8531-JCRC-B111-00000-00&context=) at para. 280.

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

**112**  The defendants submit that Mr. Granja's evidence concerning his complaints of ongoing chronic pain and anxiety lack credibility and reliability. They say that he has exaggerated the impact of his injuries and the impact they have had on his life. The defendants cautioned me that Mr. Granja's complaints about pain levels are not objectively measureable and therefore I should be careful about accepting his evidence absent some corroboration. In support of the submissions respecting the findings I should make in relation to Mr. Granja's credibility, counsel for ICBC relies on the cumulative impact of a number of considerations, including:

1. Inconsistencies between Mr. Granja and Ms. Arana's description of the circumstances of the motor vehicle incident in particular the severity of the impact;
2. The Youtube video clip of Mr. Granja being interviewed at the Fusion Festival in which Mr. Granja in located near the food preparation area wearing gloves and appearing to be in good spirits;
3. The exaggerated pain levels described by Mr. Granja which the defendant says are simply unbelievable.
4. The suggestion that Mr. Granja was engaged in renovation projects post-incident.

**113**  I reject the defendant's submission that Mr. Granja had a tendency to testify in a manner that was favorable to his interest and thus deliberately mislead the court. Given the traumatic events that unfolded on the day in question over five years ago it is not surprising to me that those involved might have a different recollection of certain details. Certainly, contrary to the submission of ICBC, this does not equate with one of them being untruthful or less credible. I have no hesitation in finding that when Mr. Jozsef drove into the passenger side of Ms. Arana's vehicle the force of the impact caused Mr. Granja to be tossed around in the back seat coming into contact with various hard surfaces of the vehicle.

**114**  The Youtube video does not establish that Mr. Granja was engaged in any type of physical labour while at the Fusion Festival. The fact that Mr. Granja is seen in the video wearing an apron and gloves does not support ICBC's submission that Mr. Granja was actually working at the event. Further, it is not surprising that Mr. Granja appeared in good spirits in the video as many witnesses testified that he enjoyed attending the festival and associating with others in the Colombian community.

**115**  The medical experts testified that it is common among those suffering from chronic pain to experience fluctuations in the pain levels. Neither the defendant nor ICBC produced any medical evidence to challenge the evidence of the medical experts. There is simply no evidence before me to establish that Mr. Granja was exaggerating his pain.

**116**  Much has been made by ICBC regarding Mr. Granja's efforts to engage in renovation projects post-accident. However, Mr. Granja testified about only one occasion where he had supervised two others on a renovation project which was not a success. ICBC also relies on the fact that Mr. Granja's bank records established that purchases were made at home hardware stores. However, there is simply no evidence to support ICBC's submission that Mr. Granja engaged in other renovations projects post-accident.

**117**  Counsel for Mr. Granja submits that Mr. Granja gave his evidence in an honest and forthright manner. Further, he submits that Mr. Granja's evidence was corroborated by both the civilian and medical experts who testified at trial.

**118**  I agree. I have had the benefit of observing Mr. Granja over several days of testimony. I find there is no support for the characterization of Mr. Granja urged upon me by the defendants. It did not appear to me that he embellished his complaints or testified in a deliberately dramatic fashion. Indeed, I found Mr. Granja's display of emotion throughout his testimony as genuine and a reflection of the devastating impact the June 2010 incident has had on his health and well- being. The various friends, colleagues and family members who testified on behalf of Mr. Granja provided a consistent description of Mr. Granja pre and post- accident. As well, the medical evidence also supports Mr. Granja's description of his pain and suffering. Considering all of the evidence, I have no hesitation in finding Mr. Granja credible and I accept his evidence. I find that when Mr. Jozsef drove his vehicle into the passenger side of Ms. Arana's vehicle the impact caused Mr. Granja to be tossed around the back seat area resulting in his body hitting the hard plastic of the console and seat as well as the steel frame of the car. There is no evidence before me to suggest that the padding on the car seat, head rest or any other part of the vehicle would have protected Mr. Granja from the force of impact.

**Causation**

**The Legal Principles**

**119**  The plaintiff must establish on a balance of probabilities that the defendant's ***negligence*** caused or materially contributed to an injury. The defendant's ***negligence*** need not be the sole cause of the injury so long as it is part of the cause beyond the range of *de minimus*. Causation need not be determined by scientific precision: *Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=) [*Athey*] at paras. 13-17; *Farrant v. Laktin*, [*2011 BCCA 336*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22RP-00000-00&context=) at para. 8.

**120**  In *Mirsaeidi v. Coleman,* [*2014 BCSC 415*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JP4G-61S5-00000-00&context=), Harris J. further outlines the principles of causation at para. 50:

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.

**121**  In special circumstances, the "but-for" test proves unworkable, and the law has applied a "material contribution" test. As Chief Justice McLachlin wrote 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 para. 46:

...Exceptionally, a plaintiff may succeed by showing that the defendant's conduct materially contributed to risk of the plaintiff's injury, where (a) the plaintiff has established that her loss would not have occurred "but for" the ***negligence*** of two or more tortfeasors, each possibly in fact responsible for the loss; and (b) the plaintiff, through no fault of her own, is unable to show that any one of the possible tortfeasors in fact was the necessary or "but for" cause of her injury, because each can point to one another as the possible "but for" cause of the injury, defeating a finding of causation on a balance of probabilities against anyone.

**122**  Causation must be established on a balance of probabilities before damages are assessed. 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 fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: [*Athey*].

**123**  In addition to establishing whether the damage was caused *in fact* by the conduct of the defendant using the "but for" test, the plaintiff must also establish causation *in law* as recently stated by our Court of Appeal in *Borgfjord v. Boizard*, [*2016 BCCA 317*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K9P-92K1-F1H1-217H-00000-00&context=) at para. 56-57:

[56] Second, the plaintiff must establish causation *in law*. This has been described as proving the defendant was a proximate cause of the loss, the damage was not too remote from the factual cause, or the damage suffered was reasonably foreseeable: *Hussack* at para. 54. Overall the inquiry asks whether the harm is too unrelated to the wrongful conduct to hold the defendant fairly liable: *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=) (CanLII) at paras. 11 and 12.

[57] It is not necessary for the plaintiff to show the precise injury or the full extent of the injury was reasonably foreseeable, only that the type or kind of injury was reasonably foreseeable: *Hussack*, at para. 71.

**124**  In all the circumstances, the most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been if not for the defendant's ***negligence***, no better or worse. Tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe than they would be for a normal person (the thin skull rule). However, the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would have experienced anyway (the crumbling skull rule): *Athey 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.

**125**  The plaintiff also seeks damages in relation to the psychological injury which manifests itself in his ongoing depressive disorder which impacts on his general well-being. In *Yoshikawa v. Yu*, [*(1996) 21 B.C.L.R. (3d) 318*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G2J5-00000-00&context=), Mr. Justice Lambert cited with approval the overall test which had been referred to by the trial judge in *Maslen v. Rubenstein*, [*[1989] B.C.J. No. 1683*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-DY33-B09H-00000-00&context=), (September 18, 1989), Victoria 88/131 (B.C.S.C.) as follows:

[C]hronic benign pain syndrome will attract damages ... where the plaintiff's condition is caused by the defendant and is not something within her control to prevent. If it is true of a chronic benign pain syndrome, then it will be true also of other psychologically-caused suffering where the psychological mechanism, whatever it is, is beyond the plaintiff's power to control and was set in motion by the defendant's fault. See also: *Carmichael v. Kwon*, [*2016 BCSC 265*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5J6J-RHK1-FGCG-S0R5-00000-00&context=)

**126**  The concept of "reasonable foreseeability" is subject to a qualification when the injury is psychiatric in nature. As Justice Bennett stated in *Hussack v. Chilliwack School District,* [*2011 BCCA 258*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JJK6-S222-00000-00&context=) at para. 74:

where the psychiatric injury is consequential to the physical injury for which the defendant is responsible, the defendant is also responsible for the psychiatric injury even if this injury was unforeseeable. See *White v. Chief Constable of South Yorkshire Police,* [1999] 2 A.C. 455 at 470, *Varga v. John Labbatt,* [*[1956] O.R.1007*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJS1-JN6B-S3P8-00000-00&context=), [*6 D.L.R. (2d) 336*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJS1-JN6B-S3P8-00000-00&context=) *(H.C.) Yoshikawa v. Yu* [*(1996) 21 B.C.L.R. (3d) 318*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G2J5-00000-00&context=), [*73 B.C.A.C. 253*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G2J5-00000-00&context=) (C.A.); *Edwards v. Marsden,* [*2004 BCSC 590*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F30T-B2GM-00000-00&context=); *Samuel v. Levi,* [*2008 BCSC1447*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JS5Y-B2MT-00000-00&context=).

**Discussion**

**The Plaintiff's Position**

**127**  Mr. Granja submits that other than his right wrist work place injury he had no pre-existing conditions at the time of the June 2010 incident. In fact, before the workplace injury he was working steadily as a cement finisher which involved physically demanding work. While he did have some limitations in his left hand due to an injury sustained while in Colombia, it had not restricted his ability to work as a cement finisher. At the time of the incident, Mr. Granja was not suffering from a major depressive disorder and in fact had established a happy and fulfilling life in Canada with his wife and children. He was looking forward to getting back to work and providing for his family.

**128**  In response to the defendant's submission that it was the punches from Mr. Jozsef that caused his injury, Mr. Granja submits that this reasoning is unsupported by the medical evidence and inconsistent with the facts. For example, Ms. Arana's vehicle was hit with sufficient force to bend the B pillar of the car. They argue it was this same amount of force that caused Mr. Granja to be tossed around in the car resulting in the damages to his neck and back. In contrast, the pain in Mr. Granja's left arm attributed to the assault by Mr. Jozsef cleared up shortly after the incident and was not considered something of significance by Dr. Benitez-Lazo.

**ICBC's Position**

**129**  ICBC submits that any injury Mr. Granja sustained was a result of the physical assault by Mr. Jozsef. They submit the punches by Mr. Jozsef were sufficiently forceful to cause injury to Mr. Granja and that Mr. Granja is unfairly downplaying the impact of the assault and the force of the punches. Further, ICBC maintains the impact during the motor vehicle incident was so minor it could not have resulted in any injury to Mr. Granja. ICBC submits that the court must apportion damages between the assault and the motor vehicle incident.

**130**  ICBC points to inconsistencies in the evidence called by Mr. Granja; for example, Ms. Arana said on discovery that he was not inside the car once it was hit the second time, but at trial she said that he was inside the car for the second hit; and Mr. Granja said he was hit on the head in the accident, but he never mentioned this to any of his doctors. Further, ICBC submits that the opinion of Dr. Benitez-Lazo on the issue of causation should not be accepted because a) he was mistaken as to the circumstances of the accident, b) he did not know whether Mr. Granja had struck any body parts during the accident, but he assumed he had, and c) he assumed the forces in the motor vehicle accident were significant but did not consider equally the forces in the assault.

**131**  ICBC also points to two intervening events that should be considered in the assessment of Mr. Granja's damages. First, in June 2011, Mr. Granja missed a step and injured his lower back, and it was after this incident that he developed pain in his left leg. This lower back injury is submitted to be an independent injury unrelated to the motor vehicle accident, while Mr. Granja links this injury to the injuries sustained in the accident, which made him more susceptible to a slip given his leg dragging as per Dr. Benitez-Lazo's evidence. Second, Mr. Granja had a right knee injury unrelated to the June 2010 accident, which occurred in August 2015. ICBC claims this injury would have caused pain and limitations regardless of the motor vehicle accident.

**132**  With respect to the psychological damages, ICBC submits that Mr. Granja would have experienced depression regardless of the motor vehicle incident and assault by Mr. Jozsef. In particular, they rely on the fact that Mr. Granja was off work at the time of the incident and had already experienced a significant decrease in his income, which resulted in increased stress and anxiety. ICBC also submits that the marital break-up was inevitable as Mr. Granja's wife suspected he was having an affair.

**Mr. Jozsef's Position**

**133**  Mr. Jozsef submits that it was impossible for him to strike Mr. Granja on the head during the assault because, as Mr. Granja testified, he had his arms up crossed in front of him in a defensive stance. Mr. Jozsef also argues that the medical evidence does not show any evidence of head injury. Mr. Jozsef submits that he was so intoxicated at the time of the assault that he could barely walk without someone's help. He claims his level of intoxication rendered him incapable of materially injuring Mr. Granja. Mr. Jozsef self-describes as a short man who weighs 50 or more pounds less than Mr. Granja. Mr. Jozsef claims that Mr. Granja has exaggerated his injuries. He argues that Mr. Granja's injuries are related to pre-existing factors or other factors unrelated to the assault.

**134**  The medical evidence establishes that prior to the incident Mr. Granja was a relatively healthy and happy person who was enjoying his life in Canada. He did have a pre-existing injury to his left hand which resulted in some limitations but did not prevent him from pursuing a physically demanding job as a cement finisher. At the time of the incident, Mr. Granja was off work due to a work place injury to his right wrist. However, plans were in place for Mr. Granja to participate in a WorkSafeBC vocational training program with the goal of him obtaining employment as a janitor.

**135**  Having considered all of the evidence, I find the accident caused the plaintiff's physical and non-physical injuries, some of which have been resolved, some of which have not. I find the accident to have caused injury to the plaintiff's neck, shoulder and back. I am not satisfied that all of his injuries have been resolved and accept that he has a chronic pain condition.

**136**  I find that Mr. Granja's physical injuries were caused solely by the motor vehicle incident. In my view, the submissions by ICBC that the assault by Mr. Jozsef caused the physical injuries to Mr. Granja are not grounded in the evidence. Indeed, it is remarkable to me that ICBC would suggest that Mr. Jozsef, who was undeniably intoxicated, would be capable of inflicting punches on Mr. Granja of such a magnitude that they resulted in the injuries to Mr. Granja's neck and back yet deny that the force of the impact, capable of damaging a steel pillar in the car, could not have caused any injury to Mr. Granja. The other problems that arose after the accident were relatively mild injuries and of short duration, thus I find that they would not have hampered his ability to secure employment.

**137**  I find that the psychological injuries Mr. Granja suffered are a result of one transaction, rather than two independent and unrelated events. These non-physical injuries are a non-divisible injury as the term is used in *Athey.* In this case, there is no evidence to suggest that Mr. Granja's psychological difficulties are caused solely by either the motor vehicle incident or the assault or some other non-tortious cause. ICBC urges me to place little weight on the opinion of Dr. Chapman because they say she failed to properly consider the impact of his marital breakup and his precarious financial situation. However, as she stated in cross-examination, Dr. Chapman's opinion was that the plaintiff's marital breakup would not have been sufficient to cause his moderately severe major depressive disorder. Further, she rejected the suggestion that Mr. Granja had a previous diagnosis of major depressive disorder. She also opined that had the motor vehicle incident not occurred, Mr. Granja would have proceeded with the WorkSafeBC retraining program and not developed major depression. Therefore, I find that the plaintiff's depression and anxiety as expressed by the diagnosis of major depressive disorder is a 100% non-divisible injury caused by the motor vehicle accident and the assault coupled with the verbal abuse by Mr. Jozsef that enveloped the entire incident.

**138**  With respect to apportionment of liability for psychological injury, I find that Mr. Jozsef is 25% at fault given his physical and verbal assault of Mr. Granja.

**DAMAGES**

1. **Non-Pecuniary Damages**

**The Legal Principles**

**139**  Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Benavides v. John* Doe, [*2015 BCSC 1831*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5H60-GJS1-FD4T-B15X-00000-00&context=) at para. 94.

**140**  In *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=), the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages at paras. 64-65:

[64] The underlying purpose served by non-pecuniary damages was discussed 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=), [*263 D.L.R. (4th) 19*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1M7-00000-00&context=). She began (at para. 45) by setting out the following passage from the judgment of Mr. Justice Dickson, as he then was, 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:

Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (*Thornton* [*[1978] 2 S.C.R. 267*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250X-00000-00&context=) at p. 284 of S.C.R.).

[65] Madam Justice Kirkpatrick then provided (at para. 46) a non-exhaustive list of common factors to be considered in assessing non-pecuniary damages: (a) age of the plaintiff; (b) nature of the injury; (c) severity and duration of pain; (d) disability; I emotional suffering; and (f) loss or impairment of life. While acknowledging that the following additional factors may be subsumed within the ones already listed, she added: (g) impairment of family, marital and social relationships; (h) impairment of physical and mental abilities; (i) loss of lifestyle; and (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [*2005 BCCA 54*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S131-00000-00&context=), [*38 B.C.L.R. (4th) 17*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S131-00000-00&context=)).

**141**  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 that experience: *Dilello v. Montgomery,* [*2005 BCCA 56*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S13K-00000-00&context=) at para. 25.

**142**  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., 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, 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.

**143**  While comparison between authorities may provide useful guidance, direct comparisons in many cases are difficult as "no two situations are identical". The gravity of the injury is not determinative: *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.

**Discussion**

**144**  Mr. Granja submits that his injuries warrant an award for non-pecuniary damages of $150,000. He submits that he has suffered from his physical injuries and psychological injury, namely, his major depressive disorder, for over five years since the accident. He argues that his accident related injuries have caused him emotional suffering including loss of self-esteem and humiliation on account of having to assign himself into bankruptcy. His socialization has been negatively impacted where he has lost the friendship of many people in his community; for example, he was expelled from the Columbian Cultural Organization that he helped to establish. He also attributed the disintegration of his marital relationship to the accident.

**145**  In support of his claim for non-pecuniary damages in the amount of $150,000 the plaintiff relies on the following authorities which range in awards between $75,000 - $160,000:

1. *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=), involved a motor vehicle accident at an intersection where the 35 year-old plaintiff was forcefully rear ended. He sustained soft tissue injuries in his neck and back. He would likely have to retrain as he was unlikely to continue work as a plumber. The quality of his work and non-work life diminished substantially. The Court awarded him $75,000 in non-pecuniary damages.
2. *Sirak v. Noonward,* [*2015 BCSC 274*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-F900-G4WF-00000-00&context=), the 55 year-old plaintiff was rear ended by a van while stopped on the highway for a road-construction crew. He suffered serious injuries to his neck and back, including a herniated disc, that continued to cause significant pain, headaches, and numbness, in addition to other neurological symptoms in his arms, hands, and legs. The plaintiff used to work as a painting contractor. There were some pre-existing degenerative changes to his spine, but they were not symptomatic. The Court awarded him $160,000 for non-pecuniary damages.
3. *Redmond v. Krider,* [*2015 BCSC 178*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5G6C-VP51-F7VM-S0N2-00000-00&context=), the 47 year-old plaintiff was struck by a motor vehicle making a left hand turn. She had fibromyalgia from two previous motor vehicle accidents. She also suffered from PTSD after being a victim of armed robbery. After the accident in question, she experienced pain from soft tissue injuries in her neck, back, legs, hips, arms and back of her shoulder. Her fibromyalgia flared up post-accident, as did her psychiatric condition. Her pain was found to be chronic and she no longer could engage in fitness and recreational activities with her partner. She became preoccupied with lessening her pain. The Court awarded her $150,000 for non-pecuniary damages.
4. *Gulati* v. Chan, [*2015 BCSC 431*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-JSRM-60G5-00000-00&context=), the plaintiff, age 53, was hit by a driver as she walked across a pedestrian crosswalk. As a result of the accident, the plaintiff suffered several injuries, including left arm, soft-tissue injuries, concussion, hearing and memory loss, headaches, depression, and post-traumatic stress. The Court found that the accident aggravated her pre-existing arthritis, although it reduced her non-pecuniary damages award by 20% owing to the "crumbling skull" doctrine. The plaintiff also suffered further trauma to her left arm a year and a half following the accident, constituting an intervening event. The Court awarded her $120,000.
5. *Hosseinzadeh v. Leung,* [*2014 BCSC 2260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-FK0M-S4TJ-00000-00&context=), the 43 year-old plaintiff was struck at an intersection by a left turning vehicle. The plaintiff had pre-existing hypothyroidism and type II diabetes. She suffered from scratches, bruises, and injury to her neck and lower back, as well as a herniated disc. Her condition persisted and became debilitating, chronic, and permanent. She also developed fibromyalgia following the accident. Prior to the accident she was able to look after all the cooking, housekeeping, laundry, and shopping for her family, but after, she relied mainly on her family for support. . She could no longer work as a daycare worker, although she likely may be able to engage in sedentary work. The Court awarded her $125,000 in non-pecuniary damages.
6. *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=), the 43 year-old plaintiff was rear ended while in her car with her two-year old daughter. She developed soft tissue injuries, chronic sleep disruption, PTSD, severe depression and heart palpitations. She was a stay at home mom, but would have likely returned to work. The medical evidence showed that she was totally disabled from engaging in full time work in the future. Her family remained intact, although negatively affected. The Court found that previously she was an energetic wife and mother of two. She now felt devastated as she could no longer contribute to her family as she used to. The Court awarded her $130,000 as non-pecuniary damages.
7. *Cumpf v. Barbutta*, [*2014 BCSC 1898*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-JGHR-M49R-00000-00&context=), the plaintiff had a previous motor vehicle accident, which caused her pain in the left side of her back radiating into her arm, reduced range of motion in her neck, headaches, and she previously had some degenerative disc disease. As a result of the motor vehicle accident at issue, the 48 year-old plaintiff experienced pain in her shoulders, arm, back, right leg, and, for the first time, in her hips. The Court found that the accident in question exacerbated her injuries from before notably her cervical myalgia and pain in her lumbar spine pain and caused her an adjustment disorder with depressive mood. The Court found her credible and awarded her $150,000 in non-pecuniary damages.

**146**  Counsel for ICBC submits that an appropriate award for non-pecuniary damages in this case is in the range of $50,000 - $60,000. They rely on the following cases:

1. *Yip v. Saran,* [*2014 BCSC 1283*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B15W-00000-00&context=), the 52 year old female plaintiff sustained mild to moderate soft tissue injuries to her neck, shoulder, back, right leg and knee in a motor vehicle accident. She also suffered from a vestibular concussion and headaches. Her emotional problems consisted of nightmares and flashbacks of the accident. The plaintiff's emotional struggles persisted despite having undergone counselling, which led her to see a psychiatrist. At trial, she was settled somewhat but the medical evidence showed she still dealt with severe depression and anxiety. Her emotional problems were causally linked to the accident. The Court awarded her $55,000 for non-pecuniary damages.
2. *Lourenco v. Pham,* [*2013 BCSC 2090*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JG02-S42X-00000-00&context=), the plaintiff pedestrian was a 22 year old female who was hit by a car. After the accident, the plaintiff had various bruises, pain in her elbows, knees and right buttocks. She limped slightly after the accident, but at the time of trial, she still had some pain in her neck, back, and shoulders. She continued to have anxiety while crossing streets. She no longer engaged in her recreational activities. The Court awarded her $50,000.
3. *Hatch v. Kumar*, [*2013 BCSC 2049*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JG02-S40C-00000-00&context=), the plaintiff was 49 years old at the time of trial. She was highly active before she was rear ended. She sustained neck and back injuries. She attended physiotherapy with not much success, as well she tried prolotherapy. At the time of trial, she was still experiencing back pain. The injuries continued to impact the plaintiff's life generally. The Court awarded $50,000.
4. *Rutledge v. Jimnie,* [*2014 BCSC 41*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1J0-00000-00&context=), the 48 year old plaintiff was struck by a truck while exiting his vehicle after he parked. He sustained injuries to his neck and arm, as well as significant headaches. He was diagnosed as having chronic post-traumatic headaches. The accident caused significant lifestyle changes, particularly, to the plaintiff's passion for weight lifting. The Court awarded $55,000.
5. *Espinoza v. Espinoza,* [*2015 BCSC 762*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVD1-JS5Y-B1B8-00000-00&context=), the 47 year old plaintiff was injured in a motor vehicle accident in which he was the front seat passenger. He was originally from Honduras and emigrated to Canada about 28 years prior to trial. He worked as a cement mason. He argued that the accident injuries diminished his capacity to work in this field. Shortly before the accident, he suffered an injury to his shoulder during the course of his employment. He was off three weeks before returning to light duties. Since the accident he returned to work for different periods, but each time, he claimed that he had to quit because of the toll they took on his back and neck. Despite inconsistencies in the plaintiff's evidence, the court found he sustained chronic soft tissue injuries to his neck and back. While finding there had been some exaggeration of his injuries, the court awarded the plaintiff $55,000.

**147**  In coming to a decision on the appropriate award under this category, I have reviewed the various cases cited by the parties, mindful that each case is different and that damages must be assessed on the basis of the particular circumstances of the individual plaintiff. The cases referred to by ICBC simply do not capture the extensive impact of Mr. Granja's injuries to his psychological health. The key distinguishing factor is that everything from the ramming of Mr. Jozsef's car to the physical and verbal assaults were intentional and not purely an accident. The cases do not involve any comparable incidents; for example, in the *Espinoza* case, the plaintiff there was eventually able to return to work for some periods and there was no related trauma from intentionally violent manoeuvres of a car or assaults.

**148**  Given the chronic nature of Mr. Granja's physical injuries together with his ongoing emotional difficulties, I accept he will continue to suffer in his day to day living. With respect to the impact on Mr. Granja and his family and friends, I accept that the relationship he has with his son and his many friends has been negatively impacted as a result of the injuries. There is no doubt that the injuries also contributed to the failure of his marriage. Mr. Granja's enjoyment of all aspects of his life is significantly reduced. His prospects for employment are bleak. In summary I find that the aftermath of the incident has had a devastating impact on every aspect of Mr. Granja's well-being.

**149**  Based on the cases referred to by counsel and the unique circumstances of Mr. Granja's accident coupled with the physical and verbal assaults, I award him $125,000 in non-pecuniary damages.

1. **Past Loss of Earning Capacity**

**The Legal Principles**

**150**  Compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Ibbitson v.* Cooper, [*2012 BCCA 249*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24M7-00000-00&context=) at para. 19; *M.B. v. British Columbia,* [*2003 SCC 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YB-00000-00&context=) at para. 49; *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=).

**151**  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*, [*[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; *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.

**Discussion**

**152**  Mr. Granja seeks an award for past income loss based on the assumption that Mr. Granja would have worked as a janitor following the WorkSafeBC vocational rehabilitation program from April 2011 up to the time of trial. While Mr. Granja testified he hoped to eventually secure employment as a cement finisher and counsel originally made those submissions, in reply submissions and in keeping with the medical evidence, counsel for Mr. Granja altered his submission to focus on the loss relating to one in a janitor position.

**153**  ICBC submits that the plaintiff has failed to demonstrate on the balance of probabilities that he has suffered any past income loss. Alternatively, they submit that should the Court find that the plaintiff's pass loss of income is related to the accident, then past gross wage loss should be assessed at $20,000 to $25,000, less a percentage for failure to mitigate.

**154**  I have found on a balance of probabilities that the accident caused Mr. Granja's injuries. I find that those injuries in turn caused a loss of earning capacity. In other words, Mr. Granja has established impairment to his earning capacity and a real and substantial possibility that the impairment has resulted in pecuniary loss: *Perren* at para. 32. The evidence of Dr. Benitez-Lazo was that Mr. Granja would have been capable of returning to work as of April 2011. There is no doubt that Mr. Granja intended to return to work and this is corroborated by the civilian witnesses. Ms. Barber-Starkey testified that the WorkSafeBC vocational rehabilitation program has a 70% success rate but she did acknowledge that Mr. Granja presented some barriers to employment including his age, lack of English language skills and physical limitations due to his pre-existing left hand injury and work place injury to his right wrist.

**155**  Dr. Powers indicated that the average earnings for a building services workers and janitors was $32,751 however, he identified similar concerns over Mr. Granja's employability due to his physical limitations. The calculations provided by Mr. Peever are of limited assistance because they do not consider the specific issues influencing Mr. Granja's employability.

**156**  As stated earlier, the parties agree that Mr. Granja could not have returned to work as a cement finisher or as a milker due to his right wrist workplace injury. Therefore, I am persuaded that as of June 2010, Mr. Granja would have been limited to full time employment as a building services worker.

**157**  The calculation of the appropriate award under this head of damage must take into account the fact that Mr. Granja missed a total of $11,194.18 in WorkSafeBC benefits for the period June 27, 2010 to September 15, 2010, and October 13 to November 10, 2010. I find that Mr. Granja would still have taken time off to travel to Columbia to deal with his family matters and cannot be compensated for the six month period. Further, I agree with ICBC counsel that the $5,844 that Mr. Granja received in social assistance in 2013 must be deducted otherwise he would receive double recovery of income for that period of time as set out in *M.B. v. British Columbia*, [*[2003] 2 S.C.R 477*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YB-00000-00&context=). Generally, statutory benefits such as workers' compensation benefits are non-deductible unless s. 106 of the *Insurance (Vehicle) Regulation*, [*BC Reg 447/83*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W2C-X5J1-JJ1H-X0F6-00000-00&context=) (uninsured and underinsured cases) applies.

**158**  The question remains, what would Mr. Granja have earned as a building services worker until the time of the commencement of the April 27, 2015 trial?

**159**  Mr. Granja tendered a report addressing past loss of net income prepared by Curtis Peever, an economist. As stated above, while Mr. Peever's report is of some assistance I do not find it adequately accounts for Mr. Granja's specific circumstances. As mentioned, given his physical limitations, he would likely find work as a building services worker earning roughly $30,000 a year for the four year period April 2011 till April 2015. However, Mr. Granja would have faced various barriers to employment such as his age and limited English, so I find he would have likely earned $20, 000 as a building services worker, which when multiplied by four years becomes $80,000. This figure then becomes roughly $74,400 factoring a 7% tax rate on an income of $20,000 using Mr. Peever's tax rates. I must also deduct $9,300 (half of net income of $18,600) for the six month period Mr. Granja was in Columbia and $5,844 in social assistance, which is thus $59,256. With the inclusion of the $11,194.18 in WorkSafeBC benefits that was missed by him, his past wage loss award comes to $70,450.

**160**  The defendants argue the plaintiff did not mitigate his damages by failing to attempt to work in some capacity after the incident. I disagree, as I set out later in these reasons

1. **Loss of Future Earning Capacity**

**The Legal Principles**

**161**  A claim for loss of future earning capacity raises two key questions: 1) has the plaintiff's earning capacity been impaired by his or her injuries; and, if so 2) what compensation should be awarded for the resulting financial harm that will accrue over time? The assessment of loss must be based on the evidence, and not an application of a purely mathematical calculation. In *Morgan v. Galbraith*, [*2013 BCCA 305*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JW09-M12P-00000-00&context=) [*Morgan*], the Court of Appeal noted that a plaintiff must establish a "real and substantial possibility" that his or her earning capacity has been impaired (para. 53). The appropriate means of assessment will vary from case to case: *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.); *Pallos v. Insurance Corp. of British Columbia* [*(1995), 100 B.C.L.R. (2d) 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0K2-00000-00&context=) (C.A.) [*Pallos*]; *Pett v. Pett,* [*2009 BCCA 232*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M2G2-00000-00&context=); *Mazur v. Lucas,* [*2014 BCCA 19*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1DP-00000-00&context=).

**162**  In *Reilly v. Lynn*, [*2003 BCCA 49*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G50F-00000-00&context=), the Court of Appeal summarized the legal principles that inform an analysis for future loss of earning capacity as follows:

[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 BCCA 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=) at para. 11; *Ryder v. Paquette,*[*[1995] B.C.J. No. 644*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F1WF-M2HD-00000-00&context=) (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* [*(1995), 12 B.C.L.R. (3d) 248*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-DY33-B0YN-00000-00&context=) (C.A.).Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch, supra,* at 79.

**163**  The assessment of damages is a matter of judgment, not calculation: *Rosvold v. Dunlop,* [*2001 BCCA 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=) at para. 18. Insofar as possible, the plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendant's ***negligence***: *Lines v. W & D Logging Co. Ltd.,* [*2009 BCCA 106*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3X8-00000-00&context=), leave to appeal ref'd [*[2009] SCCA No. 197*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SH1-F8KH-X1YH-00000-00&context=) at para. 185. The essential task of the Court is to compare the likely future of the plaintiffs working life if the accident had not happened with the plaintiff's likely future working life after the accident: *Gregory v. Insurance Corporation of British Columbia,* [*2011 BCCA 144*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1K8-00000-00&context=) at para. 32.

**164**  There are two possible approaches to assessment of loss of future earning capacity: the "earnings approach" from *Pallos,* and the "capital asset approach" in *Brown.* Both approaches are correct. The "earnings approach" will generally be more useful when the loss is easily measurable: *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 [*Perren*]. Where the loss "is not measurable in a pecuniary way" the "capital asset" approach is more appropriate: *Perren* at para. 12. This approach is more typically used in cases where the plaintiff has no clear earnings history: *Sirak v. Noonward*, [*2015 BCSC 274*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-F900-G4WF-00000-00&context=) at 202.

**165**  I find that the capital asset approach is more appropriate given the facts in the case at bar. The capital asset approach involves considering factors such as: i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; ii) whether the plaintiff is less marketable or attractive as a potential employee; iii) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and iv) whether the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown* at para. 8; *Gilbert* at para. 233; *Morgan* at paras. 53, 56.

**Discussion**

**166**  Mr. Granja submits that due to his chronic neck and back pain, and ongoing psychological issues, he is entitled to $225,000 under this head of damages using the capital asset approach.

**167**  ICBC submits that the plaintiff has not established a claim for loss of future income earning capacity, but alternatively submits if the court were to make an award, then an award of $20,000 to $25,000 would be appropriate given all the circumstances. Mr. Jozsef also submits the plaintiff did not establish a claim for loss of future earning capacity.

**168**  In assessing whether the evidence establishes a real and substantial possibility that Mr. Granja will earn less in the future on account of the injuries caused by the accident, I take the following factors into account:

1. Dr. Benitez-Lazo's medical evidence demonstrates that Mr. Granja suffers from chronic and myofasical pain syndrome, and that his overall prognosis is uncertain, especially given his ongoing major depressive disorder.
2. Dr. Bohorquez also diagnosed Mr. Granja as having myofacsical pain syndrome and confirmed his psychological challenges. Dr. Bohorquez did not feel that Mr. Granja could return to work as a cement finisher given the limited range of motion in his neck and back. He thought Mr. Granja would be capable of doing office type work to allow for frequent breaks.
3. Dr. Chapman diagnosed Mr. Granja with major depressive disorder. He would require further therapy and medication in the foreseeable future. Dr. Chapman's prognosis for Mr. Granja's recovery from major depressive disorder was guarded at best.
4. Dr. Powers' assessment found that Mr. Granja's employment prospects were significantly reduced following the motor vehicle accident. He will likely only find work where speaking English is not vital, and the work demands are in sedentary to light duty positions. Dr. Powers said employment will be very hard for him in this current market. Dr. Powers expected, at best, Mr. Granja would find work as a light duty cleaner on a part-time basis.

**169**  Having already concluded that the accident caused Mr. Granja's injuries, I find that those injuries in turn caused a loss of future earning capacity. I find that but for the accident Mr. Granja would have continued to work as a building service worker as I earlier concluded under the previous head of damage. According to Ms. Barber-Starkey there was a basis to believe the work was available to him and there is no doubt that he possessed a good work ethic. He is now rendered less capable of earning an income in a competitive labour market and, as found by Dr. Powers, is severely limited in the type of employment he may seek.

**170**  I find that a realistic assessment would be that at best Mr. Granja may now obtain a part-time or casual job as a light duty cleaner paid minimum wage making roughly $12,000 a year. I arrive at this conclusion given Mr. Granja's age, his lack of English skills, limitations on his physical abilities due to the accident, his major depressive disorder and the fact he has been out of the work force for a considerable amount of time.

**171**  The injuries caused by the accident have completely cut off the possibility of more remunerative work even as a full time janitor.

**172**  It is possible that he may have had to slow down a bit in the future, he may have developed another unrelated injury/illness, or work may not have always been available due to instability of the economy. I must factor in these negative contingencies into my assessment.

**173**  In these circumstances, I am mindful that essentially I am making a narrow comparison between Mr. Granja working as a building services worker with a casual or part-time light duty cleaner. Taking into account the negative and positive contingencies of life and assuming Mr. Granja works till age 70, I assess Mr. Granja's future loss of earning capacity from the time of trial till he turns 70 (an 11 year period) as $85,000.

1. **Costs of Future Care**

**The Legal Principles**

**174**  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. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *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 paras. 21-22; *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.) adopted in *Aberdeen v. Zanatta*, [*2008 BCCA 420*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3RY-00000-00&context=) at para. 41 ; *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=) at paras. 29-30.

**175**  The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care: there must be a medical justification for claims for cost of future care and the claims must be reasonable: *Milina* adopted in *Aberdeen* at 84; *Tsalamandris v. McLeod,* [*2012 BCCA 239*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24BC-00000-00&context=) at paras. 62-63.

**176**  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 future. If a plaintiff has not used a particular item or service in the past it may be inappropriate to include its cost in a future care award: *Izony v. Weidlich,* [*2006 BCSC 1315*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JX3N-B19D-00000-00&context=) at para. 74; *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.

**177**  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* at para. 253; *Tabet v. Hatzis*, [*2013 BCSC 1167*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JW09-M13J-00000-00&context=) at para. 69.

**178**  An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle* at para. 21.

**Discussion**

**179**  Mr. Granja submits that an award of $40,025.15 ought to be granted for this head of damages. The amount includes costs related to prescriptions for Lyrica and Cyclobenzaprine for his chronic pain for five years. As well as, the figure includes treatments at a private multi-disciplinary pain clinic, psychological counselling, 50 hours of vocational rehabilitation services, twice weekly physiotherapy sessions for two years, and membership at the pool at North Surrey Recreation Centre for five years.

**180**  ICBC claims that the plaintiff has not established a claim for cost of future care relating to the motor vehicle incident. Alternatively, they submit should the court find that the incident caused the plaintiff's injuries then they submit that the plaintiff should only receive one year's worth of prescription costs. ICBC claims that the public pain clinic at Jim Pattison Outpatient Pain Clinic in Surrey offers chronic pain management free of charge; therefore, no amount should be awarded for a private multi-disciplinary pain clinic. ICBC submits that three more psychological counselling sessions should suffice for Mr. Granja. ICBC submits that WorkSafeBC vocational rehabilitation program remains an option for Mr. Granja. In the alternative they say the maximum allowance for vocational rehabilitation services should be 35 hours at $135/hour with a private service provider. With respect to physiotherapy, ICBC proposes eight sessions at $50 per session. Lastly, they submit that a yearly pass to the pool is sufficient. The summary of their position for this head of damage is $6,385.03.

**181**  As stated earlier, Dr. Bohorquez, Dr. Benitez-Lazo and Dr. Chapman recommended that Mr. Granja attend a multi-disciplinary pain clinic. Dr. Benitez-Lazo expressed his frustration over the wait times with the Jim Pattison Outpatient Pain Clinic however he acknowledged that he failed to facilitate this avenue of treatment. In addition, Mr. Smith an intake nurse with the public clinic testified that the wait times have been reduced to 6-9 months. While I am satisfied there is evidence to justify Mr. Granja pursuing treatment at a pain clinic, I agree with counsel for ICBC that there should be no award for cost to attend a private pain clinic given that there are services available free of charge through the Jim Pattison Outpatient clinic.

**182**  Mr. Smith explained that the pain clinic would provide a host of treatment services including both psychological counselling and physiotherapy. However, given the inevitable delay in Mr. Granja being admitted to the pain clinic I am prepared to consider his request for these services as set out below.

**183**  A number of the witnesses who provided medical opinions recommended that Mr. Granja receive further psychological counselling. Ms. Undurraga testified that Mr. Granja symptoms appeared to improve during the course of treatment. I am satisfied that Mr. Granja would benefit from further psychological counselling sessions and would benefit from these sessions while he awaits admission to the pain clinic. Therefore, I award him ten further sessions at a rate of $150 per session for a total award of $1500.

**184**  Dr. Bohorquez and Dr. Benitez-Lazo also recommend Mr. Granja engage in an exercise program with the assistance of a kinesiologist and/or a physiotherapist. I am satisfied that Mr. Granja would benefit from bi-weekly sessions for the next twelve months in order to assist him in developing an exercise program which addresses his symptoms. Therefore, I award him 24 further sessions at a rate of $50 per session for a total of $1200.

**185**  There is also ample evidence to justify Mr. Granja's membership at a recreation centre that would provide him with an ability to do both stretching and strengthening exercises and pool exercise. Based on the evidence that the cost of a membership at the North Surrey Recreation Centre is $15.94 per month and factoring in the potential for an increase in those fees, I am award Mr. Granja $400 for the cost of a monthly membership for two years.

**186**  Dr. Powers conducted a vocational assessment on Mr. Granja and recommends vocational rehabilitation services to assist in securing employment. In his report Dr. Powers recommend 35 hours at a rate of $150 although during his testimony he increased the number to 50 hours. While I am satisfied that vocational rehabilitation services are required, I am not satisfied that Dr. Powers provided an adequate explanation to justify the increase in hours. Further, Ms. Baber-Starkey of WorkSafeBC testified that Mr. Granja remains eligible to utilize the vocational rehabilitation services offered by WorkSafeBC which are free of charge. There is no evidentiary basis for me to conclude that the WorkSafeBC program is no longer available or inappropriate, therefore I find there is no basis for awarding damages for the cost of a private vocational rehabilitation program.

**187**  The medical experts agree that Mr. Granja will require significant prescription medications although they did not provide any helpful recommendations as to duration. I do accept that Mr. Granja will continue to require a variety of pain and other medications as needed. I consider $2000 is a reasonable award under this head of damages.

**188**  In sum, I award $5,100 for the cost of future care.

1. **Special Damages**

**189**  It is well established that an injured person is entitled to recover the reasonable out-of-pocket expenses he or she incurred as a result of an accident. This is grounded in the fundamental governing principle that an injured person is to be restored to the position he or she would have been in had the accident not occurred: *Hardychuk v. Johnstone*, [*2012 BCSC 1359*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S2PF-00000-00&context=) at para. 220; *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 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.) adopted in *Aberdeen v. Zanatta*, [*2008 BCCA 420*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3RY-00000-00&context=) at 78.

**Discussion**

**190**  Mr. Granja submits than an award of $4,978.15 should be made based on various medical receipts including costs of physiotherapy, kinesiology and chiropractic treatments in addition to the cost to attend the recreation centre and purchase of a Tens machine. ICBC submits that should the court find that Mr. Granja's injuries are as a result of the accident, then they do not dispute the amounts claimed, although, they submit that he should only be entitled to half the amounts claimed for those expenses where receipts have not been produced and a reduction for periods Mr. Granja was out of the country.

**191**  Accordingly, I find that Mr. Granja is entitled to reimbursement for his special damages in the amount of $4,500.00

1. **Duty to Mitigate**

**Should the award of damages be reduced because Mr. Granja failed to mitigate his damages?**

**192**  ICBC asserts that Mr. Granja has failed to mitigate his damages and a reduction between 30-40% should be applied to amounts awarded for damages. ICBC says the failure to mitigate issue arises from Mr. Granja's failure to seek the recommended psychological counselling or attend a multidisciplinary pain clinic. Further, they submit he also failed to take advantage of the vocational rehabilitation program available through WorkSafeBC.

**The Legal Principles**

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

**194**  The duty to mitigate is described in the following passage from *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:

The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. These principles are found in *Janiak v. Ippolito*, [*[1985] 1 S.C.R. 146*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2361-00000-00&context=).

**195**  Once the plaintiff has proved the defendant's liability for his or her injuries, the defendant must prove that the plaintiff acted unreasonably and that reasonable conduct would have reduced or eliminated the loss. Whether the plaintiff acted reasonably is a factual question and it involves a consideration of all of the circumstances: *Gilbert v. Bottle,* [*2011 BCSC 1389*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-62FG-00000-00&context=) at para. 202; *Wahl v. Sidhu*, [*2012 BCCA 111*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-626S-00000-00&context=), at para. 32.

**Discussion**

**196**  Despite the fact that both Dr. Bohorquez and Dr. Benitez-Lazo agreed that treatment at a multidisciplinary pain clinic would have assisted Mr. Granja, neither took steps with Mr. Granja to ensure that he had the necessary information to pursue this option. Counsel for ICBC submits that it was incumbent upon Mr. Granja, having received a copy of the medical assessments to take steps himself to pursue the course of treatment at a pain clinic. However, it is not apparent to me that the specific portions of the medical-legal reports were passed onto Mr. Granja and if they were there was certainly no information provided to him as to how to obtain these services.

**197**  With respect to ICBC's submission regarding Mr. Granja's failure to attend for psychological counselling I find it is without merit as the evidence established that Mr. Granja did in fact attend several sessions with Ms. Undurraga once ICBC agreed to fund the sessions. I do not accept that the failure to attend these sessions earlier was due to Mr. Granja's pride.

**198**  Finally, I find there is no merit in ICBC's submission that Mr. Granja deliberately failed to inquire about the availability of the WorkSafeBC retraining program despite the fact that he acknowledged having employment would be "the best therapy". There is no doubt that Mr. Granja had an ongoing desire to return to work and become self-sufficient and there is nothing to support the suggestion that Mr. Granja avoided employment. The reality is due to his ongoing physical and psychological condition, Mr. Granja was simply not capable of pursuing employment.

**199**  I find that the defendants have failed to establish that Mr. Granja did not properly mitigate his losses.

**SUMMARY**

**200**  In summary, damages are awarded as follows:

Non-pecuniary damages $125,000

Past Income Loss $70,450

Loss of Future Earning Capacity $85,000

Cost of Future Care $5,100

Special Damages $4,800

**TOTAL** **$290,350**

**Costs**

**201**  In the event that the parties are unable to agree on costs, they are at liberty to apply to me in writing to settle the matter within 60 days of the issuing of these reasons.

M.M. DEVLIN J.

**End of Document**

[***Graydon v. Harris, [2013] B.C.J. No. 203***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JGHR-M3B9-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

G. Weatherill J.

Heard: January 21, 22 and 24, 2012.

Judgment: February 5, 2013.

Docket: M122675

Registry: New Westminster

**[2013] B.C.J. No. 203** | [*2013 BCSC 182*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JFDC-X1FC-00000-00&context=)

Between John Graydon, Plaintiff, and Bruce Harris and Super Save Disposal Inc., Defendants

(85 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Neck — Soft tissue — Considerations impacting on award — Age of claimant — Pre-existing injury — Action by plaintiff for damages for injuries arising from motor vehicle accident allowed — Plaintiff's vehicle was struck by industrial truck while he waited for traffic to clear — He was 65 and continued to work — Other driver was negligent and company was vicariously liable — Plaintiff was awarded $60,000 in non-pecuniary damages and $125 in special damages — He suffered moderate soft tissue injuries to neck, lower back and shoulders that exacerbated pre-existing condition — Award reflected 25 per cent chance that pre-existing condition would have interfered.**

**Damages — Types of damages — General damages — For personal injuries — Calculation — Contingencies — Considerations — Aggravation of pre-existing injury — Employment status — Pre-existing medical conditions — Special damages — Non-pecuniary loss — Action by plaintiff for damages for injuries arising from motor vehicle accident allowed — Plaintiff's vehicle was struck by industrial truck while he waited for traffic to clear — He was 65 and continued to work — Other driver was negligent and company was vicariously liable — Plaintiff was awarded $60,000 in non-pecuniary damages and $125 in special damages — He suffered moderate soft tissue injuries to neck, lower back and shoulders that exacerbated pre-existing condition — Award reflected 25 per cent chance that pre-existing condition would have interfered.**

**Tort law — *Negligence* — Motor vehicles — Liability of driver — Liability of owner — Action by plaintiff for damages for injuries arising from motor vehicle accident allowed — Plaintiff's vehicle was struck by industrial truck while he waited for traffic to clear — He was 65 and continued to work — Other driver was negligent and company was vicariously liable — Plaintiff was awarded $60,000 in non-pecuniary damages and $125 in special damages — He suffered moderate soft tissue injuries to neck, lower back and shoulders that exacerbated pre-existing condition — Award reflected 25 per cent chance that pre-existing condition would have interfered.**

**Tort law — Vicarious liability — Liability of employer for acts of employee — Action by plaintiff for damages for injuries arising from motor vehicle accident allowed — Plaintiff's vehicle was struck by industrial truck while he waited for traffic to clear — He was 65 and continued to work — Other driver was negligent and company was vicariously liable — Plaintiff was awarded $60,000 in non-pecuniary damages and $125 in special damages — He suffered moderate soft tissue injuries to neck, lower back and shoulders that exacerbated pre-existing condition — Award reflected 25 per cent chance that pre-existing condition would have interfered.**

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| Action by the plaintiff for damages for injuries arising from a motor vehicle accident. The plaintiff's vehicle was struck by a large industrial garbage truck while he waited for traffic to clear on a main thoroughfare. He claimed that the collision occurred when the other driver attempted to beat oncoming traffic by cutting across the thoroughfare at an angle. The plaintiff was a 65-year-old welder. He did not miss any work as a result of the accident, except for a few occasions when he left early due to pain, and did not lose any pay. He continued to work a full shift and planned to keep working for several more years. Two doctors attributed his ongoing pain to a soft tissue injury resulting from the accident, which exacerbated a pre-existing condition caused by another accident eight years earlier. The plaintiff claimed non-pecuniary damages, loss of earning capacity and special damages. The defendants denied liability, but called no evidence and did not cross-examine the plaintiff. The parties disagreed as to the impact of the accident on the plaintiff.  HELD: Action allowed.  There was no reason to disbelieve the plaintiff's version of how the accident occurred. The other driver was therefore negligent and his company was vicariously liable. The plaintiff was awarded $60,000 in non-pecuniary damages and $125 in special damages. He suffered moderate soft tissue injuries to his neck, lower back and shoulders as a result of the accident. At the time, he had pre-existing neck pain, headaches and a degenerative condition of the cervical spine. The soft tissue injuries exacerbated his pre-existing condition. The injuries had, and would continue to have, a lasting effect on his work life and, to a lesser degree, his home and recreational life. There was at least a 25 per cent chance that his pre-existing condition would have interfered with his activities had the accident not occurred. The accident would have little, if any, impact on his ability to earn income for the rest of his intended work life. The special damages claim was reduced by the contingency percentage applied to the assessment of non-pecuniary damages. |

**Counsel**

Counsel for the Plaintiff: J.M. Green.

Counsel for the Defendants: C.L. Thiessen.

**Reasons for Judgment**

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| **G. WEATHERILL J.** |

**1**   The plaintiff seeks damages for personal injuries suffered as a result of a motor vehicle accident that took place on October 25, 2007. He claims non-pecuniary damages, damages for lost earning capacity and special damages.

**2**  Liability is denied by the defendants.

**The Plaintiff's Evidence**

**a)** **The Plaintiff**

**3**  The plaintiff is 65 years old. He is and has been a welder for over 40 years. He receives a pension from his many years as a member of the International Brotherhood of Boilermakers union.

**4**  For the past twelve years, the plaintiff has been employed by Global Rigging & Transport Canada Corp. ("Global Rigging") as a welder. Global Rigging specializes, *inter alia*, in crane installation, modification and repairs, primarily for the shipping industry. Global Rigging has offices in Surrey, British Columbia and in Virginia Beach, Virginia.

**5**  Subsequent to his retirement, the plaintiff was approached by Global Rigging to provide project superintendent and welding services for various projects in the United States and internationally. For the last several years, the plaintiff has been working on projects in New Orleans and Virginia Beach. Currently, his primary function for Global Rigging is welding and welding supervision.

**6**  On October 25, 2007, the plaintiff, who was 60 years old at the time, had just finished an eight hour shift as a welder. He was in his pick-up truck driving out of Global Rigging's yard in Surrey. While stopped waiting for traffic to clear on main thoroughfare (96th Avenue), his vehicle was struck by a large industrial garbage truck owned and operated by the defendant, Super Save Disposal Inc., and driven by the defendant Bruce Harris.

**7**  According to the plaintiff, the garbage truck had been travelling eastbound along 96th Avenue. Another vehicle was approaching the garbage truck westbound. The garbage truck attempted to beat the oncoming vehicle by cutting across 96th Avenue at an angle into Global Rigging's yard when the collision occurred.

**8**  The impact pushed the plaintiff's vehicle backwards. He was thrown forward but was restrained by the seat belt he was wearing. His knee hit either the steering column or the dashboard. His glasses were knocked off. Both doors were jammed shut as a result of the collision and the plaintiff had to force the driver's door open by kicking it.

**9**  The plaintiff's vehicle was equipped with air bags. None of them deployed.

**10**  The defendant driver, Bruce Harris, immediately said to the plaintiff words to the effect that the accident was his fault.

**11**  The fire department attended the scene but the plaintiff did not feel the need for an ambulance. His vehicle was towed away as it was not operable. The damage to the plaintiff's vehicle was sufficient for it to have been written off.

**12**  The plaintiff did not miss any work as a result of the accident except on a few occasions when he went home early due to pain. He did not lose any pay. To this day he continues to work a full shift for Global Rigging, often in excess of ten hour days and often on weekends.

**13**  Immediately after the accident, the plaintiff noticed that his left arm and knee were sore. He saw his family physician, Dr. Koelink, one week later. Dr. Koelink prescribed Tylenol 3 and physiotherapy. The plaintiff attended approximately 12 physiotherapy sessions during the next two months. He discontinued physiotherapy as it increased his back and leg pain. He has also had the occasional massage. He has not had any other treatment subsequent to the accident.

**14**  In the days, weeks and months that followed the collision, the plaintiff developed stiffness and soreness in his shoulder and neck. He began to experience back pain that he said felt like a knife in his back. He also developed pain in his leg, which flares up when he sits for long periods of time while driving or seated on a plane. He began to have numbness in his left arm and leg.

**15**  The intensity and duration of his pain varies depending upon his activities. He alleviates the pain with Aleve, Tylenol or, if necessary, Tylenol 3.

**16**  The plaintiff testified that, ever since the accident, he has experienced constant dull headaches. Occasionally, if he moves the wrong way, his headaches become intense. Wearing a hard hat and welding helmet, as is required during welding work, aggravates his headaches causing him to become irritable. He testified that he often "flies off the handle" with his family and with those he supervises at work, much more so than he ever did prior to the accident. He described how his sleep is either delayed or interrupted by these headaches.

**17**  On direct examination, the plaintiff testified that he did not have any of these symptoms prior to the accident. However, during cross examination, he admitted having a pre-existing neck injury and headaches from an earlier car accident (in 1999) for which he had been taking Tylenol 3 for many years. He also admitted that the pain he is experiencing, particularly his headaches, is not constant but rather is intermittent. He described his headaches to Dr. Koelink as "persistent", "continued", and "ongoing". He maintained that he has learned to simply live with his pain. He does not complain about it to his doctor unless it flairs up.

**18**  He testified that his hobbies and recreational activities have been affected by his injuries. Although he has continued to ride his motorcycle, he claims his pain has affected his ability to golf and hunt. During cross examination he admitted that the main reason he no long hunts or plays golf has more to do with him working outside of Canada than it does with any injuries sustained during the accident. He is still able to go on long walks and perform household chores, more or less, unrestricted.

**19**  The plaintiff continues to travel extensively for both work and vacation; although sitting on an airplane for long periods of time causes him some discomfort.

**20**  The plaintiff testified that, like his father before him, he plans to continue working at least into his seventies so long as he is able.

**b)** **Dr. Anthony Koelink**

**21**  Dr. Koelink has been a practicing physician since 1977. He has been the plaintiff's family physician since the mid-1990s. He has treated many patients over the age of 60 for whiplash-type injuries. He provided both factual and opinion evidence. In respect of the latter, he was qualified as an expert in muscular skeletal injuries and rehabilitation, specifically relating to whiplash injuries.

**22**  Whiplash injuries are classified into four categories:

|  |  |  |  |
| --- | --- | --- | --- |
| Type I |  | no signs of major pathology and little interference with daily activities; |  |
| Type II |  | no signs of major pathology but restricted cervical range of motion that restricts daily activities; |  |

|  |  |  |
| --- | --- | --- |
| Type III | neck pain with neurological signs or symptoms; |  |
| Type IV | neck pain with major pathology requiring surgery. |  |

**23**  Dr. Koelink testified that, typically, soft tissue whiplash injuries improve over time. It is highly unusual for symptoms to worsen unless they are aggravated or stressed by activity.

**24**  Dr. Koelink has been treating the plaintiff for elbow, shoulder and neck pain since June 1996. Since then, he has prescribed Tylenol 3 to the plaintiff as needed. Indeed, he renewed the plaintiff's Tylenol 3 prescription two months before the accident because the plaintiff was complaining of continued headaches.

**25**  In 1999, the plaintiff was involved in a motor vehicle accident that resulted in him having some neck pain and headaches. These symptoms apparently resolved within six months.

**26**  On December 20, 2002, almost five years prior to the accident, Dr. Koelink treated the plaintiff for left shoulder pain and prescribed Tylenol 3. On October 24, 2004, he treated the plaintiff for left shoulder pain and diagnosed a possible underlying degenerative condition.

**27**  On December 29, 2005, the plaintiff was sent for x-rays of his neck because he was continuing to complain of pain. The x-rays revealed a moderate to marked degenerative disc disease at the C5 - C6 of the cervical spine resulting in a narrowing of the right foraminal. Dr. Koelink agreed on cross-examination that such narrowing can result in numbness and tingling down the arm.

**28**  Dr. Koelink first saw the plaintiff after the October 25, 2007 accident on November 1, 2007. At that time the plaintiff presented with pain in his left arm, low back and neck which he said was aggravated by his work as a welder. Dr. Koelink found that the range of motion of the plaintiff's cervical spine (neck) was restricted, with lateral flexion reduced to 20% and rotation to 45% bilaterally. The plaintiff also had reduced extension of his neck. Dr. Koelink noted local paracervical tenderness. He sent the plaintiff for x-rays.

**29**  The x-rays revealed the same degenerative condition to the C5-C6 cervical spine area as had been revealed by the earlier x-rays.

**30**  By November 29, 2007, the plaintiff's lateral neck flexion had been reduced from 20% to 10%.

**31**  Dr. Koelink was of the opinion, initially at least, that the October 25, 2007 accident caused the plaintiff to suffer a Type II, possibly Type III injury with restricted cervical range of motion. The injuries aggravated an underlying degenerative condition particularly at the C5-C6 level of the spine. He maintained that the plaintiff's neck pain and continued headaches are more than 50% attributable to the accident.

**32**  Dr. Koelink opined that the plaintiff's pain symptoms likely mean his working lifetime has been reduced. On cross-examination he agreed that the plaintiff's degenerative condition, which predated the accident, will likely continue to progress and is such that his remaining work lifetime would probably have been reduced regardless of the October 25, 2007 accident.

**33**  Dr. Koelink stated in his April 20, 2008 report that the extent to which the injuries suffered in the accident would impact the plaintiff's ability to work would become apparent "within the next year or so".

**34**  On May 18, 2009, Dr. Koelink updated his April 20, 2008 report. His assessment of the plaintiff after seeing him on December 22, 2008, January 29, 2009 and in March 2009 was that he continued to experience soft tissue headaches arising from degenerative changes in the neck which were aggravated by his work activities. It was his opinion that at least 50% of the plaintiff's neck pain, headaches and back pain was related to degenerative changes associated with prolonged postural stress caused by his work as a welder.

**35**  On January 31, 2010, Dr. Koelink updated his May 18, 2009 report. X-rays and an MRI conducted in the meantime had not disclosed any significant pathology. However, Dr. Koelink changed his earlier opinion and concluded that "there is less than a 50% chance that his current ongoing symptoms are pre-existent and continuing with his underlying cervical degenerative changes". He noted that "the ongoing symptoms of pain are of significant effect on Mr. Graydon's current work function".

**36**  Dr. Koelink's final report is dated March 1, 2012. He opined that the plaintiff has experienced "significant improvement" over time, from constant pain to intermittent pain primarily in the neck and headaches with some left arm symptoms in the form of numbness and paraesthesias. He was of the opinion that these ongoing symptoms were, in large part, degenerative in nature - i.e. they predated the October 25, 2007 accident. In his opinion, the October 25, 2007 accident precipitated the onset of cervical symptoms of pain, stiffness, intermittent left C8 nerve root irritation resulting in intermittent paraesthesias in the left arm and cervicogenic headaches. He noted that the plaintiff "will likely manage his symptoms better if he eventually switches career or simply stops working as a welder entirely and avoids excessive use of his neck". He suggested that the plaintiff may be able to better manage his symptoms by changing to a more sedentary supervisory employment position.

**37**  Dr. Koelink noted that the plaintiff's cervical occipital headache is his primary disabling problem and requires continued use of Tylenol 3, more frequently when the plaintiff is working.

**38**  Dr. Koelink agreed on cross-examination that the plaintiff has in fact been able to continue to work well beyond the time frame Dr. Koelink predicted in his April 20, 2008 report and that any injuries sustained during the accident had not significantly impacted his working life. He also agreed on cross-examination that the percentage figures he adopted in his reports were somewhat arbitrary.

**c)** **Dr. William Craig**

**39**  Dr. Craig obtained his Bachelor of Science degree in 1989, his Masters of Science in 1993 and a Doctor of Medicine in 1999. He completed five years of residency training in physical medicine and rehabilitation, two years at Dalhousie University and three years at the University of Utah. He received his fellowship in the specialty of Physical Medicine and Rehabilitation from the Royal College of Physicians and Surgeons of Canada in 2004. Since then, he has practiced in this specialized area in the West Kootenays and North Vancouver.

**40**  Dr. Craig was qualified as an expert in physical medicine and rehabilitative assessment.

**41**  Dr. Craig's opinions regarding the plaintiff's complaints are set out in two reports, dated April 2, 2009 and August 20, 2012.

**42**  Dr. Craig first saw the plaintiff for assessment on April 1, 2009. At that time, the plaintiff presented with ongoing neck pain, headaches, left shoulder pain and back pain. The plaintiff reported that the injury to his left knee had resolved since the October 25, 2007 accident.

**43**  Dr. Craig examined the plaintiff and found that he had limited rotation of his neck due to pain. He found nothing remarkable in the plaintiff's arms or legs but found some tenderness and restrictions in the plaintiff's shoulders and lower back.

**44**  Dr. Craig agreed with Dr. Koelink's assessment that the plaintiff suffered a moderate soft tissue injury to his neck, left shoulder and back as a result of the October 25, 2007 accident. He was also of the opinion that the plaintiff's headaches were due to the soft tissue injury to his neck. Dr. Craig was unable to link the plaintiff's arm symptoms to the accident. In Dr. Craig's opinion, the October 25, 2007 accident exacerbated the plaintiff's pre-existing condition.

**45**  In April 2009, Dr. Craig was of the opinion that the plaintiff's condition would continue for at least another six months to a year with some gradual improvement but with some permanent partial disability. He expected that the plaintiff would continue to be able to work as a welder but that there would be a gradual decline in those activities due to age.

**46**  Dr. Craig examined the plaintiff again on August 20, 2012, over three years later. He was of the opinion that there was no significant change to the plaintiff's condition with the exception that his shoulder symptoms had resolved. He opined that the plaintiff will likely continue to have neck pain and headaches with a baseline level of discomfort with acute flares in his symptoms. He expects a gradual decline in the plaintiff's functional ability due to age. In his opinion, the October 25, 2007 accident will cause that decline to accelerate.

**47**  He was of the opinion that intramuscular stimulation or trigger point injection treatments could provide some room for improvement of the plaintiff's condition.

**48**  Like Dr. Koelink, Dr. Craig was of the opinion that the plaintiff should be able to continue to work for several more years if he moves into a more supervisory role.

**49**  On cross-examination, Dr, Craig agreed that, although there has been gradual improvement in the plaintiff's pre-existing neck pain and headaches symptoms, they nevertheless have remained unresolved for over 15 years. He also agreed that the degenerative condition of the plaintiff's cervical spine is part of the natural aging process.

**d)** **Dr. Donald Cameron**

**50**  Dr. Cameron is a neurologist. His expert report dated March 12, 2012 was introduced in evidence by the plaintiff. He did not testify.

**51**  Dr. Cameron examined the plaintiff on February 22, 2012. In his opinion, the plaintiff suffered soft tissue and musculoskeletal injuries to his neck, upper extremity and left knee in the October 25, 2007 accident and that his headaches, which present on an intermittent basis, are the result of musculoskeletal or cervicogenic injuries caused by the accident.

**52**  It is Dr. Cameron's opinion that the plaintiff's headaches probably do not create significant disability.

**53**  Dr. Cameron agreed with Dr. Koelink that the plaintiff suffered from an exacerbation of pre-existing neck pain caused by a whiplash injury sustained during the October 25, 2007 accident. Dr. Cameron does not believe the plaintiff's injuries have had a significant adverse effect on his work capabilities.

**Analysis**

**a)** **Liability**

**54**  Liability for the accident was denied by the defendants. However, they neither cross examined the plaintiff regarding his version of the event nor called any evidence to contradict the plaintiff's version of the event. Indeed, the defendants called no evidence at all.

**55**  I have no reason to disbelieve the plaintiff's version. The defendants' vehicle attempted to beat oncoming traffic by cutting across 96th Avenue at an angle into Global Rigging's yard and collided with the plaintiff's stationary vehicle. By doing so, the defendant Bruce Harris was negligent. The defendant, Super Save Disposal Inc., is vicariously liable for that ***negligence***.

**56**  I find that the defendants are wholly liable for any injury and damages suffered by the plaintiff as a result of the October 25, 2007 accident.

**b)** **Non-Pecuniary Damages**

**57**  The plaintiff argues that the sole or alternatively material cause of his ongoing symptoms was the October 25, 2007 accident. He argues that his health and potential future employability have been compromised as a result.

**58**  Both Dr. Koelink and Dr. Craig attribute the plaintiff's ongoing headaches and other pain to a soft tissue injury resulting from the October 25, 2007 accident which exacerbated a pre-existing neck condition.

**59**  The plaintiff argues that he continues to have headaches as well as neck, back and arm pain five and one-half years after the accident and that his prognosis for recovery is poor. He submits that non-pecuniary damages in the range of $100,000 to $150,000 are appropriate in this case. The plaintiff relies on the following decisions as the basis for this submission:

1. *Ward v. Klaus*, [*2010 BCSC 1211*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JWXF-216D-00000-00&context=) ($150,000)
2. *Gabbard v. Hung*, [*[1999] B.C.J. No. 1907*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-FG68-G153-00000-00&context=), [*1999 CanLII 6437*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-FG68-G153-00000-00&context=) (B.C.S.C.) ($95,000)
3. *Fox v. Danis*, [*2005 BCSC 102*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S119-00000-00&context=); aff'd [*2006 BCCA 324*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1T2-00000-00&context=) ($100,000)

**60**  In *Ward*, the plaintiff suffered a soft tissue injury to her neck, continuing generalized moderate headaches with severe migraines occurring two to three times per week. The plaintiff had a neurostimulator surgically implanted with electrodes to stimulate her nerves in order to reduce her pain. Within three years of the accident she had to stop work and she began to collect a disability pension. She became addicted to the narcotics she had been prescribed for her pain. She was also on morphine. Her homemaking role was substantially diminished. Her family was in despair. In short, her work and home life were devastated by the accident.

**61**  In *Gabbard*, *t* he plaintiff suffered soft tissue injuries to her neck and upper back with associated flare up of an old back injury. Subsequently, she developed fibromyalgia with associated sleep difficulties, in respect of which the accident was a materially contributing factor. During the seven years between the dates of the accident and trial, her health problems waxed and waned. She became psychologically debilitated. Her marriage relationship deteriorated. She had to give up many if not all of her outside interests.

**62**  *Fox* was a case involving a plaintiff who suffered permanent, moderately severe soft tissue injury to her cervical and lumbar spine. She also sustained nerve damage to her lower back. She had migraines caused by muscle tension. She continued to work but this required her full energy. She also suffered a prolapsed disc at level L5-S1 resulting in pain running into her left buttock, down her left leg and into her left foot. She underwent surgery. She could not longer participate in many of the activities she had enjoyed prior to the accident.

**63**  The defendants submit that the accident had minimal impact on the plaintiff and his life and that his current symptoms are primarily attributable to his pre-accident condition caused by either the 1999 accident or an age-related degenerative disability.

**64**  The defendants argue that the plaintiff has been inconsistent in his evidence and the court should be circumspect in accepting his subjective complaints. Defendants' counsel points to the following examples of the plaintiff's inconsistent evidence:

1. the plaintiff's evidence-in-chief that he has suffered from "constant" neck pain and headaches since the October 25, 2007 accident. However he told his doctors his pain and headaches were "intermittent"';
2. the plaintiff testified at trial that he has not gone more than one week without taking Tylenol 3. During his examination for discovery he gave evidence that he has gone as long as one month without taking a Tylenol 3;
3. the plaintiff testified at trial that his household chores and recreational activities had been affected by his injuries. However during his examination for discovery he gave evidence that there is nothing he was able to do around the house or recreationally before the accident that he cannot do now or has having difficulty doing after the accident;

**65**  The defendants rely on the following decisions as demonstrating that a more appropriate award for non-pecuniary damages is in the range of $35,000 to $45,000:

1. *Kahle v. Ritter*, [*2002 BCSC 199*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JC5P-G1D9-00000-00&context=)

The plaintiff had a pre-existing lower back injury but no functional limitations. He sustained soft tissue injuries to his neck and lower back as a result of the accident. At the time of the accident he was 24 years old. Five years after the accident, he continued to suffer from chronic occasional pain in his neck and had chronic ongoing pain in his lower back that was likely permanent. He was able to work and engage in recreational activities, although he may have pain while doing them. The court awarded $50,000 for non-pecuniary damages.

1. *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=)

A 55 year old plaintiff suffered a flexion-extension injury of the cervical spine as a result of a motor vehicle accident. His soft tissue injuries were unresolved three years after the accident and were considered permanent. She was stoic about her injuries and she carried on despite her pain, which increased when she worked. She was not limited in her job activities. The court awarded $40,000 in non-pecuniary damages.

1. *Doosti v. Enterprise Rent-a-Car Canada Ltd.* [*2006 BCSC 247*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-23FJ-00000-00&context=)

The 41 year old plaintiff sustained soft tissue injuries from an accident three years prior. He had a pre-existing degenerative condition in his spine, specifically C5-C6. The accident exacerbated this condition. It also resulted in moderate but intermittent chronic pain. He did not have a reasonable prospect for full recovery. The court awarded $35,000 for non-pecuniary damages less a 20% contingency for his pre-existing degenerative condition.

1. *Gilmour v. Machibroda* [*2008 BCSC 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JWR6-S1T2-00000-00&context=)

A 24 year old plaintiff sustained an injury to his neck and lower back from a collision. He suffered from chronic pain to his upper back and neck as well as headaches. He had a pre-existing degenerative condition in his spine that was asymptomatic before the accident. The court found that this condition would have detrimentally affected the plaintiff in the future regardless of the defendant's ***negligence***. He was awarded $45,000 for non-pecuniary damages.

1. *Singh v. Shergill* [*2010 BCSC 323*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X15S-00000-00&context=)

The 55 year old plaintiff had a pre-existing neck and back problem. Medical evidence tendered at trial indicated the accident accelerated the development of this condition. He continued to work and succeed at his job even though it required that he lift heavy weights. The court found that it was likely he would continue to be employed for the remainder of his intended work life although he would likely suffer episodic pain. It was likely that his condition would gradually improve. He was awarded $40,000 in non-pecuniary damages.

1. *Lamont v. Stead* [*2010 BCSC 432*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-62MR-00000-00&context=)

The 50 year old plaintiff sustained a soft tissue injury from a collision. She had a pre-existing degenerative disc disease. The court concluded that she suffered from chronic, disabling and likely permanent pain. Her ongoing pain would likely significantly affect her future activities, especially outside of work. She was awarded $60,000 in non-pecuniary damages.

1. *Coutakis v. Lean* [*2012 BCSC 970*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24M0-00000-00&context=)

A 71 year old plaintiff suffered from continuous headaches and lower back pain as a result of a motor vehicle accident. There was little likelihood of significant improvement in his condition or in his ability to return to work given his age. The court declined to follow authority involving younger persons. He was awarded $45,000 in non-pecuniary damages.

**66**  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, the Court of Appeal set out the following non-exhaustive list of factors that influence an award of non-pecuniary damages:

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.

**67**  Based upon the evidence before me, I find that the plaintiff is a very stoic and hardworking man who has suffered a moderate soft tissue injury to his neck, lower back and shoulders as a result of the October 25, 2007 accident. I also find that, at the time of the October 25, 2007 accident, the plaintiff was suffering from pre-existing neck pain, headaches and a degenerative condition of the cervical spine. That is why Dr. Koelink was continuing to prescribe Tylenol 3 for him. The soft tissue injuries suffered during the October 25, 2007 accident exacerbated his pre-existing condition.

**68**  Despite some inconsistencies in his evidence, I find that the plaintiff's injuries have had and will have a lasting effect on his work life and, to a lesser degree, on his home and recreational life. He continues to be able to work but not without pain and discomfort. He continues to have headaches which flare up when he is welding.

**69**  He is able to travel both for vacation and work without adverse effects with the exception of occasional numbness in his left leg after sitting for prolonged periods of time. However, as Dr. Craig testified, that discomfort can be eased by changing position.

**70**  The plaintiff was suffering from pain, headaches and a degenerative condition of the cervical spine well before the October 25, 2007 accident. In my view, there is at least a 25% chance that the plaintiff's pre-existing condition would have interfered with his work and other activities had the October 25, 2007 accident not occurred.

**71**  After considering all of the plaintiff's circumstances, the principles set out in *Stapley* and the cases provided by counsel, and after applying a 25% contingency in respect of the plaintiff's pre-existing condition, I find that an award of $60,000 for non-pecuniary damages is appropriate.

**c)** **Mitigation**

**72**  The defendants plead that the plaintiff did not take reasonable steps to mitigate his loss by failing to follow his doctor's recommendations. Defendants' counsel, wisely in my view, did not press this issue during argument. There is no evidence that the plaintiff would have recovered from his injuries either more fully or quickly had he done so. Although Dr. Craig was of the opinion that the plaintiff may have benefitted from intramuscular stimulation or trigger point injection treatments, he did not opine that he probably would have done so. The defendants have failed to prove on the balance of probabilities that the plaintiff failed to mitigate his loss.

**d)** **Loss of Future Earning Capacity**

**73**  The plaintiff, who is now 66 years of age, is and has always been a hardworking individual who does not turn down work. He missed little if any work and missed no pay as a result of the October 25, 2007 accident. He continues, even at his age, to work long hours at a strenuous job. There is no question that he will continue to do so as long as he is able in keeping with his character. If the plaintiff is unable to continue to weld, the evidence indicates that he will work in a supervisory capacity. To date, the October 25, 2007 accident has had no significant impact on his earning capacity. The question is whether the accident will impact his future earning capacity.

**74**  As was stated by Madam Justice Huddart in *Bradley v. Dymond*, [*2002 BCCA 284*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-FJTD-G2M2-00000-00&context=) at para. 9:

...The trial judge must gaze into the future with the benefit of all the evidence to assess two uncertainties: what might have been and what might be. Both require an assessment of the physical, emotional, and mental capacity of a claimant, of his character, of the family, community, and economic forces at work.

**75**  The plaintiff bears the onus of establishing a real and substantial possibility of a future event attributable to the defendants' ***negligence*** leading to an income 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 para. 32.

**76**  Initially, Dr. Koelink's opinion was that the plaintiff's working life span would be affected by his degenerative condition, not the October 25, 2007 accident. He agreed that the plaintiff's degenerative condition would likely progress with age. Subsequently, Dr. Koelink changed his opinion, opining there is "less than a 50% chance that [the plaintiff's] current ongoing symptoms are pre-existent and continuing with his underlying cervical degenerative changes". He agreed that the percentages he used were arbitrary. Later still, Dr. Koelink opined that the majority of the plaintiff's symptoms "are in large part created by the underlying degenerative changes".

**77**  Dr. Craig also opined that the plaintiff will likely experience a decline in his work capabilities due to his pre-existing degenerative condition.

**78**  According to Dr. Cameron, the plaintiff's neck pain and headaches were not "significantly disabling" to the plaintiff with respect to his work capabilities.

**79**  On the evidence before me, I find that the accident has had and will have little if any impact on the plaintiff's ability to earn income for the rest of his intended work life. There was no real and substantial evidence that his pain will have any effect on his income. Moreover, he continues to weld and perform welding supervision work. There was no evidence that his current employer will not continue to use his experience, expertise and services in the future in either a welding or supervisory capacity. There was no evidence that the plaintiff is less marketable or attractive as an employee to potential employers. There was no real and substantial evidence that any future disability will be attributable to the October 25, 2007 accident rather than to the natural aging process or the plaintiff's pre-existing condition. The comments of Drs. Koelink and Craig in this regard are pure speculation. The plaintiff has already proven them wrong. He has beaten the odds.

**80**  Any ongoing pain or discomfort the plaintiff experiences while performing his work duties have been compensated through the award of the non-pecuniary damages.

**81**  Accordingly, the plaintiff's claim for loss of future earning capacity is dismissed.

**e)** **Special Damages**

**82**  The parties are in agreement that the plaintiff incurred special damages in the amount of $167.00 in respect of prescription drugs. I agree with counsel for the defendants that the plaintiff would likely have required Tylenol 3 regardless of the accident. In my view it is appropriate to reduce the plaintiff's claim for special damages by the same contingency percentage I applied in respect of the assessment of non-pecuniary damages, which is 25%.

**83**  The plaintiff is entitled to recover special damages in the amount of $125.25.

**Conclusion**

**84**  The plaintiff is entitled to judgment in the following amounts:

|  |  |  |
| --- | --- | --- |
| Non-pecuniary damages | $60,000.00 |  |

|  |  |  |
| --- | --- | --- |
| Special damages | $125.25 |  |

|  |  |  |
| --- | --- | --- |
| Loss of earning capacity | $0 |  |

|  |  |  |
| --- | --- | --- |
| Total | $60,125.25 |  |

**85**  The plaintiff is entitled to his costs at scale B.

G. WEATHERILL J.

**End of Document**

[***Jarmson v. Jacobsen, [2012] B.C.J. No. 90***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1JG-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vernon, British Columbia

I.C. Meiklem J.

Heard: November 14-18, 21-24 and 28, 2011.

Judgment: January 18, 2012.

Docket: 44007

Registry: Vernon

**[2012] B.C.J. No. 90** | 2012 BCSC 64

Between Robert Ernest Jarmson, Plaintiff, and Bret W. Jacobsen, Defendant

(140 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Leg injuries — Knee — Fibromyalgia or chronic pain — Psychological injuries — Cognitive impairment — Third party claims — Persons entitled to claim — Spouse — Action for personal injury damages allowed in part — 55-year-old plaintiff had chronic pain, cognitive impairment and likely required knee replacement — Plaintiff awarded $230,000 non-pecuniary damages — Plaintiff awarded $55,000 USD past wage loss plus $30,000 USD past freelance income loss — Plaintiff returned to teaching until 2011 but was unable to meet demands and had to resign — Plaintiff likely could only earn modest photography income until retirement — $400,000 USD for future loss of income — Plaintiff's wife awarded $110,000 in-trust and plaintiff awarded $110,000 cost of future care, $128,555 USD special damages and $16,310 CAD.**

**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 — Loss of profits — Expenses and expenditures — Non-pecuniary loss — Pain and suffering — Action for personal injury damages allowed in part — 55-year-old plaintiff had chronic pain, cognitive impairment and likely required knee replacement — Plaintiff awarded $230,000 non-pecuniary damages — Plaintiff awarded $55,000 USD past wage loss plus $30,000 USD past freelance income loss — Plaintiff returned to teaching until 2011 but was unable to meet demands and had to resign — Plaintiff likely could only earn modest photography income until retirement — $400,000 USD for future loss of income — Plaintiff's wife awarded $110,000 in-trust and plaintiff awarded $110,000 cost of future care, $128,555 USD special damages and $16,310 CAD.**

**Tort law — *Negligence* — Causation — Causal connection — Motor vehicles — Rules of the road — Evidence and proof — Action for damages for personal injuries sustained in motor vehicle accident allowed in part — Plaintiff's motorcycle struck defendant's vehicle and plaintiff sustained serious physical and cognitive injuries — Plaintiff had no recollection of accident but theorized defendant made sudden U-turn in front of him — Defendant was wholly unreliable witness and did not deny making U-turn, simply stating he did not recall doing so — Plaintiff's passenger testified defendant suddenly pulled in front of them and witness evidence and position of defendant's vehicle established plaintiff's theory was likely accurate — Defendant 100 per cent liable.**

**Transportation law — Motor vehicles and highway traffic — Rules of the road — Turns — U-turns — Liability — Civil actions — Causation — Action for damages for personal injuries sustained in motor vehicle accident allowed in part — Plaintiff's motorcycle struck defendant's vehicle and plaintiff sustained serious physical and cognitive injuries — Plaintiff had no recollection of accident but theorized defendant made sudden U-turn in front of him — Defendant was wholly unreliable witness and did not deny making U-turn, simply stating he did not recall doing so — Plaintiff's passenger testified defendant suddenly pulled in front of them and witness evidence and position of defendant's vehicle established plaintiff's theory was likely accurate — Defendant 100 per cent liable.**

|  |
| --- |
| Action for damages for personal injuries sustained in motor vehicle accident. The plaintiff's motorcycle collided with the defendant's vehicle in July 2008. The accident occurred in clear daylight hours on a straight, dry stretch of highway. The plaintiff had no recollection of the accident because of the head injuries he sustained, but theorized the defendant made a sudden U-turn in front of him. The defendant claimed the plaintiff hit him while trying to re-enter the lane after passing. The defendant testified he entered the highway and was accelerating when he heard a bang and saw the plaintiff and his passenger on the road. The plaintiff's daughter, who was his passenger, testified they were driving in westbound lane when the defendant performed a sharp U-turn in front of them, giving the plaintiff no opportunity to avoid the accident. A witness testified she heard a bang and saw the defendant's vehicle perpendicular to the centre lane. Witnesses reported the defendant kept telling the plaintiff's daughter she was going to hate him forever and was worrying he killed someone. The defendant failed to report the accident to his insurer and wandered away after the accident. At trial, the defendant acknowledged he had made false statements in discovery. When asked if he made a U-turn, the defendant did not explicitly deny doing so. Rather, he claimed he did not recall doing so. The plaintiff, who was a 55-year-old art teacher at the time of the accident, sustained a traumatic brain injury, broken bones, contusions and lacerations. He was hospitalized for 35 days and required surgery. The plaintiff was unable to work for one year. He returned to his teaching job in Dubai in 2009, but was unable to plan and was easily angered, upsetting his students. The plaintiff and his employer agreed he would resign after the 2010/2011 school year. The plaintiff had not worked since. The plaintiff sought $250,000 non-pecuniary loss, past wage loss for teaching and photography, $957,073 future income loss, $858,742 cost of future care, in-trust claim for his wife, loss of housekeeping ability and special damages.  HELD: Action allowed in part.  The defendant was wholly unreliable. The witness evidence and position of the defendant's vehicle strongly supported the plaintiff's theory. The accident likely occurred when the defendant suddenly made a U-turn from the shoulder. The defendant was 100 per cent liable. The plaintiff was very fit pre-accident with an active social life and no health problems. The plaintiff continued to have cognitive and mood problems, chronic pain and would likely require a knee replacement, though he had made significant recovery since the accident. $230,000 non-pecuniary loss awarded. The plaintiff was awarded $55,000 USD for lost teaching wages in the year after the accident and $30,000 USD for lost freelance photography income. The plaintiff was unable to return to teaching and his physical and cognitive limitations, along with his age, made retraining improbable. The plaintiff could likely earned $10,000 annually from freelance photography. The plaintiff was awarded $400,000 USD future income loss, on the basis he would have likely taught full-time until age 65. The plaintiff's future care claim was based on a rehabilitation plan that went well beyond what was reasonable. The plaintiff was awarded $110,000 cost of future care. The plaintiff's wife had provided constant care and would continue to do so indefinitely. $110,000 in-trust claim awarded. There was no basis for additional recovery for loss of housekeeping ability. The plaintiff was also awarded $128,555 USD for special costs, plus $16,310 CAD. |

**Counsel**

Counsel for the plaintiff: G. Weatherill, Q.C., K. Burnham.

Counsel for the defendant: J. Hemmerling, D. Graves.

**Reasons for Judgment**

|  |
| --- |
| **I.C. MEIKLEM J.** |

**INTRODUCTION**

**1**  At approximately 5 p.m. on July 27, 2008, Mr. Jarmson's motorcycle collided with the defendant's car on Highway 6 near Edgewood, B.C., seriously injuring Mr. Jarmson and his passenger, his 15 year old daughter, Lindsay. This action concerns only Mr. Jarmson's claims.

**2**  The most significant issues at trial were liability and, if liability is established, the quantum of damages to be awarded for the cost of future care and loss of earning capacity. The wage component of Mr. Jarmson's past loss of income from his employment as an arts teacher in Dubai has been agreed upon. There remain issues about income loss from freelance photography and as to the proper treatment of job-related allowances. These also have an impact on the assessment of loss of future earning capacity, but the main question to be determined on that head of damages is how long Mr. Jarmson would have worked as an arts teacher in the absence of the accident.

**LIABILITY FOR THE ACCIDENT**

**3**  There is very little direct evidence as to exactly how the collision between these two westbound vehicles occurred in clear daylight hours on a straight, level and dry stretch of highway.

**4**  The plaintiff's submission is that the only reasonable conclusion on all the evidence is that Mr. Jacobsen made an unsafe U-turn immediately into the path of Mr. Jarmson's motorcycle and is 100% at fault for the accident.

**5**  The defendant submits that the plaintiff has failed to prove any negligent act or omission by the defendant, and the case must be dismissed. The defendant theorizes that while the defendant was accelerating to highway speed his car was struck by the plaintiff's motorcycle as the latter was attempting to re-enter the westbound lane after attempting a pass.

**6**  It is trite that the party asserting ***negligence*** must prove the facts amounting to ***negligence*** on a balance of probabilities and that requires more than simply establishing a more plausible theory than the opposing party. The court must be in a position to find that the facts alleged by the plaintiff are, more probably than not, correct.

**7**  Mr. Jarmson has no recollection of the accident, or events immediately preceding or following it, because of the head injury he suffered.

**8**  The evidence supporting the plaintiff's theory includes the following:

1. The direct evidence of Lindsay Jarmson that Mr. Jacobsen's car turned in front of them with insufficient time for her father to react, and that she had not perceived any clues of a pass being initiated, such as acceleration;
2. The evidence of Lori Ukkonen as to the extremely loud noise from the collision, and as to the resting position of the defendant's car perpendicular to the centre line;
3. The photographic evidence of markings on the roadway;
4. The defendant's utterances and behaviour following the accident.

**9**  Mr. Jacobsen, uninjured but shaken, asserts that he has no recollection other than that he had entered the highway from Inonoakin Road, (which joins the highway from the south) turned westward and was accelerating to highway speed when he heard a bang and felt his car shake. He saw a girl sliding by him. He sat in his car for a while, then got out and heard a girl yelling and someone else moaning or screaming from over the bank (which is off the eastbound side of the highway). Then he got back in his car and moved it off the road and onto the westbound shoulder. He asserted that he did not recall the position of his car on the road before he moved it. He testified that it "came to him" to go to the home of acquaintances named Esperson to summon help for the injured, and he started walking toward their place as fast as he could. He walked eastward on the highway back to Inonoakin Road and down it a short distance to its intersection with Langille Road and along the latter a short distance when Mr. Esperson coincidentally came by and picked him up and took him to the Esperson residence further down Langille Road.

**10**  Mr. Jacobsen said he does not know why he did not stop for help at the Backfire Cafe which is located on Highway 6 just 100 to 150 meters east of the site of the collision and which he walked by on his way to the Espersons' residence, which is many multiples of that distance away from the accident site. He acknowledged that he had known the owner of the cafe for years from buying hamburgers at her establishment which was the only fast food place in the area.

**11**  The only other direct evidence about the collision itself came from Lindsay Jarmson. She testified that as they came onto the long straight stretch of the highway they were driving on the left side of the westbound lane. Without perceiving any of the usual clues that they were passing anyone, such as increased engine revs, she saw a white car ahead "hanging a sharp left or U-turn", and before she had time to say anything, they hit the car. She tumbled down the road and ended up lying on the left side of the road. Despite having suffered a fractured femur, she pulled out her cell phone to call 911, but did not get a signal. She also remembers trying unsuccessfully to call her mother, who was travelling in a car preceding her and her father. She said that a woman approached her, as did the defendant, who had his hands on his head and was swearing. The woman commented to the defendant about his profanity, and the defendant said to Lindsay: "You're going to hate me for the rest of your life." She replied that it was OK as long as her father was OK. The defendant turned and walked away.

**12**  On cross-examination Lindsay Jarmson agreed that she was primarily enjoying the view as they drove, rather than looking ahead. She is about 5' 3" tall and her father about 5' 9''. She said she saw the white car at about a 2-car length distance and angled pointing at about 10 o'clock on a clock face relative to their straight ahead line of travel. She said she did not recall telling Mr. Esperson on his subsequent arrival at the scene that: "We cut in too early." (Erik Esperson later testified that she had said: "Dad cut in too early.")

**13**  On cross-examination Lindsay Jarmson initially said the white car seemed to be going slowly. She said she was not sure if it was less than 10 kph, because she is not sure what 10 kph looks like. She was shown her statement to police investigators given from a hospital bed at 1:30 p.m. on the day following the accident, wherein she had stated that "I think he was making a U-turn, cause he was going pretty fast as he turned ...". She then agreed that "fast" was correct, but acknowledged she was unsure about the speed aspect. She said that the one thing she was sure about was the angle of the car. In fairness to Ms. Jarmson, it must be noted (by use of simple arithmetic) that if two car lengths (taken at an estimated 6.5 metres per car) is a reasonably accurate measure of the distance between the vehicles when she first noticed the car, and the motorcycle was travelling at 90 kph (25 metres per second), her time for observation prior to impact would have been approximately .5 of a second. It is common sense that such a brief opportunity is unlikely to be sufficient to allow a reliable estimate of speed, which includes a time dimension, but is more likely sufficient to allow a reliable perception of position.

**14**  Lori Ukkonen, the postmistress at nearby Edgewood, was at the Backfire Cafe, together with her spouse, ordering food. She knows the defendant. She testified that she had heard and seen a motorcycle as it came to the bottom of the hill just east of Inonoakin Road and entered the straight stretch (that commences just east of the cafe). It was travelling at a "normal speed, nothing out of the ordinary". She noted that the passenger was seated higher than the driver as the motorcycle passed. As she turned back to ordering food, she heard a "God awful bang" that sounded like someone hitting a brick wall and which she said was so loud she will never forget it. She thought someone was dead, and before looking out again she told the cafe owner to call the police. Her spouse, who had first aid training, started walking down to the scene. Ms. Ukkonen stepped outside the cafe and saw the defendant's white car situated cross-ways in the westbound lane, nearly perpendicular to the centre line, with its front end at or near the centre line and its rear end over the fog line on the right hand side of the westbound lane. Asked to describe how far off being perpendicular, by reference to an imaginary clock face with 12 o'clock being the centreline looking westward, she said just past 9 o'clock.

**15**  Ms. Ukkonen later saw the defendant walking "wobbly", staggering past the cafe on the opposite side of the road. This evidence, together with Mr. Jacobsen's admission that he is an alcoholic, that he spent the prior evening drinking at his parents' place in Edgewood and consumed 6 to 12 beer, that he has a conviction and driving suspension for impaired driving and refusal to provide a breath sample, and that he immediately drank a beer on arrival at the Esperson's, raises the possibility of him driving while impaired. However, the evidence as a whole does not adequately support that hypothesis and the plaintiff did not seek such a finding.

**16**  In addition to his quoted comment to Lindsay Jarmson, (which the defendant did not deny, but said he did not recall making) I find that Mr. Jacobsen's behaviour and utterances in the aftermath of the accident are consistent with at least a belief on his part that he was at fault in the accident. He kept repeating to Erik Esperson that he thought he had killed someone. He did not report the accident to ICBC, although he knew he was legally required to do so. He made no claim against Mr. Jarmson or Jarmson's insurer for the significant damage to his car. The car was an older model Chrysler K car, but he had recently purchased it for $1,000 and it was in good condition. His explanation for that inaction was that he disliked ICBC because they had disbelieved him in regard to a previous accident and had mistreated other people he knew. That explanation makes no sense to me; if he believed Mr. Jarmson to be at fault, his inaction would be a saving to ICBC at his own expense.

**17**  Mr. Jacobsen's manner of dealing with the evidence relating to the position of the car was not to deny the evidence or try to explain it, but to assert that he has no idea where his vehicle came to rest. While I acknowledge the submission that Mr. Jacobsen did not try to concoct a story to explain how his car came to a rest across the westbound lane, that is not necessarily an indicator of his testimonial reliability. Considering that he apparently sat in the car for a time after the collision, then got out of the car, then went back to it to move it to the shoulder of the road, it is difficult to believe that he has absolutely no recollection of its location and position relative to the road, assuming that he was not impaired. It also strains credibility to accept that it was only after he got to the Espersons that he was able to think logically enough to realize he had been struck by a motorcycle, on the basis he had noted that the injured girl lying on the road was wearing a motorcycle helmet.

**18**  Mr. Jacobsen was examined for discovery less than a month before the opening day of trial, after he was belatedly located. He acknowledged at trial that some of his discovery answers were false and he denied the accuracy of others which were clearly inconsistent with his trial testimony. One example is his discovery evidence was that he was on pain killer medication Gabapentin at the time of the accident; at trial he said that was false and he was not on any medication. He was able to give positive answers on discovery on matters about which he claimed to have no recollection at trial one month later.

**19**  Mr. Jacobsen acknowledged that prior to being examined for discovery on October 24, 2011; he thought the accident had happened at noon and in the fall season. Mr. Jacobsen was not located by counsel or ICBC for over three years following the accident and there is no evidence of intervening consideration by him or statements to others in that three year period. At discovery he said he had no idea where the impact occurred on the highway. Mr. Jacobsen said that he did not recall telling Mr. Esperson that he thought he had killed someone but accepted that he did say so if Mr. Esperson so recalled. As previously mentioned, he did not recall saying to Lindsay Jarmson "you're going to hate me for the rest of your life".

**20**  During examination-in chief Mr. Jacobsen said that he had not planned to make a U-turn and no reason to do so. When confronted in cross-examination with the scenario of him pulling over to the side of the road and pulling a U-turn, his first response was "in my mind for sure that did not happen" and a subsequent response was "not that I recall". These answers, read in the context of his general befuddlement and inconsistency, are indicative of a lack of reliable memory.

**21**  I find that Mr. Jacobsen was a wholly unreliable witness, and I can place no weight on his evidence that he was driving along normally in his lane accelerating toward highway speed and was mysteriously struck.

**22**  The only hypothetical explanation for the post accident position of the defendant's car and the tire marks on the road that counsel was able to present that is inconsistent with the plaintiff's theory is the "flat tire theory", which I will deal with later.

**23**  Unfortunately, neither party presented any expert evidence attempting to reconstruct the detail of the collision. There are photographs in evidence depicting the scene and several markings on the road surface. There is an investigation report (Exhibit 18) prepared from an RCMP inspection of the scene on August 2, 2008 providing some dimensions of same. There are photographs of the damaged vehicles. Counsel's arguments were based on common sense and a rudimentary knowledge of the laws of physics, and this court's analysis must be similarly based.

**24**  A verbal description of the road markings is contained in Exhibit 18 as provided by Constable Orb who was an RCMP collision analyst. It is not necessary or helpful to quote his entire description in these reasons. His report and his testimony also referenced photographs taken by Constable Robinson, who attended the scene on the day of the accident. In short, there are several tire scuff marks and streaks of gouges obviously made by the motorcycle commencing (in the case of one arc shaped tire mark) in the westbound lane near the centre line of the highway and angling across the centre line and toward and off the far edge of the eastbound lane. Constable Orb's report states that the 14.2 m long streak of gouges is located on a 45 degree angle to the centre line. The arced tire mark that commences in the westbound lane arcs across the eastbound lane at an angle much more near the perpendicular than the gouges, and it intersects the other tire scuff apparently made by the rear tire of the motorcycle. That mark was 3.4m long as measured by Constable Orb, but he acknowledged in his report that Constable Robinson's photographs depicted it as beginning across the centreline, which was not observable to Constable Orb.

**25**  There is also a tire scuff mark that Constable Orb aptly described as J-shaped which is in the westbound lane near the centre line. It appears to have been made by the left front tire of the Jacobsen vehicle. The J is situated such that the long side of the J is pointed toward the centre line at an angle of approximately 45 degrees and the apex of the rounded bottom of the J is located approximately 1/3 of the width of the westbound lane away from the centre line. The point at the short side of the J-shaped scuff is close to the point where the arced scuff commences; this is evident in Exhibit 4, Tab 2, photographs 3 and 4.

**26**  The front left tire of the Jacobsen car was punctured and flat. The rim of that wheel was also damaged, but that might well have occurred as the car was driven off to the shoulder of the road after Mr. Jacobsen re-entered the car.

**27**  The defendant suggests that Ms. Jarmson's evidence of not noticing an acceleration cluing her to the initiation of a pass was inconsistent with Ms. Ukkonen's evidence of hearing a slight acceleration, and that the only logical reason for acceleration would have been to initiate a pass of a slower moving vehicle. I think the apparent inconsistency is simply a matter what degree of acceleration the two witnesses were speaking of. Ms. Ukkonen spoke of a slight acceleration that may well have been unremarkable to Ms. Jarmson and insufficient to constitute the signal of a pass. This was not fully explored with Ms. Jarmson. The evidence did provide an alternative reason for accelerating, namely: the opening up of a straight level stretch of highway after descending a significant hill with an S curve and a speed sign suggesting 60 kph at the top. Ms. Ukkonen and Mr. Esperson testified as to the usual more marked acceleration at that point by many motorcyclists, who are always the first vehicles off the ferry and leading the ferry traffic.

**28**  The defendant suggests that Ms. Jarmson was inconsistent in her estimates of the speed of the Jacobsen car as it turned. That is true, but understandable in the circumstances, as I have said. The defendant highlights the brevity of the opportunity for observation on the part of Ms. Jarmson and suggests that her observation of the angle of Mr. Jacobsen's car to the road may actually have been an observation of the relative angles of the vehicles as Mr. Jarmson was returning prematurely to the westbound lane from the eastbound lane after attempting a pass. While a passenger with some obstructed view and such a limited window of observation could hypothetically be disoriented or mistaken about her vantage point, it is highly unlikely that is the case here. I think it is highly unlikely that with her experience as her father's motorcycle passenger she would have been unaware of them having moved over to the eastbound lane, and even if that manoeuvre was achieved so gradually as to escape her notice, the initiation of a relatively dramatic return manoeuvre to approach the Jacobsen car at an angle that the defendant elsewhere postulates at 45 degrees to the highway centre line could not reasonably have escaped her notice. This would be the case whether Mr. Jarmson turned to the right by steering or by leaning.

**29**  The defendant argues against drawing the inferences sought by the plaintiff from Ms. Ukkonen's evidence about the nearly perpendicular position of the Jacobsen car in the westbound lane after the collision. He points out that Ms. Ukkonen's evidence positioned the car several metres west of the known impact point, which is impossible if it was hit while perpendicular because there are no skid or scuff marks indicating that it was forced there by the impact. The submission is as follows:

We submit that the flattening of the tire and a hard turn of the vehicle to the left commencing with the flattening of the tire is logical and accounts with the scuff mark and Ms. Ukkonen's belief as to the final resting spot of the defendant's car.

This submission also does not explain a final resting position of the car metres down the road from the impact point with both rear wheels on the fog line. A veering to the left does not explain how the rear end could skid around without leaving skid marks on dry bare pavement, or where the force for a spin in that direction originated. Ms. Ukkonen did not place her sketch of the resting location of the defendant's car by reference to the marks at the point of impact, but by recalling from memory where it was in reference to roadside trees and shrubbery. There is evidence (Mr. Esperson) that some first responders cut some trees down which might account for some small error on her part, but in any event she placed the car within about 1 to 1 1/2 car lengths of the point of impact. I conclude that she was probably slightly in error in doing so. Her evidence in that regard is of less significance than the orientation of the car and that error does not cause me to conclude that her evidence of the latter is unreliable.

**30**  I find that Ms. Ukkonen's evidence of a very loud noise from the collision is consistent with the plaintiff's theory of a very direct impact and a significant difference in speed between colliding vehicles, and is inconsistent with the theory of a motorcycle travelling highway speed cutting in too soon while passing a vehicle approaching highway speed, where the speed differential would be far less.

**31**  As for Mr. Esperson's evidence that Lindsay said "we" or "Dad" cut in too soon, I have difficulty accepting that she said that. She gave a statement to the police less than 24 hours later that related how the defendant had started to turn in front of them. She did not impress me as the type of person who would have concocted a lie in that circumstance, and she had no opportunity to be coached or to collaborate with any family prior to making that statement. Mr. Esperson's testimony in examination-in-chief was that he spent only 5 minutes with Lindsay of the "good hour" that he was at the scene. (The defendant's submissions state that his evidence was that he spent the bulk of his time tending to Lindsay, but that is contrary to my notes.) He also said in examination in chief that everyone at the scene was talking and speculating about how the accident happened. I don't suggest that Mr. Esperson is knowingly being untruthful, but I think he may have misunderstood something Lindsay said or wrongly attributed his or somebody else's speculation to Lindsay.

**32**  In my view the perpendicular location of Mr. Jacobsen's car before he moved it off the road is strongly supportive of the scenario advocated by the plaintiff. The location of the rear of the car is not consistent with any explanation put forth or that occurs to me other than that the car got into that position by being driven there from the shoulder of the westbound lane. The shoulder at this location is very wide. Photograph 6, at Tab 3 of Exhibit 4, shows a full sized police cruiser parked fully on the shoulder with about two feet to spare on the outside of the white fog line.

**33**  The J-shaped scuff mark indicates movement of the Jacobsen car toward the centre line after the impact. Common sense tells us that this means the car was already moving in that direction before impact, since there was no impact force in that direction. That particular mark does not appear to have been made by a rolling flat tire and it seems likely the left front tire was punctured and knocked off the rim either at the time of impact or as the tire skidded while making its scuff mark.

**34**  Another item of physical evidence suggesting that a force in a southerly direction was in play is the shape and direction of the arced scuff mark ostensibly from the front tire of the motorcycle, which I described earlier.

**35**  The defendant suggests that the departure angle of 45 degrees for the motorcycle and riders is wholly inconsistent with the Jacobsen vehicle being nearly perpendicular to the highway at the time of impact, and consistent only with the motorcycle sideswiping the westbound car at an impact angle of 45 degrees. Absent expert evidence, I do not find that submission compelling. It is clear from the nature of the damage to the car that at the actual impact the vehicles were not exactly perpendicular to each other and no evidence suggests that they were. Clearly the motorcycle glanced off the front corner to an extent and this was not a T-bone collision which stopped the forward movement of the motorcycle. I cannot discern whether this was because the witnesses' estimates of the relative angles of the vehicles are in error or because the momentum of the car toward the centre line affected the departure trajectory of the motorcycle and riders. In any event, I find the suggestion that Mr. Jarmson must have driven his motorcycle at a 45 degree angle at the car he was passing and struck its front wheel and wheel well with the front fender, front wheel and forks of the motorcycle wholly implausible in the circumstances.

**36**  I am satisfied on the whole of the evidence that this accident probably occurred in the manner claimed by the plaintiff. As I previously noted, the Jacobsen car probably initiated a turn from the shoulder of the westbound lane. As to the question of contributory ***negligence*** on the part of the plaintiff, it is obviously possible that he was not keeping a proper lookout or driving with due caution in respect of the Jacobsen car which was there to be seen, but in the absence of any reliable evidence as to whether or not the defendant's car was moving or displaying signal or brake lights or other indications of a hazard that should have been evident to Mr. Jarmson prior to Mr. Jacobsen negligently turning into the path of Mr. Jarmson, I am unable to find on a balance of probabilities any failure to exercise the appropriate standard of care or negligent driving on Mr. Jarmson's part. I therefore find the defendant 100% at fault.

**MR. JARMSON'S INJURIES AND A SUMMARY OF THE MEDICAL EVIDENCE**

**37**  Mr. Jarmson, a few days short of his 56th birthday at the time of the accident, sustained a traumatic brain injury, fractures of his right femur, his left wrist, and right foot, chest trauma with a collapsed right lung, contusion of his left eye, facial lacerations and lacerations to his right great toe and right elbow. Surgery was required in respect of the fractures. The metal devices used for internal fixation of his femur and his wrist remain in place. He was hospitalized for about 35 days. While he was in hospital, a CT scan revealed a moderate left-sided disc herniation at C4-5, but the medical evidence is equivocal as to whether this was a consequence of the accident.

**38**  Later diagnoses of problems stemming from the initial injuries included right foot complex regional pain syndrome, heterotopic bone formation in the right thigh muscle, stiffness of the right knee, tears of tendons and cartilage of the right shoulder, post-traumatic stress disorder, and depression.

**39**  Mr. Jarmson's pre-accident health status is summarized succinctly in the following paragraphs from a June 2010 medical legal letter from Dr. Susan Norton, his family physician in Dubai:

Prior to the aforementioned accident, Mr. Jarmson was an extremely fit individual. He exercised regularly and was in excellent physical condition. He regularly travelled with his family and the school at which he worked, and these trips were often quite rigorous, involving trekking, cycling etc. He also worked full time at the American School of Dubai as an art teacher. Prior to the MVA, he had never requested any sick leave from my office.

Prior to the MVA Mr. Jarmson's visits were for simple complaints such as sinusitis, persistent upper respiratory tract infection, Dupytren's contracture and one episode of patellofemoral syndrome. He never had any visits for mood disorder, pain or disability. In fact he was a very happy, well adjusted individual, living life to its fullest.

**40**  Mr. Jarmson's pre-accident nature was, according to the evidence, that of a socially outgoing, humorous, light-hearted, gregarious, family-oriented man, with a passion for pursuing his artistic talents and teaching art. He was keen (his own description was "religious") about keeping fit by running and gym workouts, primarily with free weights, but also using the treadmill and cycles. He and his wife and two daughters were avid and very experienced international vacation travellers. Prior to Mr. Jarmson taking the teaching position in Dubai in 2003, he taught art in Bangkok, Thailand for 6 years, and prior to that he had a teaching position in Bolivia. Each of these international positions provided bases from which the Jarmson family travelled to other neighbouring countries. According to his wife and his daughter Lindsay, Mr. Jarmson was usually the planner and initiator of their travels.

**41**  Following his discharge from the Kelowna General Hospital on August 30, Mr. Jarmson convalesced at the home of friends in Vernon B.C., under the care of Mrs. Jarmson until about November 25, 2008, when he and Mrs. Jarmson returned to Dubai. Their daughter Lindsay had returned to Dubai in mid-September to continue her schooling. Mr. Jarmson remained on disability leave for the entire 2008/2009 school year and Mrs. Jarmson returned to her teaching assistant position in January 2009.

**42**  Mr. Jarmson continued his convalescence in Dubai, which Mrs. Jarmson described as consisting of exercising, napping, visiting medical doctors regularly and occasionally going to work with her in the afternoons. She worked out with him as they had done before the accident, but he used the weights at a much reduced level and was in pain when he used the stationary bike. Mrs. Jarmson described Mr. Jarmson as being moody and depressed. Medication helped somewhat, as did counselling once they found a suitable counsellor, but Mr. Jarmson was full of rage and slapped himself in the face to the point of bruising and banged his head on walls. This occurred weekly at first, but with diminished frequency over time.

**43**  Dr. Susan Norton's June 2010 medical report described her observations and impressions of Mr. Jarmson upon his return to Dubai and in the first few visits thereafter:

On December 18, 2008 Mr. Jarmson presented to my office, shortly after having returned to Dubai from Canada. He reported that he had been involved in an MVA in Canada the previous summer, in which [he] had allegedly been hit by a car while riding a motorcycle with his daughter. He was thrown down an embankment and suffered a massive closed head injury, comminuted fracture of the right femur and left wrist, fractured ribs, pneumothorax and hemothorax. He was kept in Kelowna Gen Hospital until August 30/2008. It is my understanding that during this time he had extensive rehabilitation, and after discharge had ongoing rehabilitation. I have reviewed a neuropsychological testing report by Dr. Miller dated 28/08/2008. In that report he states that Mr. Jarmson had suffered a prolonged period of post traumatic amnesia and on original assessment 11/08/2008 was reported to have moderate to severe cognitive dysfunction. On the assessment on 28/08/2008 Dr. Miller found a variety of cognitive deficits, as well as symptoms of anxiety, depression, short attention span and agitation.

At that first visit on December 18, 2008 I was shocked to see the state Mr. Jarmson was in. He moved very slowly, in obvious pain. He on numerous occasions stopped his speech in mid sentence as he had forgotten what he was talking about. He was exhibiting signs of depression. He was complaining of insomnia secondary to pain in his leg, shoulders, neck, chest wall and wrist. He was having nightmares about the accident. I started him on Amitryptaline 25 mg at night to help him sleep and to treat his pain. He also reported to me that he was being followed by Beverly Strathearn, physiotherapist at Orthosports and Dr. Moosa Kazim, Orthopaedic Surgeon at Orthosports.

On December 27, 2008 I saw Mr. Jarmson again. He was having severe insomnia due to pain and nightmares and the Amitryptaline had unfortunately had a paradoxical effect on him and made him hyperalert I gave him a small supply of Diazepam 5 mg to help with sleep and also to relax his muscles. I also gave him a letter to help get financial coverage for a thick memory foam for his bed and pillow to try to alleviate the pain.

On January 15, 2009 I got a call from Mr. Jarmson. He stated his pain was ongoing and he walked with a limp and significant pain. He also advised he got very fatigued if walking for even short periods of time. He was attending Fitness First gym with a personal trainer to undertake a rehabilitation programme, which often would require 3 to 4 hours to get through a routine, as he would have to go slowly and take frequent rests. I did a letter authorizing a handicapped parking pass as the parking area was quite a distance from the gym.

On February 18, 2009 I saw Mr. Jarmson. He advised me that he had been diagnosed with Reflex Sympathetic Dystrophy in the right foot and was getting sympathetic nerve blocks at American Hospital of Dubai to try to help the pain. As well he said he had ossification of the right quadricep that was giving him pain. He was also getting bilateral shoulder pain and was awakening in the middle of the night with bilateral upper limb stiffness and pain. He was taking Lyrica for neuropathic pain and this was helping his sleep somewhat.

**44**  Mr. Jarmson returned to his teaching job at the American School of Dubai in August 2009 but his ability to cope with the demands of the job was badly compromised. The superintendent of the school, Mr. Fleetham, testified that Mr. Jarmson was unable to do the necessary mapping and planning, and some of his previous functions were assumed by others. Mr. Fleetham observed that Mr. Jarmson changed from being the life of the party to "not being able to put his head in the door". Mr. Jarmson had to be spoken to about losing his composure at times, displaying anger and ranting, and he was completely ashamed of that. Mr. Fleetham observed that the brain trauma had a severe effect on Mr. Jarmson's life and his relationships. Everyone knew he had to be dismissed, but the school was the heart of the expatriate community and there was a sense of family, a bond amongst the staff and administration.

**45**  Mr. Fleetham spoke directly to Dr. Miller, Mr. Jarmson's neuropsychologist, and was given hope that Mr. Jarmson's brain injury symptoms would improve. In the summer of 2010, Mr. Jarmson advised Fleetham that he would resign, but needed one more year to enable his daughter Lindsay to finish grade school in Dubai. Mr. Jarmson was kept on for the 2010/2011 school year, after which he resigned and returned to Canada.

**46**  Mr. Fleetham testified that before his injuries, Mr. Jarmson was an excellent "hands-on" teacher who went the extra mile in extracurricular activities and was a "spot-on" colleague, liked by his students and loved by their parents. But at this point in time, if asked, he would have to decline to recommend him as a teacher.

**47**  Mr. Fleetham's evidence was echoed and reinforced by that of Mr. Hansen, a former art teaching colleague of Mr. Jarmson, who related the details of a strange loss of control by Mr. Jarmson at a meeting, which included him hitting himself in the face. He also related how he had to help other staff and students deal with the changed Mr. Jarmson, and how on occasion he would have to go into Mr. Jarmson's classroom to manage the students after Mr. Jarmson had walked out of the classroom to "deal with himself". Mr. Hansen would also not be able to provide a reference for the plaintiff as a teacher.

**48**  Similar evidence was provided by Mr. Ridley, the head of Arts at American School of Dubai, a former colleague and good personal friend of Mr. Jarmson. Mr. Ridley has taught in Canada, England, France, and Venezuela. He is now in his 12th year of teaching in Dubai. He described Mr. Jarmson before his motorcycle accident as passionate, creative, talented, and one of the best art teachers he has been associated with. He loved his job and the students loved him. Mr. Ridley said that when Mr. Jarmson returned to work one year post accident, he was like a different person. He heard daily reports of Mr. Jarmson's difficulties on the job, including "explosions" and marked lack of respect. He had become a "slacker" who was always sitting down. Ridley also witnessed Jarmson's loss of control and head banging that occurred over a minor issue at a meeting. He volunteered the opinion that Mr. Jarmson should not have returned to the job, and that he would have been fired if he was working in a school in Ontario or Saskatchewan. Some staff did not want him to be kept on, but others, including Mr. Fleetham and Mr. Hansen, were "covering" for him.

**49**  Lindsay Jarmson also testified about the differences in her father's demeanour and functioning as a teacher after the accident. She was once "texted" by a friend in his class, to come and see her father immediately. She asked to be excused from her own class and went to calm her father down. This was difficult to do because of his exaggerated stubbornness and his posture of being strong

**50**  Lindsay also testified about the difficulties for the family in not knowing when Mr. Jarmson would have a "fit", or "meltdown", which occurred at least weekly at first, but diminished in frequency over time. She said that Mr. Jarmson's role within the family has changed, although she said had difficulty explaining how. Mrs. Jarmson testified to the same effect in respect of Mr. Jarmson's meltdowns, stating that although progressively less frequent, and completely absent since his return to Canada, he has had a meltdown within the last six months.

**51**  Mrs. Jarmson clearly took on a great deal in emotionally supporting and physically caring for Mr. Jarmson after the accident and by all the evidence she did so in an exemplary fashion. By the accounts of several witnesses, that role has become a permanent feature of their lives. At least one witness referred to her as "a saint". Mr. and Mrs. Jarmson always had a strong partnership, but it appears that much of the energy that he previously supplied must now come from her. I think that is probably also the role change that Lindsay Jarmson was alluding to. Mr. Krahn, a long term friend of the Jarmsons, testified that they were always a team, but since the accident Mrs. Jarmson has become more like a mother or a nurse to Mr. Jarmson. Mr. Krahn said that Mr. Jarmson defers to Mrs. Jarmson on decisions, and he doubts that he could manage his life without her.

**52**  Clearly the last three years in Dubai were extremely difficult for Mr. Jarmson and his family. However, since his retirement from teaching in June 2011, and the release from the frustrations of dealing with his condition and feeling overwhelmed in those years, Mr. Jarmson said that he feels as if a huge weight has been lifted from his shoulders.

**53**  Shortly after returning to Canada, Mr. Jarmson underwent his third neuropsychological evaluation by Dr. Harry Miller, and Dr. Miller's July 28, 2011 report summarized his findings, including references to previous evaluations, as follows:

In summary, the patient is a 58-year-old, right-handed male who was a motorcyclist involved in a motorcycle/motor vehicle collision on 27 July 2008. The motorcycle was struck by a vehicle, and the patient went down an embankment. He suffered multiple injuries including a right femur fracture, left wrist fracture, and traumatic brain injury. Serial CT scans of the brain revealed bifrontal contusions, subarachnoid blood, and bifrontal and right temporal subdural hygromas. There was a prolonged period of post traumatic amnesia. The patient received initial attention at Arrow Lakes Hospital, with transfer to Kelowna General Hospital for further acute care and rehabilitation. He underwent an abbreviated neuropsychological evaluation on 11 August 2008 while in hospital, and results revealed diffuse cognitive dysfunction of a moderate to severe nature. The patient was discharged from Kelowna General Hospital on 30 August 2008 and he was seen for a repeat neuropsychological evaluation in July 2009. The results demonstrated significant deficits for complex auditory attention, verbal learning and memory, and speed of auditory information processing. Certain aspects of language were noted to be impaired and in particular, there was evidence of hyperverbosity. There were significant emotional issues, including depressed mood, anxiety, irritability, poor frustration management, and the patient becoming readily overwhelmed. The patient returned to his position as a teacher in Dubai in August/September 2009 and there were accommodations in place to facilitate durability of return to teaching. The patient retired from teaching in June 2011. When he was seen for the neuropsychological evaluation on the present occasion (20 and 21 July 2011), the patient reported ongoing cognitive, emotional, and physical changes since the motorcycle/motor vehicle collision of 27 July 2008.

The results of the neuropsychological evaluation completed on 20 and 21 July 2011 revealed most areas of higher cognitive function to be within normal limits. These included visual attention, processing speed, most aspects of language, academic skills, learning and memory, intellectual abilities, and problem solving/reasoning. In contrast, there were deficits for complex auditory attention and some aspects of language (i.e. hyperverbosity, circumstantial speech). Personality examination and clinical interview revealed significant emotional disturbance characterized by depressed mood and anxiety.

**54**  Dr. Miller's DSM IV diagnostic formulation included personality disorder due to traumatic brain injury and an adjustment disorder with mixed features of anxiety and depressed mood. Based on neurological indices of severity, Mr. Jarmson suffered a severe traumatic brain injury.

**55**  A further indication of the severity of the injury to Mr. Jarmson's brain is gleaned from the evidence of Dr. Gary Stimac, a diagnostic neuroradiologist, who testified and reviewed with the court many of the scanned CT and MRI images of Mr. Jarmson's brain. These consisted of CT images taken at Kelowna General Hospital at intervals of about 9 hours, 40 hours, and 5 1/2 days after the collision, and a complex set of MRI images obtained April 5, 2011. Dr. Stimac's written report of August 15, 2011(p. 5-6) notes that:

The radiology examinations, in conjunction with emergency evaluations, establish that Mr. Jarmson sustained severe injury to the head. The immediate and subsequent CT scans show the left frontal impact and the coup-contrecoup contusions. The later MRI shows diffuse brain atrophy, evidence of white matter scarring, encephalomalacia, and hemosiderin deposits from the hemorrhagic contusions.

**56**  Dr. Stimac explained that the atrophy he referred to is due to the absorption/removal of necrotic tissue.

**57**  At p. 6-7 of his report, Dr. Stimac applies his knowledge of the neuropathology of shearing injuries to the imaging evidence in this case, in the following manner:

White matter shearing injuries are the result of acceleration, deceleration, and rotation of the brain within the cranial vault, they can occur with or without impact of the head, because the brain deforms under abrupt change in position. Helmets can lessen the impact and prevent skull fracture. However, helmets are not designed to prevent rotational and translational shear forces. This is especially true when the force of impact exceeds the protective effects of the padding and structure of the helmet. The substantial facial/scalp injuries and the multiple hemorrhagic contusions demonstrate that the impact was well beyond that for which any helmet could prevent shearing trauma to the brain.

Shearing of brain tissue occurs in the planes of motion throughout the brain and, particularly, at margins of structures of differing densities. These margins include the gray-white junctions, the basal ganglia regions, the deep white matter, and the corpus callosum. This shearing can injure small blood vessels (causing focal hemorrhages) or small areas of brain tissue (causing small contusions). In this case there were several visible shear hemorrhages on the initial CT scans. The more recent MRI scan shows several foci of gliosis, indicative of shear injuries. The larger contusions in the frontal lobes, the left temporal lobe, and the high left convexity, as shown on the initial CT scans, have left residual areas of encephalomalacia and gliosis. Contusions are highly correlated with the presence of shearing injuries. Other than traumatic brain injury, there is no alternative explanation for these abnormalities in Mr. Jarmson's scans.

Such focal lesions on scans are visible evidence of shear injury. However, the ominous lesions in closed head injury are the shearing of individual axons. The axons are white matter processes that extend between brain cells - the connections that allow communication throughout the brain and between the brain and the rest of the body. The shearing forces result in a shearing of axons diffusely throughout the brain, a process called diffuse axonal injury (DAI). Because the axons are microscopic, these lesions are not visible on CT or traditional MRI scans.

The result of DAI is diffuse disconnection of the brain cells from one another and from the body. Depending on the location and number of injured axons, the symptoms may vary from one individual to another. Generally, more severe impact results in greater axonal injury and, consequently, greater neurocognitive impairment. Because axons are injured diffusely throughout the brain, multiple functions can be affected. These often include vision, memory, speech, executive function, balance, coordination, personality, emotion, energy, and motor function. When macroscopic contusions occur, as were present in this case, there is an added effect of focal areas of brain injury to the diffuse brain damage.

**58**  Dr. Stimac's conclusions (p. 7-8) included the following:

1. The long term symptoms reflect a constellation of abnormalities in diverse areas of brain function. This pattern is typically seen as a result of closed head trauma and DAI. These problems are further exacerbated by the multiple brain contusions and resultant loss of brain substance.
2. The immediate CT scans show left forehead impact. Within the brain are multiple hemorrhagic contusions, shear hemorrhages. These findings indicate significant closed head impact and the likelihood of shearing injury to the brain. Shearing injury is highly associated with DAI.
3. The MRI scan, performed 2 1/2 years after the injury, confirms the outcome of the initial CT scans, documenting hemosiderin deposition from the hemorrhagic contusions, diffuse brain atrophy, and gliosis [scarring].

**59**  Dr. Miller recommended that Mr. Jarmson continue to receive psychotherapy/counselling to address the emotional issues, to decrease the level of emotional distress, and to develop strategies to facilitate a proactive management of emotional issues. With improvement in emotional health, Mr. Jarmson is likely to realize a better cognitive and day-to-day function. As to prognosis, Dr. Miller expressed the opinion that the neuropsychological impairment demonstrated on the current neuropsychological evaluation is of a permanent nature although it is possible that if there is improvement in his emotional adjustment there may be some lessening of the severity of neuropsychological impairment.

**60**  After noting that Mr. Jarmson's return to work was achieved with modifications and accommodations in the circumstance where Mr. Jarmson was familiar with the expectations and demands of the job, he noted that:

... typically, a new work environment and new job are expected to place greater demands on cognitive abilities such that it might be anticipated that the patient will have increased challenges to function in the workplace, relative to the already significant challenges he experienced in his efforts to return to work in a job that was very familiar to him. In essence, the patient, as a result of the neuropsychological consequences of the motorcycle/motor vehicle collision of 27 July 2008 has a persistent vocational disability and it is unlikely that the disability will be lessened in the future.

**61**  As to how Mr. Jarmson's current brain injury disability will affect his activities of daily living, recreational, social and cultural activities, Dr. Miller's report stated the following:

The nature of the patient's neuropsychological impairment is unlikely to present difficulties in the patient's efforts to manage routine and overlearned day-to-day activities. However, if he is required to plan and organize more complex activities such as vacations or building of a home, or to participate in more demanding financial transactions, there is the potential for the patient to develop anxiety and to become overwhelmed, and should this occur, the patient will be compromised in his efforts to carry out more complex or demanding activities. I expect that the patient will have persistent issues of this nature in the future. Further, he is subject to being readily fatigued, and fatigue will have a negative effect on cognitive abilities and increase the likelihood of becoming overwhelmed, such that the magnitude of interference as a result of the patient's neuropsychological dysfunction on carrying out more complex day-to-day activities can be variable and might range between mild to a more striking effect.

**62**  Dr. Travlos, a Physical Medicine and Rehabilitation specialist examined Mr. Jarmson for an independent assessment on July 25, 2011. He provided a written report of the same date, and testified at trial. I note that Dr. Travlos' assessment preceded Dr. Miller's third report, but nothing particularly contentious arises on that account. Dr. Travlos would have to defer to Dr. Miller's specific expertise on neuropsychological matters. Dr. Travlos said there is nothing in Dr. Miller's third report that would influence the opinions he expressed in his July 25, 2011 report. I note only that Dr. Travlos' reference to Mr. Jarmson's brain's physiological recovery having plateaued and his current level of cognitive function being permanent should be taken as subject to Dr. Miller's comment that improved emotional health could possibly result in improved day-to-day function.

**63**  Dr. Travlos' report agrees that increased readiness to fatigue is a consequence of Mr. Jarmson's brain injury and is likely to be a permanent problem for him.

**64**  The following excerpts from Dr. Travlos' report (p. 12) are pertinent in identifying other incidental consequences of his brain injury:

... Although individuals with head injuries can function in isolated areas quite well, it is the ability to multitask, the ability to block out extraneous information, and the ability to focus on tasks while other tasks still need to be done at the same time, that is lost in these individuals. This unfortunately is exactly what teachers have to do all the time due to the need to deal with multiple students, multiple inputs and multiple different questions and interactions at the same time. Switching from one teaching subject to another can also impact on the ability to adapt and it is not surprising that he had feelings of being overwhelmed. In order for Mr. Jarmson to return to any formal work, he would need to have a relatively controlled environment with restricted activities and work hours.

Mr. Jarmson has not had any problems with his smell and is not at any increased risk of danger to himself because of his lack of smell. Although he says it is not as good as it was, he can still smell and he can still differentiate things in terms of taste.

Mr. Jarmson's visual spatial orientation is not quite as good and he does tend to get lost. This should not be a major issue of concern for him, although it may be inconveniencing at times.

Mr. Jarmson may be at mild increased risk of a seizure disorder, given the amount of trauma and bleeding around the brain. This increase is small and only a possibility.

With Mr. Jarmson's background history of Alzheimer's, he may be at increased risk of developing late onset Alzheimer's or dementia as a result of the combination of his brain injury and a family history of Alzheimer's disease.

**65**  Dr. Travlos' report deals with the progress and status of Mr. Jarmson's other bodily injuries. The injuries to his left elbow, left wrist and chest have healed. The left wrist is producing shooting pains occasionally, which is probably due to a radial deviation and reduced mobility of the carpal bones.

**66**  Dr. Travlos says that Mr. Jarmson's shoulder is a concern, with an obvious tear of the subscapularis tendon and labrum, and rotator cuff impingement. If further exercises and a possible further cortisone injection do not help, Dr. Travlos suggests that Mr. Jarmson should seek an Orthopaedic's opinion as to a surgical solution.

**67**  Although the thigh fracture healed, a bone grew in the muscle of the thigh reasonably close to the knee. This was surgically removed and the surgery improved a previously limited range of motion in the knee, but Mr. Jarmson continues to have difficulties and limitations beyond those he would have had in the absence of the accident, including arthritic change throughout the knee. Dr. Travlos, at p. 16, is of the opinion that:

Mr. Jarmson's [right] knee symptoms will not improve, given the tethering and scarring of his quadricep muscles and the tightness around the knee. It is more probable than not that he will go on to have a knee replacement over his lifetime. It is difficult to know just when this will occur, as the knee is still functioning reasonably well for now, but I suspect that over the next ten years this will become a primary problem for him. Knee surgery is not without risk and the risks include infections, repeat surgical replacements, and trauma to blood vessels and nerves, amongst other problems. Following any knee surgery, at least a six-month rehabilitation process would be necessary. In my opinion, any future knee surgery here will be primarily a result of his motor vehicle accident and not any of the pre-accident problems that he had.

**68**  Dr. Travlos expressed the view that Mr. Jarmson's right foot injuries are fairly significant and although it is possible there was some pre-existing reduction of range of motion of his subtalar joint from a previous leg fracture, he suffered a fracture of his navicular bone, affecting the talonavicular joint and reducing the range of motion and the function of his foot. He will continue with limitations in functional use of his right foot and leg indefinitely and it is probable that he will develop increased arthritic change of the metatarsophalangeal joint. It is also possible he will develop more pain in the mid-foot that may require further surgical fusions.

**69**  Dr. Travlos' opinion as to the effect of Mr. Jarmson's injuries on his lifestyle was expressed as follows:

Mr. Jarmson is restricted from participating in recreational activities, as well as home-based chores and activities. These restrictions are here to stay even if he improves further. He is going to be restricted from higher-level balance activities, restrictions on any type of dangerous activities such as climbing scaffolding, roofs, or physical work such as mowing lawns, trimming trees, landscaping, etc. He is not going to be able to return back to recreational activities such as downhill skiing, running, going on heavy hikes or even going for long walks. Unfortunately, Mr. Jarmson's lifestyle has been impacted dramatically by this accident and he is going to have to make emotional adjustments to the changes, as his prior lifetime activities will no longer be viable for him to do over the long term. These restrictions will impact on his mental health and he is going to require some counselling assistance to deal with the expected long-term loss of mobility.

**70**  Dr. Keith Christian, orthopaedic surgeon, examined Mr. Jarmson for 45 minutes on August 24, 2010, and his written report of the same day states his opinion that the stiffness and discomfort in Mr. Jarmson's right knee is explainable as post-traumatic arthrosis involving the knee or possibly some direct trauma to the knee at the time of the accident. He did not think the knee impairments would be vocationally disabling for Mr. Jarmson as a teacher (Mr. Jarmson had not retired from teaching at that point), but if he was to consider other forms of work activity involving more vigorous physical activity, he would probably be prevented from doing so as a result of the accident.

**71**  In responding to one of the specific questions in counsel's letter of instruction, Dr. Christian stated the following opinion on Mr. Jarmson's general disability and its effect on his activities:

With respect to Mr. Jarmson's general disability and how his current disability affects his activities of daily living and recreational and household activities, I would say that he does have significant problems involving his right knee which are likely to continue to be disabling. He lacks a few degrees of extension and about 25 degrees of flexion on the right knee. The few degrees of extension loss is more significant in that it does tend to cause him to limp. The normal knee function requires the knee to be able to be locked in full extension to maintain a normal gait and, as a result of this restriction he is not able to do this. This likely will tend to promote the limp that he has and because of the abnormal forces at the knee joint caused by this problem it is likely that degenerative osteoarthritis of the knee will be a possibility for him in the future. The disruption of the articular surfaces of the foot will likely result in the development of degenerative osteoarthritis here in later life.

The functional limitations that this knee injury will cause [are] likely to impinge on his ability to be involved in certain strenuous physical activities, particularly running and cycling and anything involving the strenuous use of his lower extremities. In addition to the lack of function of his right knee, he does have some stiffness and loss of extension of the right foot, which likely compounds the problem. This will further impact on his ability to be involved in recreational activities of a strenuous nature to which he was accustomed prior to the injury.

Unfortunately the lack of a range of motion of the foot and knee that he has at this point in time is likely to be permanent.

Fortunately the radial fracture appears to have healed satisfactorily and I would not anticipate any residual problems here.

The right shoulder symptoms do not appear to correspond to any identifiable pathology attributable to the accident in question. He does have some restriction of internal rotation of the right shoulder, which causes discomfort here. Although there was no record of any direct trauma to the shoulder at the time of the accident I would consider it likely that a soft tissue injury to the shoulder did occur and was overshadowed by his other, more pressing injuries. I suspect the injury is largely soft tissue in nature and I would expect that there might be a tendency for improvement of this problem as time goes on.

**72**  Turning to the question of recommendations for future treatment Dr. Christian said the following:

With regard to future recommendations and treatment, I would not anticipate the necessity for any specific surgical measures for this man in the future. I think maintaining his normal functions of daily living is important for him and I would not be optimistic that any particular form of supervised form of physical therapy in the future would be beneficial for him.

**73**  The defendant argued that where there is any conflict between the evidence of Dr. Travlos and Dr. Christian on the shoulder injury etiology or the potential need for a knee replacement, the court should prefer the opinion of Dr. Christian because he is the more qualified expert, given that it is an orthopaedic surgeon who performs shoulder and knee surgery.

**74**  In my view, there is no direct or particularly significant conflict between the expressed opinions of these two experts. While Dr. Christian makes no reference to the obvious tear of the subscapularis tendon and labrum that are part of Dr. Travlos' discussion, and apparently saw no objective indication of how the accident caused the symptoms, he nevertheless opined that a soft tissue injury to the shoulder was likely suffered in the accident. As for the future probability of the need for a knee replacement sometime during Mr. Jarmson's lifetime, the court did not have the benefit of any specific rebuttal from Dr. Christian. Dr. Christian did not testify at trial. Without clarification as to what Dr. Christian meant in terms of probability by saying "I would not anticipate..", and whether he meant "future" to refer to Mr. Jarmson's entire lifetime, I cannot interpret his words to imply direct disagreement with the opinion that Dr. Travlos expressed approximately one year later. I note that Dr. Travlos' did not specifically relate his opinion of probability of surgery to a 10 year period, but rather stated that right knee function would become a primary problem for Mr. Jarmson over the next 10 years.

**75**  In any case, a possible knee replacement is a future event and the distinction between a strong possibility and a probability is a relatively minor one in this case, particularly in respect of assessing non- pecuniary loss. Dr. Christian clearly considered the plaintiff's knee injury to be significant and permanently disabling. I am not sure that living a good portion of the remainder of his life with a knee problem on the cusp of needing surgical replacement and naturally deteriorating further with degenerative arthritis and age is worthy of less non-pecuniary compensation than facing remedial surgery in about 10 years.

**76**  I will proceed on the basis that the odds on Mr. Jarmson requiring a knee replacement at some point during his lifetime are about even.

**77**  I will move on to a discussion of the assessment of damages under each head of damages.

**NON-PECUNIARY DAMAGES**

**78**  The plaintiff argues for a substantial award under this head of damages in view of the significant impact that his cognitive and physical injuries have had and will continue to have on all aspects of his life, socially, physically, emotionally, cognitively and behaviourally. It is submitted that his chosen life as an international teacher, with all the perks and aspects that came with it, was taken away from him, and early retirement has been forced upon him. His role within the family has had to change significantly, and he will no longer be able to participate to the same extent in the physical activities he used to enjoy with the family.

**79**  The formerly charismatic, gregarious, humorous, happy Mr. Jarmson is now less gregarious, not as humorous. He has become egocentric, and now has an adjustment disorder, depression and altered body image. He has chronic pain in his right knee, right foot and right shoulder. Notwithstanding his characteristic stoic nature, he is impacted daily by fatigue, both mental and physical, and remains prone to emotional meltdowns.

**80**  These submissions are well supported by the evidence. The plaintiff submitted that the appropriate award under this head of damage is $250,000 and, after referring to *Stapley v. Hejslet*, [*[2006] B.C.J. No. 128*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1M7-00000-00&context=) (B.C.C.A.), for the proper approach to assessing this head of damage, cited the following cases for arguably comparable awards:

*Wilson v. Russell*, [*[2000] B.C.J. No. 2346*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2CS-00000-00&context=) (B.C.C.A.): $250,000

*Moskaleva v. Laurie*, [*[2009] B.C.J. No. 1150*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S033-00000-00&context=) (B.C.C.A.): $245,000

*Lines v. Gordon*, [*[2009] B.C.J. No. 471*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3X8-00000-00&context=) (B.C.C.A.): $225,000

*Dikey v. Samieian*, [*[2008] B.C.J. No. 902*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G2DT-00000-00&context=) (B.C.S.C.): $215,000

*Burdett v. Eidse et al*, [*[2010] B.C.J. No. 289*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X0XV-00000-00&context=) (B.C.S.C.): $200,000

*Lee v. Dawson*, [*[2006] B.C.J. No. 679*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B1MJ-00000-00&context=) (B.C.C.A.): $294,600

*Coulter v. Ball*, [*[2005] B.C.J. No. 732*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FC6N-X0DR-00000-00&context=) (B.C.C.A.): $284,000

*Spehar v. Beazley*, [*[2004] B.C.J. No. 1044*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X3NB-00000-00&context=) (B.C.C.A.): $280,000

**81**  The awards in the last three cases listed were equal to the rough upper limit at the time. The award in *Moskaleva v. Laurie* was a jury finding.

**82**  The defendant acknowledged that Mr. Jarmson's injuries were significant, but emphasized that he has made a significant recovery, particularly from the brain injury. It is submitted that on the evidence his cognitive function may improve further now that he is free of the frustrations of trying to continue his teaching career, and as his emotional health improves. These submissions are also supported by the evidence.

**83**  The defendant also submitted, and I agree, that Mr. Jarmson remains a physically strong individual looking younger than his stated age.

**84**  The defendant argues that the appropriate award for non-pecuniary damages for pain and suffering and loss of enjoyment of life is $190,000. The cases cited for comparison by the defendant are:

*Kean v. Porter*, [*2008 BCSC 1594*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JS5Y-B2X0-00000-00&context=): awarding $180,000;

*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=): awarding $200,000;

*Harrington v. Sangha*, [*2011 BCSC 1035*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22SH-00000-00&context=): awarding $210,000;

**85**  I have reviewed the facts and awards in each of the cases cited by the parties. The constellation of injuries and the nature of non-pecuniary impact is of course different from case to case, and none is the same as the case at bar, but the most comparable of these cases establish an applicable range of $200,000 to $245,000.

**86**  I will not burden the reader with a case by case analysis, but of particular interest is the *Moskaleva* case, where appropriate deference was given to a jury award of $245,000, although the Court of Appeal commented that it was "undoubtedly high and may not have been one this court would make".

**87**  The female plaintiff in *Moskaleva* was somewhat younger (53 at trial) than Mr. Jarmson, but the residual effects of her brain injury were quite similar and, like Mr. Jarmson, she was foreclosed by her brain injury from a professional career. However, her physical injuries were less significant than Mr. Jarmson's.

**88**  I find that the fair, reasonable, and appropriate award to compensate Mr. Jarmson for his non-pecuniary losses is $230,000.

**PAST WAGE LOSS**

**89**  The parties have agreed on an award of $55,000 USD, inclusive of interest, for lost wages from teaching employment. At issue is a further amount claimed for earnings from freelance photography done for CAR Middle East magazine. Mr. Jarmson's evidence that he earned $500 per shoot twice a month was supported by an unsigned "To Whom it May Concern" letter dated October 5, 2008 purporting to be from Shahzad Sheikh, Editorial Director, which was admitted into evidence without great concern as to its authenticity, perhaps because there were telephone numbers provided in the letter, which would have enabled counsel to verify its authorship. This letter confirmed that Mr. Jarmson regularly contributed to the magazine as a freelance photographer and averaged 2 shoots a month at a cost of $500 USD per [photo] shoot.

**90**  The plaintiff claims $1,000 USD per month loss for the 32 1/2 months he would have been in Dubai and available between September 2008 and the date of trial. I am satisfied that Mr. Jarmson would probably have continued to get some photo shoots. The evidence from the magazine publishers could certainly be stronger as to the ongoing constancy of the need for Mr. Jarmson's contributions. I infer there would have been transportation and setup costs associated with earning this income. I will award a further $30,000 USD of past wage loss on account of photography sales, inclusive of interest, which brings the past wage loss award to $85,000 USD.

**LOSS OF FUTURE EARNING CAPACITY**

**91**  The plaintiff takes the position that his loss of future income is a certainty that can be measured by valuing the compensation package at American School of Dubai which was lost to him when he was forced to retire years earlier than he planned to. The evidence establishes that he is competitively unemployable. He does not have any vocational plans. His evidence is that his dream is to have a home studio and pursue his artistic hobbies.

**92**  The plaintiff's economist, Robert Carson, prepared his report on the stated assumption that Mr. Jarmson is not capable of maintaining any form of competitive employment. Mr. Carson calculated the present value of Mr. Jarmson's lost future income stream, on the assumption he would work until age 67, at $957,073 USD. On the assumption that he would have retired at age 65 (effectively July 31 2017) absent the accident, the present value would be $763,451 USD. The components of the compensation package valued by Mr. Carson were: basic salary, cost of goods and services allowance, housing allowance, utilities allowance, pension, and stipend. He also included annual income of $11,000 from freelance photography. The annual total of these components is $126,240 to $127,553 USD.

**93**  The defendant takes issue with the plaintiff and Mr. Carson including the Cost of Goods and Services Allowance and the housing allowance in his calculations. The defendant also takes issue with the assumptions of a retirement age of 67 and of Mr. Jarmson having no residual earning capacity in his injured state. The defendant's economist, Mr. Douglas Hildebrand, used basic salary, plus pension, stipend, and photography, which totalled $68,072 to $70,909 per annum. By his calculation, the present value of that future income to age 65 is $357,498.

**94**  On the issue of whether the Cost of Goods and Services Allowance should be treated as part of his salary or as a true offset of additional costs in Dubai, I have no reason not to accept the evidence of Dr. Fleetham and Mrs. Jarmson. They both testified that it is intended to be part of the salary package and that costs in Dubai, other than for housing and utilities, are not commensurately higher than in Canada. Housing and utilities allowances are separate matters, and they are much costlier in Dubai. It appears that the allowance was originally designed to attract United States teachers and Dr. Fleetham was clear that the school saved money by continuing its designation as something other than salary, because the pension contribution is not paid on that allowance. I find therefore that the Cost of Goods and Services Allowance should be included in the calculation of earnings lost.

**95**  I agree with the defendant and his economist Mr. Hildebrand that the Dubai housing allowance should not be included in the circumstance that the Jarmsons have returned to Canada. The compensation package included the cost of housing, which was paid to the landlord, rather than being an allowance paid to them to spend in their discretion. Their housing cost in Canada should be substituted for the $38,888. The same analysis applies to residential utilities, which were paid in Dubai in the sum of $7,500.

**96**  Mr. Jarmson and his wife are currently living in modest rented accommodation in Nelson at a cost of $1,025 per month including utilities. They will undoubtedly be accelerating their plans to build on their Proctor lot and may well be living there in the near future, but I do not accept the defendant's argument that as soon as the house is built they will be in the same position in respect of carrying the costs of a home in B.C. as they would have been absent the accident. It is speculative to conclude that they would have completed a home on the Proctor lot to a stage suitable for year round occupancy so many years before retiring.

**97**  The defendant is correct, however, in suggesting that from whatever point in time, absent the accident, they would have finished the house and assumed the cost of livable housing in B.C., the loss of the housing allowance is no longer a loss; they will be living in a house that they would have been paying for absent the accident. I will infer for the present purposes that absent the accident the Proctor house would have been built and ready for occupancy by the end of 2013. I will substitute the amount of $15,000 in the place of the $38,888 housing allowance and $7500 utility allowance up to the end of 2013.

**98**  I will next address the issue of whether Mr. Jarmson has any residual earning capacity.

**99**  Dr. Gordon Wallace, rehabilitation psychologist and vocational rehabilitation consultant, provided an assessment of Mr. Jarmson's residual employability potential and testified in addition to providing a written report. Dr. Wallace provided several opinions from a rehabilitation psychology perspective of which can be summarized as follows:

1. It is not realistic for Mr. Jarmson to return to work as a teacher, even on a part time or on-call basis;
2. His physical and cognitive disabilities effectively preclude him reverting to any of his previous occupations;
3. It is unlikely that Mr. Jarmson would be able to successfully utilize his transferable work skills in other jobs such as teaching assistant, or private art teacher, or direct entry jobs, or low skilled sales and service oriented occupations;
4. Formal educational training programs or apprenticeship training would not provide a realistic vocational plan for Mr. Jarmson in light of his age, and considering his physical limitations.

**100**  In addressing the questions of the likelihood of Mr. Jarmson being able to obtain and maintain competitive employment, and identifying what occupational options he could now consider, Dr. Wallace's August 28, 2011 report states the following:

While acknowledging and respecting the court's role in determining an individual's residual employability potential, from a rehabilitation psychology perspective, the ongoing cognitive, psychological and physical limitations that Mr. Jarmson experiences present significant challenges to his ability to meet the basic foundational skills required to maintain competitive employment. While it is possible that Mr. Jarmson would be able to meet the basic foundational skills for employment, it is my opinion that the likelihood of this occurring is less than 50%. It is my opinion that Mr. Jarmson would require a sympathetic employer willing to make accommodations to his employment duties (which as noted earlier would include a work environment with minimal distractions, limited multitasking demands, limited need to meet deadlines, limited computer input demands, limited interpersonal stimulation, etc.), assistance to be available from co-workers/supervisors, as well as be willing to tolerate emotional dysregulation (either with co-workers, supervisors and/or customers). It is my opinion that the chances of an employer providing such a supportive work environment are limited.

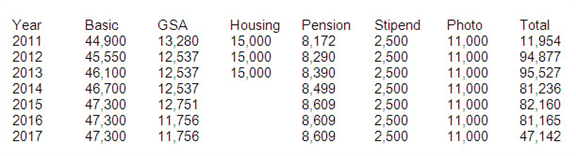
From a rehabilitation psychology perspective it is my opinion that Mr. Jarmson's better chance for vocational activity would be through his art interests. He may be able to provide art lessons/tutoring in his community but the financial compensation that you can expect from such activities is difficult to identify. In addition, he could also continue pursuing his own art related projects and may find a market for them. However, I am unable to provide an opinion regarding the economic viability of these pursuits.

**101**  The defendant's submission, which is consistent with Dr. Wallace's opinions, was that Mr. Jarmson's best prospect for residual earning capacity is as a self-employed artist and photographer. Dr. Wallace stated that he had no idea what Mr. Jarmson could earn in that capacity. The website printouts from BC Work Futures provide statistical data derived from the 2006 Census suggesting that the category of artisans and craftspersons earned $18,682 full-time salary, with only 36% of them working full-time. Painters, sculptors and other visual artists earned full-time salaries of $23,219, but only 29% worked full-time. Photographers made marginally more, at $26,733, (with 41% working full-time) but the printout suggests that by comparison to the other categories, a smaller proportion of photographers are self-employed.

**102**  I think that there is a real and substantial possibility that Mr. Jarmson could earn a very modest income from the sale of his art or photographs after a period of set-up and production, and probably following the completion of the house he and Mrs. Jarmson are planning to have built on their Kootenay Lake property. I find therefore that he has some residual earning capacity. For the purposes of calculating the present value of the income stream lost, I will impute a residual annual income of $10,000 commencing with the current year.

**103**  Turning to the issue of Mr. Jarmson's retirement age, I find that notwithstanding his dream to retire at 59, there was more reality in Mrs. Jarmson's advice to him that this would not be economically feasible. Mr. and Mrs. Jarmson clearly did not have the pension entitlements or savings to be able to afford to retire and build a house at that age. Although both daughters planned to return to Canada for post-secondary schooling and have done so, Lindsay testified that she considered Dubai to be their family home. Mr. Jarmson and his wife were both employed at a new state of the art school facility. Mr. Jarmson was very popular and loved his job, and they enjoyed their lifestyle. I find it reasonable to infer that Mr. Jarmson would have continued to work as an art teacher to July 31, 2017, just prior to his 65th birthday.

**104**  The following table sets out Mr. Jarmson's anticipated annual earnings incorporating the findings above. This is an adaptation of Mr. Carson's Table 3-B in Exhibit 8:



**105**  Utilizing Mr. Carson's multipliers in Table 2 of his August 5, 2011 report, the present values of those future annual sums are as follows:

2011: 11,954 x 998 = 11,929

2012: 94,877 x 980 = 92,979

2013: 95,527 x 948 = 90,560

2014: 81,236 x 916 = 74,412

2015: 82,160 x 884 = 72,629

2016: 81,165 x 853 = 69,234

2017: 47,142 x 822 = 38,751

|  |  |  |  |
| --- | --- | --- | --- |
|  | Total | $450,494 |  |

**106**  The present value of Mr. Jarmson's residual earning capacity assessed at $10,000 per annum to the same date of July 31, 2017 is, according to Mr. Carson's evidence, 10 x 5,213 = $52,213.

**107**  The difference in present value between his lost income stream and his imputed residual income stream is therefore $398,281.

**108**  As counsel acknowledged, the law states that this is an assessment, not a mathematical exercise. The case law states that while a comparison of pre and post MVA income streams is useful, it is not the entire exercise, and the overall fairness and reasonableness of the award must be considered.

**109**  There are usually contingencies, both negative and positive, that could be factored into the assessment of lost earning capacity. The actuarial evidence employed in this discussion has taken into account statistical survival probabilities. My findings have already incorporated a consideration of certain contingencies. Neither party suggested any other specific adjustment for contingencies to supplement the income stream analysis undertaken. I conclude that the negative and positive contingencies are evenly balanced.

**110**  Rounding the above differential to the nearest $5,000, I award Mr. Jarmson $400,000 USD for loss of future earning capacity. In my view that is an award that is fair and reasonable for both parties.

**111**  A claim was put forward on behalf of Mrs. Jarmson for consequential loss of future income on the basis that the forced retirement of Mr. Jarmson and repatriation of the family interrupted her income flow. That fact is self-evident, and I will later discuss this claim together with the claim for an "in trust" award.

**COSTS OF FUTURE CARE**

**112**  The parties are a great distance apart in their positions on this head of damages. The plaintiff claims $858,742, on the basis of recommendations for care and equipment and services contained in a report of Janice Landy dated July 16, 2011 and entitled Life Care Plan for Mr. Robert Jarmson.

**113**  Ms. Landy is a registered nurse with over 40 years of clinical nursing experience. She has practiced in the field of rehabilitation nursing since 1988 and maintained certification as a specialist in that field since 1990. She completed a course of studies in Life Care Planning through the University of Florida and subsequently became certified as a Life Care Planner. The introduction to her 82 page report explains a Life Care Plan as follows:

A Life Care Plan based upon published standards of practice, comprehensive assessment, data analysis and research provides an organized concise plan for current and future needs for individuals who have sustained traumatic or catastrophic injury. It is a systematic methodology for identifying and qualifying the multi-dimensional disability related requirements of an individual. The process considers the needs of the individual dictated by the nature and extent of the injury, the age of the client, the recommendations of medical and rehabilitation team interventionists, the effects of ageing and the theoretical framework formalized and outlined by the World Health Organisation ("WHO") under the International Classification of Functioning, Disability and Health (ICF). This construct has been developed to focus on the level of human functioning rather than on the level of disability alone. Functioning refers to all body functions, activities and participation while disability is an umbrella for impairments, activity limitations and participation limitations. This classification of function which provides for an assessment of needs encompass not only medical needs but also the needs of the individual to overcome barriers to participate in societal and personal activity.

**114**  This description of a Life Care Plan, and particularly the last sentence of the quoted passage, certainly provides traction for Mr. Hemmerling's submission that Ms. Landy's described approach has been rejected in the jurisprudence in British Columbia, specifically in the seminal case of *Milina v. Bartsh* [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=) (B.C.S.C.), and in the dozens of subsequent cases citing the words of McLachlin J. as she then was, contained within the following paras. in *Milina*:

198 If there was any doubt as to whether the award for cost of future care must be justified on a medical basis, it was dispelled by *MacDonald v. Alderson*, [*[1982] 3 W.W.R. 385*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DH1-JCJ5-239M-00000-00&context=), leave to appeal to the Supreme Court of Canada refused. In that case it was suggested that the plaintiff, a quadriplegic, should be awarded sufficient funds to purchase and maintain his own house on the non-medical grounds that this would give him a greater sense of " 'autonomy, privacy, financial stability and pride of ownership . . . and greater opportunities for gardening, owning a pet, and more space for hobbies'". The Manitoba Court of Appeal rejected this evidence as "subjective theorizing" and reduced the award made at trial. The test for determining the appropriate award under the heading of cost of future care, it may be inferred, is an objective one based on medical evidence.

199 These authorities establish (1) that there must be a medical justification for claims for cost of future care; and (2) that the claims must be reasonable. On the latter point, Dickson J. stated in *Andrews* at p. 586:

An award must be moderate, and fair to both parties . . . But, in a case like the present, where both courts have favoured a home environment, "reasonable" means reasonableness in what is to be provided in that home environment.

200 This then must be the basis upon which damages for costs of future care are assessed.

201 It follows that I must reject the plaintiff's submission that damages for cost of future care should take into account the cost of amenities which serve the sole function of making the plaintiff's life more bearable or enjoyable. The award for cost of care should reflect what the evidence establishes is reasonably necessary to preserve the plaintiff's health. At the same time, it must be recognized that happiness and health are often intertwined.

**115**  The defendant's closing submission listed 20 items recommended by Ms. Landy that the defendant argued were not medically supported by any evidence at trial. I agree with that submission. Many of those items would require very significant outlays, for example, a van with a lifting device to transport an anticipated power mobility device.

**116**  Mr. Hemmerling made other vigorous submissions challenging Ms. Landy's impartiality and objectivity and her reliance on facts and opinions not in evidence, and criticizing her for travelling to Dubai to interview witnesses already interviewed by counsel, knowing that Mr. Jarmson would soon be relocating. I would not go so far as to agree that Ms. Landy became an advocate specifically for the plaintiff in this case, but it is a fair comment that she seemed to advocate an expansion of the types of items and services claimable as future care costs under the law.

**117**  Ms. Landy did rely on facts, opinions and assumptions not in evidence, and in some instances her costing displayed a discomforting lack of care. An example of the latter is her costing of Dragon Naturally Speaking voice recognition software and instruction at $2,500 when that software and an instructional disc are readily available for $99, as advertized on the distributor's website.

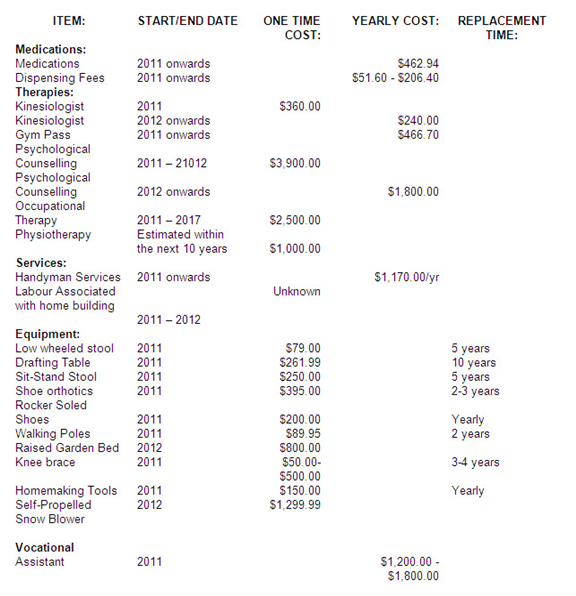
**118**  Ms. Landy acknowledged during cross-examination that she would defer to the contrary views of Dr. Travlos or other doctors in respect of some of her recommendations, such as recommending laser eye surgery to avoid the problem of dropping or damaging contact lenses due to hand tremors which Dr. Travlos cannot attribute to his injuries.

**119**  Ms. Landy's Life Care Plan is not just a Cadillac; it is a gold-plated one, which goes far beyond what is reasonable. For example, her recommendation of one-to-one rehabilitation support for 10 hours weekly, (essentially to replicate what his wife, who has been his constant workout partner, has always done) is unsupported by medical opinions other than her own, and would cost $21,600 per year. The present value of that expense alone is over $338,000. With all its shortcomings, I cannot accord Ms. Landy's recommendations very much weight in my assessment, other than to provide a checklist for comparison and thoroughness.

**120**  The defendant produced a functional capacity evaluation and cost of future care report prepared by Lydia Phillips, Occupational Therapist, dated September 27, 2011. The plaintiff was assessed by her on September 13 and 14. Ms. Phillips sets out in her report the difference between her approach and Ms. Landy's, acknowledging that the general picture of Mr. Jarmson that Ms. Landy presents is very different from her own functional assessment of Mr. Jarmson, most notably in the areas of mobility and cognition. In other words she feels that Ms. Landy overstated his level of disability. I agree.

**121**  I was very impressed with Ms. Phillips' objectivity and thoroughness. Although a defendant's expert in this case, she has frequently worked for plaintiff's counsel. She did not come across as trying to minimize Mr. Jarmson's disability, and seemed appropriately concerned that the necessary components of his future care were considered and provided. Her report provides a detailed discussion of various items and the reasons why she agrees or disagrees with the comparable recommendations of Ms. Landy. I accept her recommendations nearly in their entirety and consider them fair and generally sufficient, with the exceptions I will later mention.

**122**  Ms. Phillips sets out her recommended costs in table form at pages 21 and 22 of her report, which I reproduce here:



**123**  One item that Ms. Phillips did not recommend which I find should be awarded is anticipated transportation and lodging costs that would accompany possible future knee replacement surgery and follow up physiotherapy. My prior finding was that there is a strong possibility of this occurring sometime during Mr. Jarmson's lifetime. Taking the contingencies into account I would notionally estimate those costs at $2,000 to $3,000 and value them as if incurred in year 10.

**124**  It is noted that Ms. Phillips recommended funding to replace the labour that Mr. Jarmson would have contributed to his new home construction, but she was not able to accurately estimate the amount of work that would be involved. The court must venture an estimate, and I would estimate this component as 10 hours per week for 12 weeks at $25 per hour, which amounts to $3,000.

**125**  Another amendment that I will make to her recommendations is to change the hourly cost of psychological counselling from $150 per hour to $175 per hour, because Ms. Phillips deferred to counsel's suggestion that a new tariff was in effect. She may also have underestimated the costs of physiotherapy in regions outside of Vernon.

**126**  One further item I differ with Ms. Phillips on is the memory foam mattress. Dr. Norton's letter provides some medical support for that item and she attempted to assist Mr. Jarmson by recommending that item. There is a wide range of prices for memory foam mattresses, and the price set out in Ms. Landy's report is in the reasonable range.

**127**  Once again, this is an assessment, not a mathematical calculation. Mr. Hildeband provided mathematical calculations projecting the value of Ms. Phillips' recommendations at both the low end of estimated ranges and the high end of the estimated ranges. The results were $86,655 and $96,052 respectively. The amendment in the hourly cost of psychological counselling increases the year 1 cost by $650 and the present value of ongoing costs by $4,188, according to my calculations using the multiplier provided by Mr. Hildebrand.

**128**  Given the inexorable trend for the cost of goods and services to increase rather than decrease, I find that it is probably more realistic to use the higher end of the calculated range as the starting point.

**129**  Taking my additions to Ms. Phillips' recommendations into account. I assess the cost of future care at $110,000.

**IN-TRUST CLAIM FOR KAREN JARMSON**

**130**  In *Frer v. De Moulin*, [*2002 BCSC 408*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F900-G0T1-00000-00&context=), an award under this head was made in the amount of $100,000 for the services of the plaintiff's wife prior to trial and no award was made for future services because the claim was not pleaded and the evidence did not directly address that subject.

**131**  The plaintiff seeks a similar quantum here. The defendant suggests an appropriate award is in the range of $20,000.

**132**  Mrs. Jarmson's constant and detailed care of Mr. Jarmson over the past 3 years was remarked upon by several independent witnesses, corroborating the evidence of the Jarmson's. She cared for him like a nurse or caregiver on a full-time basis from his discharge from hospital in August 2008 until January 2009. Since then she has spent time every day keeping him organized and supervising his rehabilitation. I am satisfied that she has spent countless hours providing necessary assistance that he would not have required but for the accident and which are over and above what would be expected of a family member absent the injuries. Her work will not end with the trial, but will continue for the rest of their joint life together. I rejected Ms. Landy's recommendation of a one-to-one rehabilitation support person who would have replicated Ms. Jarmson's assumed duties in that connection, noting that the present value of that cost would be over $338,000. Notwithstanding my rejection of that recommendation, it is clear that Mrs. Jarmson's services in that regard are necessary and valuable.

**133**  I would award $110,000 for this claim combined with the claim advanced for Mrs. Jarmson's interrupted outside earnings.

**THE CLAIM FOR LOSS OF HOMEMAKING CAPACITY**

**134**  In my view there should not be an award under this head of damages in this case for two reasons. Firstly, I am unable to identify what household chores or functions Mr. Jarmson previously performed (or would have performed in the absence of their live-in housekeeper) that he is now unable to perform, and that have not already been compensated by including handyman services in the cost of future care, as recommended by Ms. Phillips. Secondly, to the extent that a claim under this head of damages is intended to compensate non-pecuniary aspects of the loss of capacity to do some homemaking services, I see it as seeking double recovery. The general damage award is intended to cover all losses of enjoyment of life that are the result of the injury.

**SPECIAL DAMAGES**

**135**  There was agreement on $136,811.22 of special damages at the outset of the trial, of which, according to submissions, $128,555.66 is in US dollars. The defendant conceded that a further $1,872.59 for a computer has been made out. Remaining in issue are $212.74 for hiking boots, $4,100 for rental housing in Nelson from August 1, 2011 to November 30, and $2,082.20 for the estimated costs of replacing Mr. Jarmson's Harley Davidson clothing and accessories.

**136**  The claim for the hiking boots has not been made out.

**137**  I will allow the housing claim, which is consistent with my treatment of B.C. rental costs as part of the future losses. I see no merit in the defendant's suggestion that this is unfair to the defendant because the Jarmson's could live in their condo in Victoria. Absent the accident, they would have returned to Dubai in August. The Victoria condo is their property, but it is their daughter's home. They were forced by the accident to advance their plans to build a home in the Kootenays, and that is their chosen locale. It is unreasonable to expect them to bear the costs of travelling back and forth from Victoria to supervise the construction of their house.

**138**  There would presumably be no issue about the payment for the loss of the Harley Davidson clothing and accessories if they had been replaced. The claimed costs are based on Mr. Jarmson's internet research. I can understand that Mr. Jarmson may not have wanted to incur that expense far in advance of having a motorcycle to ride, or even finally deciding that he is ready to ride again. If he did not intend to ride again, his loss would not be equivalent to the new replacement cost of these destroyed items, but his evidence is that he intends to ride again. I will allow the claim for the Harley Davidson gear.

**139**  The special damages award is therefore $128,555.66 USD plus $16,310.35 CAD.

**SUMMARY OF AWARDS**

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-Pecuniary Damages | $230,000.00 CAD |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Past Wage Loss | 85,000.00 USD |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Loss of Future Earning Capacity | 400,000.00 USD |  |
|  | Future Care Costs | 110,000.00 CAD |  |
|  | Special Costs | 128,555.66 USD |  |

16,310.35 CAD

|  |  |  |  |
| --- | --- | --- | --- |
|  | In-Trust Claim for Mrs. Jarmson | 110,000.00 CAD |  |

**140**  Counsel may request a hearing, if necessary, to deal with the deferred matters of income tax gross-up, management fees, and costs.

I.C. MEIKLEM J.

**End of Document**

[***Jones v. Arjun, [2013] B.C.J. No. 1617***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JCRC-B22Y-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

S.K. Ballance J.

Heard: July 3-6 and 9-11, 2012; written submissions, May 24,

2013.

Judgment: July 24, 2013.

Docket: M102282

Registry: Vancouver

**[2013] B.C.J. No. 1617** | 2013 BCSC 1313

Between Thomas Jones a.k.a. Thomas Jones Jr., Plaintiff, and Yankaia Arjun and Yellow Cab Company Ltd., Defendants

(236 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Neck — Whiplash — Soft tissue — Head injuries — Headaches — Fibromyalgia or chronic pain — Psychological injuries — Depression — Considerations impacting on award — Pre-existing injury — Mitigation — Credibility — Action for damages for injuries sustained in 2008 motor vehicle accident allowed in part — 59-year-old realtor sustained soft tissue injuries to neck and low back, right side, upper back, nausea and headaches — Accident led to chronic pain that weakened plaintiff's ability to deal with stresses and depression — Accident significantly aggravated pre-accident low back pain and injuries from 2011 accident were indivisible — Plaintiff awarded $65,000 non-pecuniary loss — Plaintiff's work ethic before 2006 was spotty and real estate industry volatile, so $70,000 past and $110,000 future loss — Plaintiff awarded $19,820 special damages and $3,600 future care.**

**Damages — Types of damages — General damages — For personal injuries — Considerations — Aggravation of pre-existing injury — Cost of future care — Loss of earning capacity — Special damages — Past loss of income — Employment income — Expenses and expenditures — Therapy or rehabilitation — Non-pecuniary loss — Pain and suffering — Action for damages for injuries sustained in 2008 motor vehicle accident allowed in part — 59-year-old realtor sustained soft tissue injuries to neck and low back, right side, upper back, nausea and headaches — Accident led to chronic pain that weakened plaintiff's ability to deal with stresses and depression — Accident significantly aggravated pre-accident low back pain and injuries from 2011 accident were indivisible — Plaintiff awarded $65,000 non-pecuniary loss — Plaintiff's work ethic before 2006 was spotty and real estate industry volatile, so $70,000 past and $110,000 future loss — Plaintiff awarded $19,820 special damages and $3,600 future care.**

|  |
| --- |
| Action for damages for injuries sustained in the 2008 motor vehicle accident. The 59-year-old plaintiff had two Master's degrees and had overcome drug and alcohol addictions. The plaintiff assigned himself into bankruptcy in 2005 following a failed investment plan and gambling problems. The plaintiff began to work as a realtor in 2006 and joined the Toastmasters club to further his business opportunities. The plaintiff won awards and became a member of the executive board. The plaintiff had pre-existing problems with anxiety, depression and low back pain prior to the accident but maintained his health was okay at the time of the accident. The plaintiff testified he felt extreme right side, neck and back pain when the collision occurred. The plaintiff was involved in a subsequent 2011 motor vehicle accident. The only evidence available about it was the plaintiff's uncontradicted testimony he was rear-ended and it aggravated the 2008 injuries. The plaintiff was referred to a mood clinic for depression and testified he was consumed by pain after the 2008 accident. The plaintiff's friends testified he became reclusive and talked about pain all the time. The defendant attacked the plaintiff's credibility and argued his 2008 injuries resolved, he already had chronic back pain at the time of the accident, the depression was due to personal stresses and he failed to mitigate. The plaintiff sought $80,000 to $125,000 non-pecuniary loss, past and future loss of income, $20,820 special damages and $7,500 cost of future care.  HELD: Action allowed in part.  The plaintiff's refusal to reveal even basic information about personal loans and lack of disclosure about tax returns did raise concerns about his credibility, but his evidence about his injuries was corroborated by medical evidence and that of lay witnesses. The plaintiff's low back injury was the most enduring and limiting of his injuries. The plaintiff's complaints about pre-accident low back pain were infrequent. After the 2008 accident, the nature, severity and frequency of symptoms got much worse, so the condition was significantly aggravated. The plaintiff also sustained soft tissue injuries to his neck, upper back, right side, and had headaches and nausea. The accident led to chronic pain, which weakened the plaintiff's ability to cope with other stressors, which aggravated the plaintiff's insomnia and led to depression. The medical evidence established the plaintiff had not recovered from his injuries at the time of the 2011 accident, leaving him more vulnerable at the time of the collision, which significantly aggravated his problems. The 2011 accident did not cause separate and divisible injuries. The plaintiff went from being gregarious and upbeat to being irritable and consumed by pain. The injuries affected the plaintiff's ability to walk, attend meetings and do volunteer work. The injuries negatively affected the plaintiff's enjoyment of life. The symptoms had improved and were not expected to be permanent, but the prognosis was guarded. The plaintiff was awarded $65,000 non-pecuniary damages. The plaintiff's injuries affected his mood and made him less able to pursue leads and develop clients. But for the accidents, the plaintiff would have continued in real estate and expanded his book to draw more commission than he was now. The earnings approach was most useful to determine past loss, but precise determination of losses was difficult given the plaintiff's spotty work ethic prior to 2006, the volatility of the real estate market and fact that the plaintiff had only been in the industry briefly. The plaintiff was awarded $70,000 loss of earnings until the date of trial. The capital asset approach was used to determine future loss, taking into account the fact the plaintiff's capacity would improve and eventually resolve. He was awarded $110,000 for future loss of earning capacity. A small deduction was made to account for chiropractic treatments the plaintiff would have had anyway, so he was awarded $19,820 special damages. Electromagnetic and massage therapy recommended were likely to be utilized and helpful, so the plaintiff was awarded $3,600 for future care, but the other expenses claimed were unsubstantiated. While the plaintiff had not begun an active exercise class, it was not clear this would have helped, and he was enrolled in a pain clinic. There was no failure to mitigate. |

**Statutes, Regulations and Rules Cited:**

***Negligence*** Act, *RSBC 1996, CHAPTER 333*,

**Counsel**

Counsel for the Plaintiff: K.R. Taylor and J.M. Sarophim.

Counsel for Defendants: W. Chalcraft and A. Mihailovic.

**Reasons for Judgment**

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| **S.K. BALLANCE J.** |

**INTRODUCTION**

**1**  This proceeding arises from a motor vehicle accident that occurred on August 9, 2008 (the "2008 Accident"). Liability for the 2008 Accident has been admitted.

**2**  The plaintiff, Thomas Jones, was involved in a subsequent collision nearly three years later on June 23, 2011 (the "2011 Accident"). At the time of the trial, no action had been commenced with respect to the 2011 Accident.

**3**  Mr. Jones claims that the 2008 Accident caused him physical and psychological injuries, which were further aggravated by the 2011 Accident, and have led to chronic pain. He seeks damages under the usual heads relative to both collisions from the defendants to this action.

**BACKGROUND**

**4**  Mr. Jones is currently 59 years old. He is an educated man, having obtained a Master's Degree in Public Administration in 1996 from the Governors State University in Illinois and a Master's Degree in Organizational Management from the University of Phoenix in 2000.

**5**  Mr. Jones has overcome significant personal challenges throughout his life. He is a recovering alcoholic and drug addict and, since approximately 1982, has been a devoted adherent to Narcotics Anonymous ("NA"). He also testified to having a gambling addiction.

1. ***Career prior to 2006***

**6**  In 1992, Mr. Jones moved with his family from Chicago to British Columbia to work for Envirotest Canada, the independent contractor hired to operate the provincial AirCare program. Within a year or so of his arrival, he was promoted to the position of general manager. While on a work assignment overseas, Mr. Jones became ill with a bout of severe asthma, an affliction he has suffered from his entire life, and returned home. After spending several months of recuperation, he decided not to resume his work at Envirotest and left its employ.

**7**  Soon after his departure from Envirotest, Mr. Jones exercised his employee stock options from which he derived significant proceeds, totaling approximately $523,000. He testified that he had devised a "master plan" to use those funds as a base from which to build a larger investment portfolio through day trading. He explained that within just a few months, his trading spiraled out of control and he was essentially gambling the money away. Mr. Jones claimed that he lost substantially all of his stock option money within a relatively short period of time. To compound his deteriorating financial situation, he failed to pay his personal income taxes attributable to the redemption of his stock options. Over time, his tax indebtedness swelled to about $500,000.

**8**  The evidence was not well-developed as to Mr. Jones's work and sources of income over the next two or so years after his unsuccessful foray into day trading. There was evidence that in about 2002, he tried his hand at developing business plans for others, but that endeavour "never took off" and it generated only about $3,000 to $4,000 annually. As I understand his evidence, he also did contract work for various companies, but was not able to reliably recall what his earnings were in those years.

**9**  Due to his crushing income tax indebtedness, Mr. Jones assigned himself into bankruptcy on May 3, 2005. According to the bankruptcy documents in evidence, his proven unsecured debts at that time were reported to exceed $800,000 and he had virtually no corresponding assets.

1. ***Career change***

**10**  At this point in his life, in his early 50s and with no retirement savings, Mr. Jones realized he was going to have to find a new career path if he was ever to recover financially. He believed that real estate would present him with financial rewards and opportunities and decided to pursue that goal.

**11**  In early 2006, Mr. Jones started work as a realtor with Royal LePage at the City Centre office. The evidence establishes that he was a motivated and hard-working agent. He was in the office on a regular basis and spent portions of his weekdays and weekends were spent with buyers and sellers, showing and viewing properties. Mr. Jones happily devoted between 60 and 70 hours each week to learning the business and generating a client base, and he "loved" every minute of it.

**12**  Christopher Simmons is a co-owner of the Royal LePage agency where Mr. Jones works as well as two other real estate brokerage firms. He has vast experience in the local real estate industry.

**13**  Mr. Simmons described the essential tasks of an agent as "finding buyers and listing sellers". Noting that the majority of real estate business is done by word of mouth referrals, Mr. Simmons explained that the foundation to a successful career is the ability to convert meetings with people interested in buying or selling property, into concrete business opportunities.

1. ***Toastmasters and other activities***

**14**  Mr. Jones understood the need to market himself to build clientele to succeed as an agent. With that objective in mind, in 2006 he joined the Tillicum Toastmasters club in New Westminster. Mr. Simmons has high regard for Toastmasters and the sphere of influence it offers to realtors.

**15**  Toastmasters was a good fit for Mr. Jones. His involvement with the organization helped him fine tune his leadership and networking skills. In his first year, he was distinguished as "Rookie of the Year" and, before the 2008 Accident, he was awarded the honour of "Toastmaster of the Year" for 2007-2008. He quickly assumed a role on the executive board.

**16**  As mentioned, Mr. Jones is a long-standing member of NA. Before the 2008 Accident, he ordinarily attended two or three meetings each week. His favourite was the "breakfast on the step" gathering early Saturday mornings. He had been en route to that meeting when he was involved in the 2008 Accident.

**17**  Every four to six weeks, Mr. Jones volunteered at various detox and pretrial confinement facilities in order to discuss the principles of NA with drug addicts. Many times he acted in the role of sponsor for other NA members. In 2003, he became a sponsor to Berold Baijius. They attended NA meetings together and their association developed into a lasting friendship.

**18**  I accept Mr. Jones's evidence that before the 2008 Accident, he walked "all the time". He walked mostly for recreation, either with friends or alone, but also took clients on walking tours of properties in the downtown core.

1. ***Health before the 2008 Accident***

**19**  Mr. Jones disclosed that he had a pre-existing history of complaints of anxiety, depression, panic attacks, insomnia, fatigue, stress and low back pain, as summarized below. He maintained, however, that his health was generally "okay" before the 2008 Accident.

***(i)*** ***Low back complaints***

**20**  It is not disputed that Mr. Jones experienced low back pain from time to time before the 2008 Accident.

**21**  In April 2001, he began seeing Dr. Victor Sam for chiropractic treatment mainly for those symptoms. He explained that his low back pain would flare up intermittently, but did not impact his ability to work and typically resolved after a few adjustments by Dr. Sam. According to Mr. Jones, he did not have a "major issue" with his low back before the 2008 Accident.

**22**  Dr. Sam does not believe in performing "maintenance" treatments, which he defined as seeing patients on a regular basis to maintain their spinal health. His approach is to treat his patients until the examination findings are normal and they confirm they feel better. Dr. Sam's evidence, which I found credible, supported Mr. Jones's testimony. He classified Mr. Jones's low back pain as "treatable" before the 2008 Accident, testifying that it would ordinarily subside after just a few sessions, and there would be considerable gaps of time between appointments. Long intervals, sometimes well over a year, passed between Mr. Jones's chiropractic sessions.

**23**  More specifically, Dr. Sam's records show that Mr. Jones received chiropractic treatment intermittently as follows:

1. six times in 2001, ending on July 31;
2. no treatment from August 1, 2001 until May 2003;
3. three treatments in May 2003;
4. no treatment from May 21, 2003 until October 2004;
5. three treatments, in October 2004;
6. no treatments from October 13, 2004 until March 21, 2006;
7. eight treatments in 2006 between March and December;
8. two treatments in May-June 2007;
9. nine treatments between September and November 1, 2007;
10. no treatments from November 5, 2007 until after the 2008 Accident.

**24**  As will be seen, that pattern changed dramatically after the 2008 Accident.

**25**  Dr. Andrew Birch became Mr. Jones's family physician in January 2005 and saw him regularly throughout that year and several times during 2006. On none of those visits did Dr. Birch document complaints of back pain or soft tissue/musculoskeletal pain of any kind. According to Dr. Birch's records, Mr. Jones's first complaint of low back pain was on July 12, 2007. Following that initial complaint, he consulted Dr. Birch about his back twice more that year. At that time, Dr. Birch assessed low back strain/sprain.

**26**  Mr. Jones had two medical appointments in 2008 before the 2008 Accident where he reported low back pain, at which time Dr. Birch charted his low back problems/pain as "chronic". At trial, Dr. Birch explained that his notation of "chronic" in respect of the May 2, 2008 appointment meant that Mr. Jones had not experienced the pain for just a few days, but had felt it for a longer period and with fluctuating intensity on an intermittent basis. At that visit, Dr. Birch suggested to Mr. Jones that he obtain a booklet called "The Back Doctor" and follow the exercises it recommended. He also referred Mr. Jones for an x-ray of his lumbar spine, which showed the presence of some spasm in the low back.

***(ii)*** ***Depression, anxiety and difficulty with sleep***

**27**  More persistent than his low back pain before the 2008 Accident were Mr. Jones's symptoms of depression, anxiety and insomnia. He first reported them to Dr. Birch when he was in the throes of declaring bankruptcy in 2005, which was obviously an overwhelmingly stressful time for Mr. Jones. He disclosed to Dr. Birch that he was having suicidal ideation. Of the seven further appointments in 2005, Dr. Birch charted feelings of depression and/or anxiety at four of them.

**28**  On January 7, 2006, Mr. Jones told Dr. Birch that he had been having panic attacks. Based on Dr. Birch's records, Mr. Jones next complained to him of depression some seven months later on August 8, at which stage Dr. Birch prescribed the antidepressant Effexor. Mr. Jones had approximately nine further visits with Dr. Birch between August 9, 2006 and the 2008 Accident. During the majority of them, he continued to report symptoms of anxiety, depression and sometimes stress and insomnia.

**29**  Mr. Jones acknowledged that he had been battling issues of depression and anxiety before the 2008 Accident and offered, as at least a partial explanation, the fact that he was having marital difficulties and significant financial problems within that timeline. His testimony finds support in Dr. Birch's corresponding records which contain notations of his bankruptcy and financial concerns and "personal problems, relationship problems" during the appointments in which Mr. Jones was complaining of such symptoms.

**30**  Mr. Jones maintained that, despite experiencing these symptoms before the 2008 Accident, he remained an upbeat and positive person in general.

**31**  In about February 2008, Dr. Birch referred Mr. Jones to the sleep disorders program at UBC Hospital to address his sleep apnea.

1. ***The 2008 Accident***

**32**  The essential facts surrounding the occurrence of the 2008 Accident are not in dispute.

**33**  On the morning of August 9, 2008, Mr. Jones was driving to his NA breakfast meeting in downtown Vancouver. He was wearing his seatbelt. He approached the intersection on a green light and, as he proceeded through, he noticed a yellow taxicab out of the corner of his eye just a moment before it struck the passenger side of the front of his vehicle. The force of the impact threw Mr. Jones's body to the left, causing that side of his head to strike against the window.

**34**  Mr. Jones testified that upon impact, he felt a "pop" on the right side of his back and immediately afterward felt extreme pain along the right side from his waist to his hip, stiffness and an intense throbbing and shooting pain in the area between his shoulder blades, severe neck pain and pain and other symptoms throughout his entire back. He also said that he had an intense headache and felt nauseous and dazed. He recalled being helped out of his vehicle by emergency personnel and being attended to by the ambulance crew at the scene.

**35**  Mr. Jones's vehicle was not fit to be driven. His friend, Mr. Baijius, picked him up and drove him to their NA breakfast meeting. Mr. Baijius credibly recalled that Mr. Jones complained of pain when he collected him at the scene and that it was evident that he was experiencing pain in his low back. After the meeting, Mr. Baijius dropped Mr. Jones at a car rental location and carried on with his day.

**36**  Later that afternoon, Mr. Jones went to the emergency department of the hospital, where he complained of nausea, headache and neck and back pain. He was discharged and advised to follow up with his family doctor.

1. ***Post-2008 Accident Medical Evidence***

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| --- | --- | --- | --- | --- |
|  | ***(i)*** |  | ***Symptoms from the 2008 Accident to August 9, 2009*** |  |

**37**  As summarized below, after the 2008 Accident Mr. Jones was treated by Dr. Birch, as well as various other practitioners, including a massage therapist, chiropractors, an acupuncturist and a physiotherapist who performed intramuscular stimulation therapy ("IMS").

**38**  Mr. Jones saw Dr. Birch within days of the 2008 Accident. He complained of headaches and pain in his forehead, neck, upper back, mid back and low back. On examination, Dr. Birch found tenderness over the areas complained of, along with decreased range of motion in his neck and back. He diagnosed neck and back sprain and strain with spasm, and muscle tension headaches. He prescribed a muscle relaxant and advised Mr. Jones to use ice, Advil, and to rest and have chiropractic and massage treatments, as required. It is clear that Mr. Jones also sustained a bump and swelling to the left side of his head that left him feeling dazed. That injury resolved within a week or so.

**39**  In his follow-up visit approximately two weeks later, Dr. Birch charted headaches and low back strain. He also noted that Mr. Jones's mood had improved with the use of the antidepressant Effexor that he had started before the 2008 Accident, and increased his dosage from 75 to 150 mg.

**40**  Mr. Jones saw Dr. Birch regularly for the remainder of 2008 and throughout 2009. Within that timeframe, he variously complained of severe headaches, pain in his neck which he ranked as 7 on a scale of 10, and pain throughout his back, the area between his shoulder blades, and along his lower right side.

**41**  The defendants endeavoured to make much of the fact that certain of these symptoms were not documented by Dr. Birch or were only charted infrequently. As I will discuss later in my Reasons, I conclude that nothing turns on those omissions in this case. This is also a convenient place to note that, throughout his testimony, Mr. Jones quantified the intensity of his pain throughout the relevant timeline by referring to a pain scale of 1 to 10. Unfortunately, his understanding of the descriptors corresponding to each level was not adequately explored at trial. That said, he did explain that when his pain reached a level of 7 or 8, he would take an Advil or aspirin. Digesting the evidence as a whole, I have concluded that Mr. Jones's classification of pain at the 4 to 5 level corresponded to pain on the mild to moderate side; 6 to 8 referred to pain at a moderate to intense degree and above 8 referred to severe pain.

**42**  Mr. Jones testified that the pain from his headaches wrapped around his entire head, including his forehead. His evidence is that six months after the 2008 Accident, their frequency tapered off to a few times per week. He stated that within the same period the pain between his shoulder blades likewise became progressively less severe and more infrequent.

**43**  Mr. Jones described the pain along his right lower flank as being constant in the weeks following the 2008 Accident and remaining ongoing at six months, although varying in intensity between 7 and 9 on the 10-point scale. He testified that his neck pain improved somewhat after the first six months, but that his neck still "creaked" when he moved it left to right, and that turning it to the outer extremes triggered heightened pain. He also detailed the injuries caused by the 2008 Accident to his back. The pain and tightness in his upper back area dissipated significantly and bothered him only slightly after six months or so. Although his mid-back was mildly tender, it was not the source of any pain and presented no difficulties.

**44**  Mr. Jones's low back, however, was an entirely different story. He claims that it was by far the most serious of the injuries stemming from the 2008 Accident. He testified that he felt the onset of low back pain immediately after the 2008 Accident, and that it remained constant at a level of about 9 or 9.5 in the weeks that followed. He described suffering low back symptoms at that intense degree until he started acupuncture treatments in April 2009, which provided him some relief and reduced his pain to a level of approximately 7.

**45**  Also in April 2009, Mr. Jones underwent a CT scan of his lumbar spine on referral by Dr. Birch. Dr. Birch testified that the scan showed a slight disc protrusion at the L4-5 level.

**46**  From time to time Dr. Birch provided Mr. Jones with samples of pain medication and prescribed various other medications to help Mr. Jones manage. Dr. Birch testified that because of Mr. Jones's history of substance abuse, he was not keen on taking narcotic-type medication or medication that might become addictive.

**47**  Mr. Jones testified that he intermittently experienced nausea after the 2008 Accident, which settled completely within six months.

**48**  Mr. Jones had seldom slept through the night as an adult. He testified that because of the resultant pain from the 2008 Accident, the quality of his sleep deteriorated even further. He found it difficult to get into a comfortable position and sometimes needed to get up in the middle of the night in order to stretch as a means of coping with his discomfort. He testified that the adverse effect on his sleep brought on by the sequelae of the 2008 Accident caused a decline in his mood and general demeanour. He testified that he felt like an entirely different person after the 2008 Accident in that he was irritable, less tolerant of other people, and distracted by and fixated on his pain.

**49**  Because his soft tissue symptoms were not improving, Dr. Birch referred Mr. Jones for an assessment by a physiatrist, Dr. Cecil Herschler on April 9, 2009. That appointment did not take place until October 2010.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | ***(ii)*** |  | ***Symptoms from approximately August 9, 2009 until the 2011 Accident*** |  |

**50**  At the one-year mark after the 2008 Accident, Mr. Jones's headaches had decreased to a frequency of once or twice a week and had considerably diminished in intensity. Over the course of the next year, he experienced them only "the odd time", perhaps a couple of times a month.

**51**  Mr. Jones stated that from August 2009 until the 2011 Accident, he continued to have ongoing tightness and soreness to the touch remaining in the area between his shoulder blades. His neck pain had improved by the first anniversary of the 2008 Accident and manifested only a few times per week, appearing to be triggered by certain physical movements. He experienced less neck pain overall during the following year, although sudden movements of his neck could bring on severe pain from time to time.

**52**  Between August 2009 and the 2011 Accident, Mr. Jones felt discomfort in his upper back and mild tenderness in his mid-back, but did not experience any real pain in either of those regions. He testified that about a year after the 2008 Accident, the pain along his right side persisted but had lessened in severity, depending on his activities. In contrast, he claimed that his low back pain remained constant, although at a reduced intensity of between 6 and 6.5.

**53**  In the first six months of 2010, Mr. Jones saw Dr. Birch five times with complaints of low, mid and upper back pain and right hip pain. On May 26 that year, Dr. Birch completed a CL-19 medical report provided by the Insurance Corporation of British Columbia ("ICBC"), in which he recorded palpatory tenderness, pain and limitations in Mr. Jones's neck and down the rest of his spine. He classified Mr. Jones's 2008 Accident-related injuries as a grade II injury to his neck and upper back, and a grade III injury to his low back, and diagnosed muscle tension headaches and neck and back sprain. On the form Dr. Birch noted that Mr. Jones required further sessions of physiotherapy and massage therapy. Based on his discussions with Mr. Jones about his work duties, he also wrote that Mr. Jones was not able to walk or stand for prolonged periods which thereby reduced his ability to work by about 50%. Dr. Birch further recorded that Mr. Jones was able to carry out non-work activities with pain as tolerated.

**54**  In cross-examination, defence counsel attempted to challenge Dr. Birch's diagnosis of neck injury by putting to him that he had it not documented any complaint of neck pain from September 2008 until the 2011 Accident, other than in the CL-19 report itself. Dr. Birch explained that he does not have time during each visit to record all of a patient's complaints. He added that in order to answer the question, he would have to review his records; however, counsel did not invite him to do so. The clear implication of Dr. Birch's evidence was that Mr. Jones could have complained about neck pain and other symptoms and he simply may not have charted it.

**55**  Moreover, the factual proposition put to Dr. Birch to the effect that there had been no reported complaints of neck pain within this timeframe was not entirely correct. The records show that Dr. Birch referred Mr. Jones to physiotherapy on April 12, 2010, for neck and back sprain. As well, his chart documented a complaint of neck pain on May 11, 2010. To this I would add, the fact that on that May visit Dr. Birch recorded tenderness of Mr. Jones's back but did not record tenderness of his neck, does not mean that Mr. Jones's complaint of neck pain was not genuine, as the defendants appeared to suggest.

**56**  The evidence establishes that Mr. Jones also continued to experience problems with his sleep and symptoms of fatigue during this period of time. In cross-examination, Dr. Birch rejected the proposition that Mr. Jones's complaints of fatigue were due to his sleep apnea, explaining that connection had been ruled out. He went on to agree that the fatigue could be related to Mr. Jones's depression or pain or both.

**57**  On October 27, 2010 Mr. Jones was seen by Dr. Herschler. Dr. Herschler testified at trial in the capacity of a consulting physiatrist. He was not called as an expert witness and provided no opinion evidence as to causation.

**58**  At the consult, Dr. Herschler had none of Mr. Jones's pre-2008 Accident records or his documented medical history. The focus of Mr. Jones's complaints to Dr. Herschler were his low back pain and the pain that ran along his lower right side that had been ongoing since the 2008 Accident. Dr. Herschler's understanding was that at the time of the 2008 Accident, Mr. Jones was "pain-free" and not complaining of back pain. At trial, Dr. Herschler elaborated that Mr. Jones told him that he had no low back pain on the day of or before the 2008 Accident. Because he was unaware of any past episodes of low back pain, he assumed that Mr. Jones had experienced none for the purposes of his assessment.

**59**  Mr. Jones did not mention to Dr. Herschler symptoms of any lingering neck pain or pain in his shoulder region or upper back, or headaches. He testified that although he continued to experience such symptoms including specifically, neck problems and light headaches, when he was seen by Dr. Herschler, his paramount concern was his low back because it was the chief source of his pain and he therefore did not raise with Dr. Herschler his less bothersome symptoms. His explanation is plausible.

**60**  On examination, Dr. Herschler found that movements of Mr. Jones's lumbar spine were affected by pain and that he was limited in flexion, extension, rotation and tilting to the right. Palpitation of the lumbar spine and adjacent right paraspinals and right buttock triggered pain. Movements of Mr. Jones's head, neck and shoulders were normal.

**61**  Based on Dr. Herschler's physical findings on examination and what he understood to be Mr. Jones's relevant history, which was incomplete, Dr. Herschler diagnosed soft tissue injuries to Mr. Jones's right low back, as well as evidence of a disc injury at the L4-5 of the lumbar spine, which he considered was also a probable source of pain.

**62**  In his report to Dr. Birch, Dr. Herschler recommended that Mr. Jones receive nine, one-hour treatments of pulsed electromagnetic field therapy. At $2,000, the treatments were expensive and, according to Mr. Jones, because ICBC refused to cover the sessions, he did not proceed with that therapy.

**63**  Mr. Jones continued to complain to Dr. Birch of low back pain and depression between January and June 2011. Dr. Birch advised him to resume his IMS treatment as it had previously provided him with considerable symptomatic relief. Dr. Birch assessed chronic pain and depression and gave Mr. Jones samples of another antidepressant medication known to help with chronic pain symptoms. On April 12, 2011, he referred Mr. Jones to a chronic pain clinic.

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|  | ***(iii)*** |  | ***Manual Therapies before the 2011 Accident*** |  |

**64**  Within weeks of the 2008 Accident, Mr. Jones began massage therapy and treatments from a new chiropractor, Dr. Truong. In 2008, he had a total of 64 such sessions. The number of his combined treatments tallied 104 in 2009 and another 95 the next year. Mr. Jones also returned to Dr. Sam for some of his chiropractic care and received treatment from him in conjunction with Dr. Truong from time to time between January 2010 and March 2011. He also continued to receive regular massage therapy throughout 2011 before the 2011 Accident. As mentioned earlier, he also had acupuncture starting in the spring of 2009 and received IMS therapy at least 28 times between the spring of 2010 and April 2011. According to Mr. Jones, the above sessions variously treated his neck, right side and low back, and provided him with varying degrees of symptomatic relief.

**65**  Of Mr. Jones's therapists, only Dr. Sam testified. His treatments had concentrated mainly on the low back and, to a lesser extent, the right side/hip area and left foot. During three appointments between February 21 and March 25, 2011, Dr. Sam documented complaints of neck pain as well.

**66**  Dr. Sam testified that, will unlike Mr. Jones's back symptoms before the 2008 Accident, he was not able to successfully treat those symptoms after the 2008 Accident, and last saw Mr. Jones on March 25, 2011.

**67**  The medical charts of the other therapists were not in evidence.

1. ***The 2011 Accident***

**68**  There was little evidence about the circumstances surrounding the 2011 Accident beyond Mr. Jones's uncontradicted testimony that the rear of his vehicle was struck by a truck.

1. ***Medical Evidence after the 2011 Accident***

**69**  Mr. Jones saw Dr. Birch the day after this 2011 Accident. He reported that his neck had snapped forward and back in the collision. Dr. Birch noted tenderness in Mr. Jones's neck and upper back area. He testified that Mr. Jones's neck and upper back injuries were typical of a rear-end collision and that the 2011 Accident affected those areas considerably more than Mr. Jones's low back.

**70**  Throughout the ensuing six months, Dr. Birch charted complaints relating to Mr. Jones's neck and upper back, as well as symptoms of depression and anxiety. He explained that the cause of Mr. Jones's depression was multifactorial and included continuing relationship difficulties, chronic pain and his reduced ability to work. In the fall of 2011, Dr. Birch referred Mr. Jones to a mood disorder clinic. I find that he made the referral because of Mr. Jones's depression, and not to address his symptoms that were later diagnosed as attention deficit hyperactivity disorder ("ADHD").

**71**  Mr. Jones continued to see Dr. Birch in 2012 in respect of his neck, upper back, mid back and low back pain. Dr. Birch continued to prescribe various medications for chronic pain and recommended that Mr. Jones resume his IMS therapy.

**72**  In terms of Mr. Jones's evidence about his injuries in the aftermath of the 2011 Accident, he testified that it caused an exacerbation of his headaches and a worsening of his upper back, low back, right side, neck, and shoulder area symptoms in varying degrees. More specifically, he testified that since the 2011 Accident, he has felt moderate pain in his temple area a couple of times a week and, at the time of trial, was still having headaches with that frequency and intensity. He also described that his low back had worsened slightly as a result of the 2011 Accident, but then had subsequently improved. Mr. Jones said that he continues to feel constant low back pain, which he ranks to be mostly between 6 to 6.5, with flares a couple of times a week that feel as high as an 8. He testified that the pain in his right side went back up to approximately 7.5 after the 2011 Accident. He currently experiences pain and even a throbbing in his right side on an almost constant basis, which he quantifies at 6 to 6.5.

**73**  Mr. Jones testified that after the 2011 Accident, the pain between his shoulder blades was "bad" for about two months. He said he felt a constant tightness in that region which, when touched, would produce a shooting electrical sensation down his back. At the time of trial, that area remained tight and painful. Mr. Jones also testified that the 2011 Accident aggravated his upper back symptoms, describing them at the time of trial as tight with moderate pain. His mid back remained tender as well.

**74**  According to Mr. Jones, his neck pain was significantly exacerbated by the 2011 Accident and he currently struggles with it on an ongoing basis. He stated that after the 2011 Accident he continued to face ongoing difficulties with his mood and demeanour.

1. ***ADHD Diagnosis - 2012***

**75**  In early 2012, Mr. Jones was diagnosed with ADHD. He confirmed that the symptoms related to this disorder include anxiety, difficulty focussing, disorganization, hyperfocus, distraction and memory problems. I accept his evidence that he has struggled with these symptoms throughout his life.

**76**  Mr. Jones agreed that his distractibility, in particular, occasionally impacted his work as a realtor to the point where, for some period of time, he relied on an assistant to remind him of his appointments and do some of the legwork. However, he functioned without that administrative support most of the time. Mr. Jones insisted that his condition did not adversely affect his job as a realtor, explaining that his tendency to hyperfocus actually assisted his performance with clients and that he did not miss appointments.

**77**  Mr. Jones's accomplishments as a realtor before the 2008 Accident lend support to his evidence on this point, and I accept it as accurate.

1. ***Post-2008 Accident non-work activities***

**78**  Mr. Jones remained a member of Toastmasters after the 2008 Accident and spent approximately ten hours per week participating in that activity. According to him, however, he modified aspects of his physical involvement in Toastmasters after the 2008 Accident. He assumed more of a leadership role in the sense that he delegated the majority of his physical responsibilities, such as setting up meeting rooms and lifting lecterns. He testified that if he was not able to delegate demanding physical tasks, he simply omitted doing them.

**79**  Mr. Jones explained that his volunteer work with Toastmasters was completely different from what was required of him as an effective real estate agent. He found Toastmasters to be the one outlet that distracted him from his pain and he described his association with it as a "powerful thing" that probably "saved my life" after the 2008 Accident. He ascended the executive board of his Toastmasters division. In 2008-2009, he became the Lieutenant-Governor of Marketing; in 2009-2010 he rose to the rank of Lieutenant-Governor of Education; and the year after that, acted as the District Governor. All were volunteer positions. He also received a leadership award and was part of a team that was recognized for distinguishing itself. At the time of trial, he held the post of Past District Governor and was no longer an active member of the executive. Since the 2008 Accident, Mr. Jones has attended a small number of Toastmasters conventions here and in the United States.

**80**  Soon after the 2008 Accident, Mr. Jones found himself forever complaining about his pain during work, at Toastmasters gatherings and at his NA meetings. He persuasively testified that he felt consumed by his pain and would constantly "whine" about it to his clients, co-workers and friends. His pain distracted him during client meetings, causing him to fidget and repeatedly modify his posture.

**81**  Mr. Jones testified that after the 2008 Accident, he curtailed on his involvement in NA. He also decreased his community service such that he was only attending one or two detox centers once every 3 to 4 months.

**82**  Mr. Jones testified that after about two years, he grew "sick and tired" of listening to his own incessant "whining" about his pain and made a conscious effort to stop and refocus. Attempting to embark on a fresh start, he left his home division of Toastmasters and joined a new club. He also joined a different NA group.

1. ***Evidence of Friends and Colleague***

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|  | ***(i)*** | ***Berold Baijius*** |  |

**83**  In a typical week before the 2008 Accident, Mr. Baijius and Mr. Jones would see one another twice and speak regularly over the telephone. Their conversations covered business matters and the core ideals of NA. Mr. Baijius described Mr. Jones as an active, positive, outgoing, ambitious man, who was full of hope and had a gregarious nature before the 2008 Accident. He regularly observed him setting up the chairs and tables for the NA meetings and stacking them away afterwards. He testified that periodically, approximately every few months Mr. Jones would complain of aches and pains. To Mr. Baijius's mind, those complaints were no greater or different than those made by any other middle-aged man.

**84**  Mr. Baijius credibly recalled that, after the 2008 Accident, Mr. Jones complained of pain almost every time they spoke. He noticed that Mr. Jones became far more introverted and even reclusive. By late 2010, he appeared to be hiding away and tended not to return Mr. Baijius's telephone calls. However, Mr. Baijius was persistent in his attempts to keep in touch with his friend and would repeatedly dial his number until Mr. Jones would finally answer. On occasion, he even went to Mr. Jones's residence in an effort to track him down. He recalled that Mr. Jones's presence at the NA home meetings became sparse about a year after the 2008 Accident. He also noticed that his friend was not able to set up tables and chairs or sit for long periods of time, and would excuse himself from meetings before they had finished. They hardly ever attend NA meetings together anymore.

**85**  Mr. Baijius recalled that when they did get together, they did not have fun and "joke around" as they had before the 2008 Accident.

**86**  Mr. Baijius was a thoroughly credible witness.

***(ii)*** ***Jacqueline Legatt***

**87**  Ms. Legatt has known Mr. Jones since 2000 or 2001. She, too, was wholly credible.

**88**  She stated that she and Mr. Jones would ordinarily chat on the telephone several times a week, and would meet up for coffee or a bite to eat once a week on average. She described him as a workaholic, energetic, engaged and stimulated by the business world. She found that Mr. Jones looked on the bright side of things and was generally upbeat. She understood from him that he felt he had made the right choice in becoming a realtor, and was excited about building his career.

**89**  Ms. Legatt testified to the dramatic decline she witnessed in Mr. Jones after the 2008 Accident. She recalled that he complained about his pain every time she saw him, and repeatedly told her that he was in pain when he walked, drove, slept and did other activities. He seemed absorbed by his physical pain.

**90**  Ms. Legatt was adamant that Mr. Jones's mood had "absolutely declined" after the 2008 Accident. He became irritable, impatient and less sympathetic to other people. He was quick to take offense from a casual comment and just as quick to make a snide remark. She also noticed that his high level of energy was easily depleted. As had Mr. Baijius, Ms. Legatt sensed that Mr. Jones was withdrawing and avoiding her.

**91**  Ms. Legatt had been aware of Mr. Jones's financial troubles that preceded his bankruptcy in 2005. She had loaned him the sum of about $2,500 in that timeframe, which he repaid. She believed it was possible that she may have loaned him additional funds after he declared bankruptcy, but the particulars of that loan were not explored in the evidence.

**92**  Ms. Legatt retained Mr. Jones as her real estate agent for a short time in November and December 2010, and found him to be impatient and inconsistent in his performance. Her perception was that he was applying pressure on her to sell and buy quickly and was more concerned about his own needs as a realtor than about hers as a client. Mr. Jones was also unresponsive, failing to return her calls in a timely way, and sometimes not at all. Ms. Legatt eventually felt that she had little choice but to sever their working relationship and would not use him as her agent again. These unfortunate circumstances took a toll on their friendship and they have drifted apart. Ms. Legatt had not seen Mr. Jones for eight or nine months before the trial.

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|  | ***(iii)*** | ***Christopher*** |  |
|  |  | ***Simmons*** |  |

**93**  Mr. Simmons described Mr. Jones before the 2008 Accident as an affable, gregarious person with a good sense of humour and effective communication and presentation skills. In addition to working in sales, Mr. Jones gave skill-based training sessions to new agents at Royal LePage on a quarterly basis. In his inaugural year in 2006, Mr. Jones's gross commissions from Royal LePage were $24,000. His first full year as a real estate agent in 2007 turned out to be a banner year for him. He was involved in many transactions and ranked as the sixth highest earning agent at Royal LePage that year. Mr. Jones also won the Royal LePage President Gold Level Award in recognition of performing in the top 10% tier of realtors. Mr. Simmons explained that it is uncommon for a junior agent like Mr. Jones to achieve such an accomplishment in his second year.

**94**  In Mr. Simmons's estimation, Mr. Jones was coming along nicely as an agent and was a rising star in the industry prior to the 2008 Accident.

**95**  He testified that since the 2008 Accident, Mr. Jones has been in the office on a reduced and irregular basis. He has observed an adverse change in Mr. Jones's overall mood, and noticed that he has difficulty in sitting, standing and maintaining one position for very long. He described Mr. Jones's performance as an agent after the 2008 Accident as disappointing.

**96**  Mr. Simmons was also a credible witness. I accept as accurate his evidence as well as the testimony of Mr. Baijius and Ms. Legatt.

1. ***Dr. John le Nobel***

**97**  Dr. le Nobel is a specialist in the field of physical medicine and rehabilitation. He assessed Mr. Jones on October 27, 2011, and his expert report dated November 7, 2011 was tendered by Mr. Jones as opinion evidence.

**98**  Dr. le Nobel had reviewed the records of Dr. Birch and Dr. Sam, as well as other pertinent medical documentation. He was aware that Mr. Jones experienced musculoskeletal symptoms for some years before the 2008 Accident and was being treated for depression and anxiety at the time of the 2008 Accident.

**99**  Mr. Jones told Dr. le Nobel that he believed his low back pain had been worsened by the 2008 Accident in that it had become more constant and functionally limiting. He also said that he believed that the pain associated with his neck, upper body, low back and buttock were made worse by the 2011 Accident.

**100**  In explaining his low back pain to Dr. le Nobel, Mr. Jones described it as being always present to some extent, although fluctuating in intensity. He reported that the pain was aggravated with certain postures and movements such as sitting, driving, bending, arching backward, and crossing his right ankle over his left knee. Dr. le Nobel asked Mr. Jones about Dr. Birch's chart entries in April 2008 that recorded complaints of low back pain. However, Mr. Jones was not able to articulate that aspect of his history.

**101**  Mr. Jones said that the ache and pain in his neck never fully disappeared, although it subsided somewhat when he laid flat. Tilting his head and even coughing could aggravate the pain and he felt it more intensely when he was tired. Dr. le Nobel noted that Mr. Jones reported pain in his neck when he put his hands on the top of his head and pushed downward. As well, he complained of aggravated pain at the extremes of its range of motion. Mr. Jones reported to Dr. le Nobel that his mood had deteriorated since the 2008 Accident. He described himself as becoming short-tempered and less tolerant. He also recounted a brief period of discontinuous memory after the 2008 Accident, and said that he currently encountered problems with forgetfulness.

**102**  Mr. Jones did not feel pain on palpation of his lumbar spine, nor did Dr. le Nobel detect any spasms. He did, however, report pain when his lumbar spine was extended while lying down. In cross-examination, Dr. le Nobel did not agree that the absence of pain on palpation was unusual given Mr. Jones's chronic condition, clarifying that not infrequently people with chronic pain do not complain of pain on palpation. While his thoracic range of rotation was lower than normal, he did not report pain with that movement.

**103**  Dr. le Nobel's view was that Mr. Jones's neck was the area of greatest pain after the 2011 Accident. That observation is consistent with Mr. Jones's testimony.

**104**  Based on the time elapsed since the 2008 Accident and Mr. Jones's ongoing pain over more than three years, Dr. le Nobel diagnosed Mr. Jones's pain as chronic. He defined chronic pain as pain that persists for longer than the 10 to 12 months that it is felt tissue ordinarily requires to heal.

**105**  In Dr. le Nobel's opinion:

1. Mr. Jones suffered injuries to his spine as a result of the 2008 Accident and has chronic pain;
2. the 2011 Accident aggravated Mr. Jones's spinal symptoms, with the greatest intensity in his cervical spine and paraspinal areas;
3. absent the 2008 Accident, Mr. Jones would likely have been more resilient to the effects of the 2011 Accident; and
4. absent both accidents, Mr. Jones would have potentially been better able to cope with the psychological and emotional challenges of his difficult marital relationship. In this regard, Dr. le Nobel understood that Mr. Jones separated from his wife in approximately December 2008 or early 2009, and assumed that the relationship was stressful at the time of the 2008 Accident. I am satisfied that his understanding was accurate.

**106**  Mr. Jones reported to Dr. le Nobel that he had difficulty concentrating on his work because he was distracted by his pain and depression. Dr. le Nobel testified that the onset of Mr. Jones's spinal pain from the 2008 Accident interfered with his work productivity and focus. In his opinion, absent both accidents, Mr. Jones likely would not have experienced the reduction in work productivity that he reported since the 2008 Accident, and would have been able to maintain his capacity for interacting with others at a higher level of connection than has been the case.

**107**  Defence counsel described to Dr. le Nobel the various tasks associated with the top executive positions in Toastmasters held by Mr. Jones after the 2008 Accident. Dr. le Nobel would not agree that the performance of any of those duties necessary entailed considerable interaction with others. Nor would he agree with the proposition that the fact that Mr. Jones was able to carry on in Toastmasters after the accidents meant that the injuries he sustained had no adverse effect on his real estate career. Dr. le Nobel stressed that the proposition was especially tenuous if Mr. Jones delegated the demands of his Toastmasters obligations, which Mr. Jones had credibly testified that he had done.

**108**  Dr. le Nobel also opined that Mr. Jones's present cognitive difficulties are multifactorial and contributed to by a combination of chronic pain, sleep difficulties, low mood and anxiety, as well as any direct cognitive effects that may have been sustained from the 2008 Accident. He favoured further assessment by a neuropsychologist if a more in depth, quantitative evaluation of Mr. Jones's cognitive abilities was required.

**109**  Dr. le Nobel offered a guarded prognosis for Mr. Jones. He explained that the longer a chronic pain condition and disability persist, the more likely they will continue into the future. In his opinion, barring some as yet unachieved improvement, Mr. Jones's account of unresolved pain for more than three years is an indication that he will continue to suffer and feel limited in his capabilities, most likely for the next several years and possibly longer. He also holds the view is that Mr. Jones has not been maximally medically investigated, and suggested that a further review in 12 to 18 months might be useful in providing a complete prognosis. Dr. le Nobel also recommended there be further imaging of Mr. Jones's cervical and lumbar spine and pelvis. Those investigations had not been carried out at the time of trial.

**110**  Dr. le Nobel did not specifically assess Mr. Jones's mood and agreed that he did not present with a flat affect, was not emotionally labile, and did not appear to be depressed during the assessment. Even so, he recommended that Mr. Jones be assessed by a psychiatrist, explaining that patients with chronic pain and reduced capabilities not infrequently suffer a deterioration in mood and sleep quality. He cautioned that unless those aspects of the post-injury state are addressed concurrently with attempts to reduce pain and increase tolerance to activity, the chances of achieving successful rehabilitation are reduced. It is Dr. le Nobel's view that a psychiatrist would be able to comment on the optimum treatment of Mr. Jones's anxiety and mood difficulty.

**111**  Additional recommendations for Mr. Jones made by Dr. le Nobel include a program of fitness reconditioning with strength training and stretching and low-impact cardiovascular training several days per week. To facilitate that course of rehabilitation, he suggested liberal access to an exercise facility over a period of 12 to 14 months, and that guidance from a kinesiologist several times per month could be of help.

**112**  Recognizing that Mr. Jones's pain symptoms would be subject to aggravation when performing this active rehabilitation, Dr. le Nobel also recommended that pain modulating measures, such as pharmacological and manual treatments like massage therapy, may be beneficial. He also endorsed Mr. Jones's attendance at a multidisciplinary, exercise-based pain clinic. As it turns out, Mr. Jones was scheduled to begin his sessions at such a clinic after the evidence portion of the trial had been completed.

**113**  To Dr. le Nobel's mind, the use of a portable TENS device may also be a helpful addition to Mr. Jones's regimen. Other recommendations to help minimize his low back symptoms included review of his work areas to determine if there could be ergonomic improvements made to reduce the aggravation to his back with prolonged sitting, and judicious use of a low back support, and possibly a heated seat feature in his car.

**114**  Dr. le Nobel impressed me as a well-informed and balanced expert. His opinions were not assailed in cross-examination in any meaningful way, and the defendants provided no expert evidence to contradict them. That is so even though they arranged for Mr. Jones to be assessed by Dr. Robert McGraw, an orthopedic surgeon, in September 2011.

**115**  I accept Dr. le Nobel's opinions across the board.

1. ***Mr. Jones's Credibility***

**116**  Assessing the credibility and reliability of a witness is fundamental to the judicial task, and yet is notoriously difficult. It has been acknowledged that the determination is not purely intellectual but is more an art. The factors involved can be challenging to verbalize: *R. v. R.E.M.*, [*2008 SCC 51*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1D3-00000-00&context=) at para. 49.

**117**  Mr. Jones's credibility and the reliability of his evidence are key in determining his pre-existing physical and psychological health, the nature, severity and causation of his injuries, and ultimately the quantum of his damages. The assessment is also material to the weight to be given to the medical opinions to the extent that they are fastened upon his subjective reporting, perception of his symptoms, and the recitation of his condition before, between and after the accidents.

**118**  The defendants used Mr. Jones's bankruptcy as grounds for a full-scale attack on his credibility. They assert that his incomplete disclosure of relevant financial information in that proceeding is emblematic of a larger tendency to obfuscate his true financial picture in this action. They characterize Mr. Jones as a vague and plainly inaccurate historian as it concerns the nature of his work and associated earnings in the years leading up to becoming a realtor, and in reference to his physical and emotional health before and after the collisions. The defendants were likewise critical of his professed impairment of capacity to work following the 2008 Accident, which they submit is not adequately supported by the medical evidence. They contend that Mr. Jones has not been forthcoming on these key issues, among others, and that he embellished his testimony with the goal of promoting his interests in this litigation over the truth. Below is a sampling of some of the alleged deficiencies.

**119**  Jennifer McCracken is a senior manager with Mr. Jones's trustee in bankruptcy, and is a licensed trustee in her own right tasked with the responsibility of overseeing Mr. Jones's bankruptcy file. She was a thoroughly credible witness.

**120**  Ms. McCracken explained that in 2006 the Canada Revenue Agency ("CRA") opposed Mr. Jones's application to be discharged from bankruptcy due to his failure to provide straightforward financial reports and income verification documentation. At that time, his discharge application was adjourned generally. Mr. Jones's lack of disclosure was complicated by the fact that for a number of years before his assignment into bankruptcy, he had evidently not operated a personal bank account, although his testimony on the matter struck me as somewhat confused or possibly inconsistent.

**121**  Mr. Jones re-applied for discharge in late 2010. On January 5, 2011, he attended a discharge hearing that was adjourned over to May 4, 2011 to enable him to answer questions posed by CRA, which continued to oppose his discharge, and to supply additional information to both it and his trustee. At the time of trial, the requested documents had not been furnished by Mr. Jones and he remained undischarged. Mr. Jones's perception is that his trustee in bankruptcy concurs with the CRA in opposing his discharge and thus no longer represents his interests. He questioned why he would give documents to his trustee in such circumstances, and yet in the next breath promised that he would "take care of it really, really soon".

**122**  In support of his discharge application, Mr. Jones had sworn an affidavit to which he exhibited statements of his monthly income and expenses spanning a period of five years, ending November 2010 (the "Monthly Statements"). He was cross-examined extensively about them.

**123**  Emphasizing that the Monthly Statements reveal that his personal expenses in 2008 and 2010 significantly exceeded his reported net business income for tax purposes, the defendants sought to ground the inference that Mr. Jones may well have enjoyed undeclared, and potentially substantial, income in those years. They advanced this point as an illustration of Mr. Jones's fundamentally tainted credibility and to suggest, inferentially, that he has been more capable of earning income after the accidents than he cares to disclose, and has probably been doing just that.

**124**  The defendants' comparison of his 2008 and 2010 net income for tax purposes against the expenses shown in his Monthly Statements overlooks the important fact that in those years, Mr. Jones claims he had to borrow funds to meet or at least assist in off-setting his personal expenses, as discussed below. As well, the calculation of his net business income under the income tax regime is not necessarily equivalent to the amount of available income to cover his living expenses. In any case, the comparison was unhelpful.

**125**  In January 2007, the Monthly Statements began to report that Mr. Jones's household consisted of just one person. The defendants say that this indicates that his marriage had broken down before the 2008 Accident, contrary to his assertions otherwise, and that his three children had also left the residence. Mr. Jones maintained that he and his wife did not separate until December 2008. According to him, he simply made an error when he recorded only a single member of his household in 2007 and 2008. Support of Mr. Jones's explanation can be found in the fact that his claimed living expenses increased rather than decreased in 2007, which is the opposite to what would have reasonably been expected in a significantly smaller household. While they also decreased in 2008, so too did his income and overall they were not appreciably less than the amounts recorded on his pre-2007 Monthly Statements that had reported five members of the household.

**126**  It is also notable that the reported decrease in the size of his household from five members to one coincided with a point in time that Mr. Jones appeared to have assumed preparation of the Monthly Statements that had formerly been completed by his trustee.

**127**  In the end, this line of questioning went nowhere. The probabilities of the evidence satisfy me that Mr. Jones made an inadvertent error reporting there was only one person in his household in his Monthly Statements. I am also satisfied that he and his wife did not separate before December 2008.

**128**  As mentioned, according to Mr. Jones, a substantial portion of his living expenses for 2008 were covered by a private loan of $21,600 that he received from a friend. He testified that in 2010 his expenses were similarly defrayed, although to a lesser extent, by way of a smaller loan received from a different friend or family member. He recorded these loans in the line item for gifts in his Monthly Statements. Mr. Jones claims to have paperwork documenting these loans, which he has yet to repay, but he did not produce it. At trial, he stated that he had assured the individuals who had made the loans that he would keep their identities confidential and, on that basis, refused to tell the Court who they were.

**129**  I am not bothered by the fact that Mr. Jones recorded what he claims are loans in the line item for gifts in his Monthly Statements. That is because that is precisely how Ms. Legatt's advance to him was characterized in the Monthly Statements for 2005 and I am satisfied that hers was a genuine loan.

**130**  Mr. Jones testified that for a number of years before the 2008 Accident, and continuing afterward, he received a modest amount of cash - somewhere between approximately $2,000 and $4,000 annually, and averaging about $2,500 - in payment for business plans he prepared for others. He did not declare that income in his personal tax return nor disclose it to his trustee in bankruptcy. Mr. Jones had little choice but to admit that, given this non-disclosure, he had signed his income tax returns those years knowing that the declaration he was making concerning his income was not entirely true. He agreed that those tax returns were only "fairly accurate" as they pertained to his income.

**131**  Starting in 2006, Mr. Jones also received a small stipend (approximately $780 per year) from Royal LePage for the training seminars he gave to new agents. He testified that he believed that those monies were included in his tax slips issued annually by Royal LePage. Ms. Wiu, an accountant with Royal LePage, clarified that was not the case, and that it was Mr. Jones's responsibility to declare the income he derived from those presentations.

**132**  The defendants argue that the implausible explanation offered by Mr. Jones to justify his non-disclosure of even basic particulars of the loans, his non-compliance with court-ordered disclosure, the repeated failure to make full financial disclosure in his bankruptcy and the inaccurate completion of his income tax returns, not only taints his credibility overall, it also casts confusion about the actual amount of his income and his capacity to work post-accidents.

**133**  Linked to their criticisms of Mr. Jones's credibility, is the defendants' further complaint that the symptoms he described to his healthcare providers over the years, including Dr. le Nobel, and those that have been recorded in the clinical records are mostly based on his subjective self-reporting and do not amount to "objective evidence of persistent pain". Compounding the problem for Mr. Jones in the eyes of the defence is that his accounts of the nature and duration of his symptoms were often not reflected in the corresponding medical records.

**134**  The defence urges that Mr. Jones's overall compromised credibility, coupled with the lack of objective evidence to support his assertions of persistent pain, calls for the Court to assess his evidence, and particularly the reporting of his subjective symptoms to his medical treatment providers and this Court, with scepticism and to discount it unless reliably corroborated.

**135**  In *Edmondson v. Payer*, [*2011 BCSC 118*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G2XC-00000-00&context=) (S.C.), aff'd [*2012 BCCA 114*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-626V-00000-00&context=), at paras. 34-37 N. Smith J. provided instructive commentary on the evidentiary use of clinical records including the relevance of the patient's documented statements and of their absence:

The difficulty with statements in clinical records is that, because they are only a brief summary or paraphrase, there is no record of anything else that may have been said and which might in some way explain, expand upon or qualify a particular doctor's note. The plaintiff will usually have no specific recollection of what was said and, when shown the record on cross-examination, can rarely do more than agree that he or she must have said what the doctor wrote.

Further difficulties arise when a number of clinical records made over a lengthy period are being considered. Inconsistencies are almost inevitable because few people, when asked to describe their condition on numerous occasions, will use exactly the same words or emphasis each time. As Parrett J. said in *Burke-Pietramala v. Samad*, [*2004 BCSC 470*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F30T-B283-00000-00&context=), at paragraph 104:

...the reports are those of a layperson going through a traumatic and difficult time and one for which she is seeing little, if any, hope for improvement. Secondly, the histories are those recorded by different doctors who may well have had different perspectives and different perceptions of what is important. ... I find little surprising in the variations of the plaintiff's history in this case, particularly given the human tendency to reconsider, review and summarize history in light of new information.

While the content of a clinical record may be evidence for some purposes, the absence of a record is not, in itself, evidence of anything. For example, the absence of reference to a symptom in a doctor's notes of a particular visit cannot be the sole basis for any inference about the existence or non-existence of that symptom. At most, it indicates only that it was not the focus of discussion on that occasion.

The same applies to a complete absence of a clinical record. Except in severe or catastrophic cases, the injury at issue is not the only thing of consequence in the plaintiff's life. There certainly may be cases where a plaintiff's description of his or her symptoms is clearly inconsistent with a failure to seek medical attention, permitting the court to draw adverse conclusions about the plaintiff's credibility. But a plaintiff whose condition neither deteriorates nor improves is not obliged to constantly bother busy doctors with reports that nothing has changed, particularly if the plaintiff has no reason to expect the doctors will be able to offer any new or different treatment. Similarly, a plaintiff who seeks medical attention for unrelated conditions is not obliged to recount the history of the accident and resulting injury to a doctor who is not being asked to treat that injury and has no reason to be interested in it.

**136**  Remarks highlighting the need to take care in the judicial treatment of clinical records along similar lines can be found in numerous additional authorities. For example, in *Tsalamandris v. McDonald*, [*2011 BCSC 1138*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-6201-00000-00&context=), Griffin J. noted at para. 133, in relevant part:

... A treating physician is not a scribe, writing down everything the patient says verbatim in anticipation of a future legal battle where every word and every absent word will be highlighted for significance. Nor is the patient shown the notes at the time, and so she has no opportunity to correct the misunderstanding of what the patient said.

**137**  Certain shortcomings in Mr. Jones's testimony were the product of his terse and sometimes abrasive style of communication, and not an attempt to be deliberately evasive or misleading. As well, a number of the so-called deficiencies seized upon by the defendants pertained to minor or collateral matters often arising from snippets in his medical chart that were of no consequence or did not serve to impugn Mr. Jones's credibility in an appreciable way or on central issues.

**138**  However, I am not completely without concern. All things considered, Mr. Jones's credibility did not emerge unsoiled at the end of cross-examination.

**139**  First, there is Mr. Jones's feeble reason purporting to justify his steadfast refusal to reveal basic particulars of the personal loans, including copies of the substantiating documents and the names of the persons who advance the funds. His testimony about wishing to preserve confidentiality was unconvincing. Also troubling is his lack of disclosure of the working copies of his income tax returns for the years 2005 through 2010 inclusive, despite being ordered by the Court to provide them. His pattern of deficient financial disclosure across a number of circumstances is unimpressive and belies a tendency to follow a path of concealment and self-interest with respect to his personal financial matters.

**140**  Cumulatively, my concerns compel me to approach Mr. Jones's testimony with extra caution. That done, the evidence as a whole is not sufficient to establish that he has received undeclared income in an amount greater than those he has testified to, and does not advance the defendants' theory that he has a much greater capacity for work than he professes. Additionally, I am not so troubled as to conclude that Mr. Jones is a fundamentally discreditable witness or to require corroborative documentary evidence in order to accept his testimony about his medical complaints or symptoms before and after the accidents. This is partly due to the fact that the lay witnesses called by Mr. Jones persuasively supported a good deal of his testimony concerning the effects of the accidents.

1. ***Overview of the Parties' Positions***

**141**  Mr. Jones contends that his pre-existing low back symptoms were infrequent and episodic and neither they nor his depression interfered with his capacity to work or were otherwise functionally disabling before or at the time of the 2008 Accident. To the contrary, he says by that stage he felt that he was finally turning his life around with his new profession which he loved and for which he had been receiving considerable positive feedback. He asserts that the constellation of his injuries from the 2008 Accident caused him chronic pain and, in a domino-effect fashion, intensified his already poor sleep, made it more difficult to cope with his existing financial and marital stress, and deteriorated his mood and outlook on life. He alleges that practically all of the 2008 Accident-induced injuries, especially his neck, were aggravated by the 2011 Accident.

**142**  Mr. Jones claims that although he continued to work as a real estate agent after the 2008 Accident, his injuries prevented him from getting fully "back on track", resulting in adverse financial repercussions. He lost self-confidence as a realtor and no longer regarded himself as an up and coming "superstar" in the industry.

**143**  The defendants concede that Mr. Jones suffered soft tissue injuries to his neck and low back as a result of the 2008 Accident. They assert that, despite his testimony to the opposite effect, the clinical evidence clearly indicates that his neck injury resolved within weeks of the 2008 Accident and that he had recovered from his remaining injuries, other than his low back, before he was seen by Dr. Herschler on October 27, 2010. Their position is that, at the time of the 2008 Accident, Mr. Jones had chronic low back pain that had been getting worse. They contend that personal stressors unrelated to the 2008 Accident (e.g. separation from his wife, increased childcare duties, being an undischarged bankrupt) were responsible for any exacerbation of his depression and/or adverse impact upon his mood.

**144**  The defendants reject outright the contention that the injuries Mr. Jones sustained have caused him any financial loss. They argue, among other things, that the sizeable income he enjoyed in 2007 was essentially a stroke of luck, and that after the 2008 Accident he made a conscious decision to pull back from his career as a realtor in order to devote more volunteer time to his endeavours with Toastmasters. They also suggest that his bankruptcy and the garnishment of his commission earnings by CRA in respect of his tax indebtedness have acted as disincentives to continue to invest much effort in his real estate career.

**145**  The defence also submits that a loss of future work capacity requires a permanent injury which Mr. Jones has failed to demonstrate. Building on that assertion, they make the problematic submission that even if Mr. Jones had diminished energy, concentration and stamina from the accidents, those frailties would not impair his earning capacity. They say further that even if Mr. Jones has experienced discomfort in the performance of his job duties, because there is no real and substantial possibility of actual income loss, his discomfort should be compensated by non-pecuniary damages as was done in *Mayenburg v. Lu*, [*2009 BCSC 1308*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-62JG-00000-00&context=).

**146**  The defence also raises mitigation arguments.

**CAUSATION**

1. ***Basic Principles***

**147**  For Mr. Jones to recover damages, there must be a causal link between the accidents and his injuries. The law does not draw a distinction between injuries that are psychological in nature and those that are physical. The primary test used in determining causation is known as the "*but for*" test. Mr. Jones bears the burden of showing, on the balance of probabilities, that "but for" the defendants' negligent act or omission, his injury would not have occurred.

**148**  A plaintiff does not need to establish that the defendant's wrongful conduct is the sole cause of the injury. So long as the plaintiff proves a substantial connection between the injuries and the defendant's ***negligence*** beyond the "*de minimus*" range, the defendant will be fully liable for the harm suffered, even if other causal factors, which the defendant is not responsible for, were at play in producing the harm: *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=).

**149**  The causation test does not demand scientific precision and is not to be applied too rigidly: *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=). Causation is a practical question of fact that can best be answered by ordinary common sense. As Dardi J. reminded in *Midgley v. Nguyen*, [*2013 BCSC 693*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-206B-00000-00&context=), at para. 172, the legal concept of causation is different from the more rigorous standard applied in the medical field that approaches scientific certainty.

**150**  The court will exercise caution in inferring legal causation by exclusive or substantial reference to a temporal sequence of events, which may take the form of comparing the plaintiff's condition in the pre and post-2008 Accident scenarios: *Madill v. Sithivong*, [*2012 BCCA 62*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1T2-00000-00&context=) at para. 20; *White v. Stonestreet*, [*2006 BCSC 801*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1CF-00000-00&context=) at paras. 74-75. As I noted in *Erickson v. Sibble*, [*2012 BCSC 1880*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JJ1H-X31K-00000-00&context=), however, it does not follow that the judicial insistence of caution signifies judicial thinking that temporal reasoning is an illegitimate analysis or a branch of logic to be seldom invoked: see also, *Midgley*.

**151**  In light of the fact that Mr. Jones was involved in two accidents, the issue arises as to whether the injuries he sustained are divisible or indivisible as between the two collisions. That determination is a question of fact and is relevant to the question of causation as well as to damages: *Moore v. Kyba*, [*2012 BCCA 361*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S2HF-00000-00&context=) at paras. 36 and 37.

**152**  Divisible injuries are those capable of being separated and having their damages assessed independently. Indivisible injuries are those that cannot be separated out and have liability attributed to the constituent causes and their damages assessed independently: *Athey*; *Bradley v. Groves*, [*2010 BCCA 361*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JWXF-20X0-00000-00&context=) at para. 20; *Blackwater*.

**153**  At the causation stage, the determination of the plaintiff's injury or injuries as divisible or indivisible is relevant to the issue of what a defendant is liable for. In assessing damages, the characterization is relevant to the question of the amount of compensation the plaintiff is entitled to receive from a defendant: *Moore*, at paras. 37 and 41.

**154**  Where there are multiple causes of the plaintiff's injuries and they are found to be divisible, the plaintiff can only recover from a defendant the damages attributable to the injury caused by that particular defendant. In contrast, indivisible injuries, whether occasioned by a combination of non-tortious and tortious causes, or solely by tortious ones, result in joint liability to the plaintiff. Absent contributory ***negligence***, the plaintiff can claim the entire amount from any of them. As the Court of Appeal pointed out in *Bradley* at para. 34, the tortfeasors' rights to seek contribution and indemnity from each other and the ultimate apportionment as between themselves under the ***Negligence*** *Act*, *R.S.B.C. 1996, c. 333*, is a matter of indifference to the plaintiff.

**155**  In *Bradley*, at para. 37, the Court explained its rejection of the appellant's argument that the concepts of aggravation and the indivisibility of injury are different:

We are also unable to accept the appellant's submission that "aggravation" and "indivisibility" are qualitatively different, and require different legal approaches. If a trial judge finds on the facts of a particular case that subsequent tortious action has merged with prior tortious action to create an injury that is not attributable to one particular tortfeasor, then a finding of indivisibility is inevitable. That one tort made worse what another tort created does not automatically implicate a thin or crumbling skull approach (as in *Blackwater*), if the injuries cannot be distinguished from one another on the facts. Those doctrines deal with finding the plaintiff's original position, not with apportioning liability. The first accident remains a cause of the entire indivisible injury suffered by the plaintiff under the "but for" approach to causation endorsed by the Supreme Court of Canada 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=), [*[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=). As noted by McLachlin C.J.C. in that case, showing that there are multiple causes for an injury will not excuse any particular tortfeasor found to have caused an injury on a "but-for" test, as "there is more than one potential cause in virtually all litigated cases of ***negligence***" (at para. 19). It may be that in some cases, earlier injury and later injury to the same region of the body are divisible. While it will lie for the trial judge to decide in the circumstances of each case, it is difficult to see how the worsening of a single injury could be divided up.

1. ***Analysis***

**156**  Mr. Jones's low back pain quickly emerged as the most enduring and functionally limiting injury stemming from the 2008 Accident. It was also the only area of his body in which he had experienced physical symptoms before the 2008 Accident. Prior to the 2008 Accident, his low back symptoms usually resolved with a few treatments by Dr. Sam. Despite Dr. Birch's May 2, 2008 notation of the low back symptoms as "chronic", his clinical records show that in the pre-2008 Accident timeline, Mr. Jones's low back complaints to him were infrequent and increased dramatically in the aftermath of the 2008 Accident. Similarly, Dr. Sam's chiropractic treatments were relatively intermittent before the 2008 Accident but climbed significantly and proved to be ineffective afterwards. I conclude that after the 2008 Accident, the nature, severity and frequency of Mr. Jones's low back symptoms were different from and much worse in terms of pain and impact than beforehand, and that his overall low back condition was significantly aggravated by the 2008 Accident.

**157**  While the defendants concede that Mr. Jones sustained soft tissue injuries to his neck and low back as a result of the 2008 Accident, in my view the 2008 Accident clearly caused him additional injuries. The evidence establishes that he also sustained soft tissue injuries to the remainder of his back, including the region between his shoulder blades and along the right side of his body from his waist to his hips. He also took a bump on the head and suffered nausea and headaches (which were at times severe) for a period of time. Mr. Jones's unresolved physical injuries caused by the 2008 Accident produced chronic pain. The ongoing pain had a cascading negative effect in that it weakened his ability to cope with the other situational stressors he then faced and contributed in a substantial way, in combination with those stressors, to aggravate his longstanding difficulties with insomnia and cause his mood and disposition to decline.

**158**  Although not entirely clear from their submissions, the defendants seem to concede that Mr. Jones's low back problem was aggravated by the 2011 Accident and is an indivisible injury. Whether conceded or not, that is clearly the case.

**159**  The defendant's assertion that before the 2011 Accident, Mr. Jones had recovered from all of his injuries caused by the 2008 Accident, other than his low back symptoms, is not borne out by the preponderance of the evidence, including Mr. Jones's testimony on the point, which I accept. He was still complaining of headaches and tenderness along his entire spine when Dr. Birch completed the CL-19 medical report on May 26, 2010. I find that the symptoms Mr. Jones said he felt between his shoulder blades was probably captured in his complaints of upper back pain. Dr. Birch charted those symptoms until May 11, 2010. Moreover, there was credible evidence that after the May 11 date, Mr. Jones received physiotherapy and chiropractic treatments to relieve symptoms attributable to the 2008 Accident other than his low back, including chiropractic treatment for his neck on at least three occasions in February and March 2011. Also important is that during the April 2010 appointment, Dr. Birch referred Mr. Jones to physiotherapy for his neck and back sprain.

**160**  As was recognized by the Court in *Edmondson* and other like-minded authorities, the fact that those symptoms were not charted by Dr. Birch after May 11, 2010 does not, of itself, indicate that they had resolved. This is especially so in this case where Dr. Birch's practice is to not record every symptom mentioned at each visit, and Mr. Jones's low back represented his dominant problem and was, therefore, understandably his main focus of discussion when seeking medical treatment.

**161**  At the time of the 2011 Accident, Mr. Jones had not fully recovered from the sequelae of the 2008 Accident. The evidence satisfies me that his neck pain, although intermittent and fluctuating in severity, was nonetheless ongoing and had not settled when the 2011 Accident took place. The balance of his spinal symptoms, the pain in his lower flank and between his shoulder blades, his headaches and the ill-effects of the 2008 Accident on his sleep and mood similarly lingered.

**162**  Drawing on Dr. le Nobel's opinions, I find that had the 2008 Accident not occurred Mr. Jones would probably have been more resilient to the effects of the 2011 Accident, and that the former made him more vulnerable to the effects of the latter. The evidence establishes that it is more likely than not that the 2011 Accident significantly aggravated Mr. Jones's compromised low back and other spinal symptoms, including his neck and the region between his shoulder blades, and the pain along his lower right side. It also aggravated his headache symptoms brought on by the 2008 Accident. The probabilities of the situation indicate that in all likelihood the exacerbation of these ongoing symptoms adversely affected Mr. Jones's downcast mood and low demeanour.

**163**  The evidence amply establishes that the injuries flowing from the 2011 Accident merged with the residual injuries of the 2008 Accident to create an injury that is not attributable to one particular defendant and cannot be distinguished from one another. Put another way, the evidence does not support a finding that the 2011 Accident caused separate and divisible injuries to Mr. Jones. To the contrary, it forcefully compels the conclusion that the injuries flowing from the 2011 Accident were indivisible from the injuries caused by the 2008 Accident and that together they constitute a single indivisible injury to Mr. Jones.

**DAMAGES**

1. ***Basic Principles***

**164**  The essential purpose of damages is to restore, as best as is possible with a monetary award, an injured plaintiff to the same position he or she would have been in had the ***negligence*** not occurred.

**165**  People have different physical and psychological susceptibility to injuries. A fundamental principle in the assessment of damages is that the defendant must take the plaintiff as she is. A plaintiff whose unique psychological makeup or pre-existing physical condition makes him more vulnerable to sustaining injury is to be compensated for the entire extent of his injury, both physical and/or psychological, caused by the defendant's ***negligence***. This is so even where due to some unique feature of the plaintiff, the injury was greater or of a more dramatic or severe or different type than one would expect an average person to sustain. It is no answer for a defendant to say that the plaintiff would have suffered less injury or a different kind of injury or no injury at all if he or she had been less susceptible or vulnerable. It is the impact of the defendant's ***negligence*** on the actual plaintiff, and not on a fictional one, that is relevant for compensatory purposes: *Athey*.

**166**  Equally as fundamental is that a defendant is not expected to put the plaintiff in a better position than the plaintiff had been in the moment before the accident happened. It is the difference between the plaintiff's original position with any attendant risks and shortcomings (e.g. a pre-existing condition) just before occurrence of the negligent act or omission, and the injured position after and as a result of such act or omission, that comprises the plaintiff's loss: *Athey* at paras. 34-35.

**167**  A pre-existing condition, latent or active, is part of the plaintiff's original condition. Where there is a measurable risk that a pre-existing condition would have resulted in a loss to the plaintiff in the future without the defendant's ***negligence***, then that risk of loss must be taken into account in assessing certain heads of damages and serves to reduce the award: *Athey* at para. 35; *Bouchard v. Brown Bros. Motor Lease Canada Ltd.*, [*2012 BCCA 331*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S294-00000-00&context=). The contingency of a pre-existing condition manifesting on its own to cause a loss at some point does not have to be proven to a certainty - it is given weight according to its relative likelihood: *A.(T.W.N.) v. Clarke*, [*2003 BCCA 670*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60TP-00000-00&context=).

1. ***Non-Pecuniary Damages***

**168**  Mr. Jones seeks non-pecuniary damages in the range of $80,000 to $125,000. The defendants counter that an award of between $20,000 and $40,000, at most, would be ample. They submit that their suggested range reflects Mr. Jones's pre-existing low back deficit.

**169**  Non-pecuniary damages are intended to compensate a plaintiff for the pain, suffering and loss of enjoyment of life and of amenities experienced as a result of the defendant's ***negligence***. They are meant to compensate for such damages suffered to the date of trial and those that the plaintiff will suffer into the future.

**170**  The award should be fair and reasonable for both parties as those concepts are measured against the adverse impact of the particular injuries on the particular plaintiff: *Hunt v. Ugre*, [*2012 BCSC 1704*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JJ1H-X2MS-00000-00&context=) at para. 176. While fairness is assessed by reference to awards made in comparable cases, because each case is decided on its own unique facts and calls for an individualized assessment, it is neither possible nor desirable to develop a "tariff": *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; *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 25. The process is one of assessment and is not amenable to mathematical precision: *Drodge v. Kozak*, [*2011 BCSC 1316*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-62B6-00000-00&context=); *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=); *Lindal*.

**171**  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. set out a non-exhaustive list of factors to be considered in awarding damages under this head. They include: the plaintiff's age; the nature of the injury; the severity and duration of the pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff's stoicism.

**172**  Mr. Jones did not suffer headaches or symptoms in his mid or upper back, between his shoulder blades or along his lower right flank prior to the 2008 Accident. Although he had a history of recurring episodes of low back pain, there was no cogent evidence that before the 2008 Accident, those symptoms impaired his ability to work or to participate to the extent he liked in NA, Toastmasters or any other activity. In saying this, I am mindful that Mr. Jones had not worked on any regular basis for approximately seven years after leaving his position at Envirotest and joining Royal LePage.

**173**  I do not propose to reiterate my summation of the nature and progression of Mr. Jones's symptoms stemming from the two accidents. Suffice it to say there is no question that he suffered a significant aggravation to his low back as a result of the 2008 Accident that rendered those symptoms more persistent and disabling than they had been before and, for the first time, imposed functional limitations on him. The 2008 Accident also caused him headaches and symptoms to the other aspects of his spine, the area between his shoulder blades and down his lower right side. The intensity and frequency of his symptoms gradually improved until the 2011 Accident, which served to worsen and aggravate most of them. His injuries have caused years of varying degrees of pain which exacerbated Mr. Jones's existing sleep difficulties and weakened his capacity to cope with ongoing marital and financial stress and, in combination with those situational stressors, served to substantially contribute to a further deterioration of his mood and formerly positive disposition.

**174**  The evidence does not establish a relationship between Mr. Jones's previous low back pain incidents to the underlying degenerative changes in his lumbar spine noted by Drs. Birch and Herschler, or that his degenerative condition presented a measurable risk that his pre-existing low back problems would have detrimentally affected him in the future regardless of the accidents.

**175**  By Mr. Jones's own credible account, supported by his lay witnesses, he went from being gregarious and upbeat to an irritable, intolerant man who constantly complained of his pain and withdrew from friends. His injuries interfered with his ability to walk both for work and for recreation, took a toll on his friendships, and curtailed his attendance at NA meetings and related community volunteer work. On the positive side, he was able to advance the executive ladder of Toastmasters by making slight adjustments to his duties and delegating certain tasks and to eventually join another Toastmasters club. He has also been able to resume walking "a little bit" every day.

**176**  The accidents have negatively affected the quality and enjoyment of Mr. Jones's life. Although his symptoms have improved over time, they had not resolved at the time of trial. Dr. le Nobel's prognosis for Mr. Jones was guarded; however, it was not bleak. He did not forecast that Mr. Jones's injuries would result in permanent symptoms or limitations. Rather, his thinking was that Mr. Jones would continue to suffer from ongoing symptoms for a number of years to come but, fortunately, not indefinitely.

**177**  Based on Dr. le Nobel's opinion and the evidence, I conclude that for the next several years Mr. Jones will continue to suffer pain and, with it, worsened insomnia and fatigue, a downcast mood and flattened demeanour, although all such symptoms at progressively diminishing intensities. Enduring pain, even when it is intermittent and its intensity fluctuates between mild and moderate, puts a negative spin on everyday living and detracts from the pleasures of life.

**178**  I have reviewed all of the cases placed before me by counsel and do not propose to review them in any detail as they provide general guidelines only. In assessing the quantum of Mr. Jones's non-pecuniary damages, I must keep in mind that his pre-existing history of low back difficulties and problems with sleep and depression were part of who he was before the 2008 Accident. Having considered the totality of the evidence and the application of the governing principles, it is my opinion that a fair and reasonable award for his non-pecuniary damages is $65,000.

1. ***Loss of Earning Capacity***

**179**  The legal framework that informs an award for loss of earning capacity was helpfully summarized by Dardi J. in *Midgley* at paras. 236-240:

The recent jurisprudence of the Court of Appeal has affirmed that the plaintiff must demonstrate both an impairment to his or her earning capacity and that there is a real and substantial possibility that the diminishment in earning capacity will result in a pecuniary loss. If the plaintiff discharges that requirement, he or she may prove the quantification of that loss of earning capacity either on an earnings approach or a "capital asset" approach: *Perren v. Lalari*, [*2010 BCCA 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=) at para. 32. Regardless of the approach, the court must endeavour to quantify the financial harm accruing to the plaintiff over the course of his or her working career: *Pett v. Pett*, [*2009 BCCA 232*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M2G2-00000-00&context=) at para. 19; *X. v. Y.*, [*[2011] B.C.J. No. 1378*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22MK-00000-00&context=), at para. 183.

As enumerated by the court in *Falati v. Smith*, [*2010 BCSC 465*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-62PC-00000-00&context=) at para. 41, aff'd [*2011 BCCA 45*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1KT-00000-00&context=), the principles which inform the assessment of loss of earning capacity include the following:

1. The standard of proof in relation to hypothetical or future events is simple probability, not the balance of probabilities: *Reilly v. Lynn*, [*2003 BCCA 49*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G50F-00000-00&context=) at para. 101. Hypothetical events are to be given weight according to their relative likelihood: *Athey* at para. 27.
2. The court must make allowances for the possibility that the assumptions upon which an award is based may prove to be wrong: *Milina v. Bartsch* [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=) at 79 (S.C.), aff'd [*(1987), 49 B.C.L.R. (2d) 99*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-JTNR-M3X3-00000-00&context=) (C.A.). Evidence which supports a contingency must show a "realistic as opposed to a speculative possibility": *Graham v. Rourke* [*(1990), 75 O.R. (2d) 622*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-F5T5-M3YH-00000-00&context=) at 636 (C.A.).
3. The court must assess damages for loss of earning capacity, rather than calculating those damages with mathematical precision: *Mulholland (Guardian ad litem of) v. Riley Estate* [*(1995), 12 B.C.L.R. (3d) 248*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-DY33-B0YN-00000-00&context=) at para. 43. The assessment is based on the evidence, taking into account all positive and negative contingencies. The overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, [*2001 BCCA 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=) at para. 11.

Although a claim for "past loss of income" is often characterized as a separate head of damages, it is properly characterized as a component of loss of earning capacity: *Falati* at para. 39. It is compensation for the impairment to the plaintiff's past earning capacity that was occasioned by his or her injuries: *Rowe v. Bobell Express Ltd.*, [*2005 BCCA 141*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M463-00000-00&context=) at para. 30; *Bradley* *v. Bath*, [*2010 BCCA 10*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-251K-00000-00&context=) at paras. 31-32; *X. v. Y* at para. 185.

While the burden of proof relating to actual past events is a balance of probabilities, a past hypothetical event will be considered as long as it was a real and substantial possibility and not mere speculation: *Athey* at para. 27.

This court in *Falati* at para. 40 summarized the pertinent legal principles governing the assessment of post-accident, pre-trial loss of earning capacity and concluded that:

[40] ... the determination of a plaintiff's prospective post-accident, pre-trial losses can involve considering many of the same contingencies as govern the assessment of a loss of future earning capacity. ... As stated by Rowles J.A. in *Smith v. Knudsen*, [*2004 BCCA 613*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G0MH-00000-00&context=), at para. 29,

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

**180**  The law has long recognized that unknown contingencies and uncertain factors make it impossible to calculate lost opportunities and a loss of earning capacity with any precision: *Erickson* at para. 271. It is because the occurrence of hypothetical and future events is unknown that allowances must be made for relevant and realistic positive and negative contingencies.

1. ***Past Loss***

**181**  The defendants say that, even if the accidents caused him discomfort and diminished his energy and stamina, his earning capacity was not adversely impacted. Indeed, pointing to the fact that Mr. Jones moved up the executive of Toastmasters, attended Toastmasters meetings and annual conferences and joined a second club, produced the odd business plan (approximately three to four annually), taught presentation skills to realtors and started to teach public speaking skills at a secondary school, in addition to working as a realtor, they insist that he actually became more active after the 2008 Accident than he was before. Tied to this is the defence theory that the reason for the decline in Mr. Jones's commissions after the 2008 Accident is that he chose to shift his effort away from his career in order to fulfill his preferred duties with Toastmasters. Central to their assertion is the premise that Mr. Jones's participation in Toastmasters after the 2008 Accident was tantamount to holding a full-time job.

**182**  The entire line of argument hinges on the contents of a farewell address that Mr. Jones composed in the summer of 2011 as the departing District Governor of Toastmasters. The defendants parse out his remarks to the effect that the executive offices of District Governor, Lieutenant-Governor of Marketing and Lieutenant-Governor of Education (positions held by Mr. Jones after the 2008 Accident) are "nearly full-time jobs".

**183**  Mr. Jones denied spending anywhere close to full-time hours discharging his Toastmasters responsibilities, and was adamant that he volunteered only about ten hours per week to that endeavour. He quite candidly, and I found persuasively, explained that his farewell address deliberately overstated the importance of the leadership roles in the organization in order to "inspire the troops". There was no convincing evidence that after the 2008 Accident, Mr. Jones decided to shift gears and concentrate most of his time and energy to Toastmasters activities at the expense of his career. His evidence about the nature of his Toastmasters duties and the manner in which he adjusted them after the 2008 Accident, as well as his testimony about the time that he devoted in carrying them out was credible. I find that he engaged in hyperbole in his address when he described the executive positions as akin to nearly full-time jobs. My findings effectively nullify this branch of the defendants' argument and the ill-conceived submissions they advanced in this context concerning Mr. Jones's failure to mitigate.

**184**  The testimony of Mr. Simmons, Mr. Baijius and Ms. Legatt was forcefully to the effect that after the 2008 Accident, Mr. Jones became an irritable, isolated and sometimes offensive person who was difficult to be around and interact with. After and because of the effects of the 2008 Accident, his energy and industriousness was diminished and his preoccupation with pain and downward spiraling mood reduced his productivity and seeped into all facets of his life, adversely impacting his interactions with friends, colleagues and clients alike. Although able to continue as a realtor, I find that Mr. Jones's injuries have impaired his ability to pursue leads, maintain and develop clients and close sales transactions.

**185**  I am satisfied that, had the accidents not occurred, there is a real and substantial possibility Mr. Jones would have continued to gain experience in the real estate field, enlarge his contacts and expand his book of business at a greater rate which, in turn, would have translated into more commission earnings than he has been able to generate. There is no question that the injuries induced by the accidents have compromised Mr. Jones's earning capacity to trial. Assessing the real and substantial possibilities of what would have happened in the past but for those injuries, I am satisfied that his diminished capacity would have resulted in a pecuniary loss. I turn next to the quantification of that loss.

1. ***The Economic Experts***

|  |  |  |  |
| --- | --- | --- | --- |
|  | ***(i)*** | ***Darren Benning*** |  |

**186**  Darren Benning of PETA Consultants Ltd. provided a report dated March 28, 2012, on Mr. Jones's behalf, assessing Mr. Jones's past and future loss of income.

**187**  Mr. Benning's methodology relative to Mr. Jones's past loss was to estimate his commissions, had the 2008 Accident not occurred, on two alternative bases:

1. commensurate with his earnings in 2007 (the "Earnings Approach"); and
2. commensurate with the earnings of the sixth highest ranking realtor working in the same Royal LePage office as Mr. Jones (the "Ranking Approach").

*The Earnings Approach*

**188**  Mr. Benning considered it preferable to not include the data about Mr. Jones's 2006 commissions in the Earnings Approach because that was Mr. Jones's first year as a realtor and he was just starting to develop his business. The legitimacy of excluding the 2006 information was indirectly supported by the testimony of Mr. Simmons, and was not disputed by the expert called by the defendants, Kevin Turnbull.

**189**  Mr. Benning also removed from his analysis commissions earned in the period of time between January 1, 2008 and the 2008 Accident, for two reasons. First, he believed that because an agent may have more or less sales at different times of the year, he would obtain a more accurate sense of an agent's annual earnings by using an entire calendar year. Second, to account for the fact that there had been a decrease in sales generally in 2008 due to the downturn in the real estate market, as confirmed by Mr. Jones and Mr. Simmons.

**190**  By comparing Mr. Jones's gross commissions in 2007 ($108,058) with the average commissions earned by realtors that year in Greater Vancouver and using the standard rate of commissions as the benchmark, Mr. Benning determined that Mr. Jones's 2007 revenues were equivalent to 134% of the average commissions earned. He next calculated Mr. Jones's foregone commissions for 2008 based on the assumption that they would have been equivalent to 134% of the average commissions earned by agents in the Greater Vancouver area in that period of time. He ran the same analysis for 2009 and 2010; for 2011 and 2012, he assumed ongoing losses equivalent to those in 2010. In calculating the commissions after the 2008 Accident, he factored in changes in the real estate market.

**191**  In addressing the issue of Mr. Jones's expenses for those years, Mr. Benning divided them into two categories - variable and fixed. Given that Mr. Jones continued to work as an agent after both accidents, the experts agreed the savings in expenses only applied to variable expenses which were equivalent to 14.79% of Mr. Jones's gross revenues.

**192**  Utilizing the Earnings Approach, Mr. Benning assessed Mr. Jones's cumulative net past income loss as $120,865.

*The Ranking Approach*

**193**  In Mr. Benning's second scenario, he assumed that Mr. Jones would have continued to earn commissions in 2008 and onwards on par with those achieved by the realtor in his office who had standing as the sixth highest producer in each of those years. Mr. Benning provided a table setting out the commissions of the sixth-ranked salespersons in Mr. Jones's office from 2008 to 2010 and compared them to Mr. Jones's actual commissions. The difference between the two amounts was said to comprise Mr. Jones's lost net commissions. Using this formulation, Mr. Benning estimated Mr. Jones's net past income loss at $209,623.

**194**  Mr. Jones submits that the evidence showing him to be a rising star at Royal LePage with a bright future in the industry before the 2008 Accident supports the inference that he had the potential to maintain his standing as the sixth highest ranked realtor in the office for years to come. Accordingly, he endorses the Ranking Approach utilized by Mr. Benning.

***(ii)*** ***Kevin Turnbull***

**195**  Kevin Turnbull provided an economic report for the defendants dated April 17, 2012. Although he agreed with many of the assumptions relied upon by Mr. Benning, such as applying a tax rate of 20% on lost commissions after expenses and an amount equivalent to 14.79% to reflect savings for variable expenses, he expressed several concerns about the core features of Mr. Benning's methodology. Specifically, he took major exception with the validity of relying exclusively on Mr. Jones's 2007 earnings in projecting the gross commissions absent the accidents, and offered an alternative formula to quantify the past loss.

**196**  Mr. Turnbull analyzed Mr. Jones's sales performance in 2007 and found that he had successfully completed many more transactions in the first part of that year than in the last part. He also noted there were considerably less sales achieved in the seven months and eight days immediately before the 2008 Accident than was the case in the comparative period in 2007 or, for that matter, any other time frame. That led Mr. Turnbull to wonder whether Mr. Jones's greater level of activity in the early part of 2007 might indicate that the time period was unrepresentative of his performance in the sense that he may have been inexplicably lucky during that timeframe. However, he also allowed that Mr. Jones's superior performance during that phase of 2007 may have been due to the fact that the real estate market was "hot" at that time and subsequently cooled off later in 2007 and into 2008. Even making the allowance for the downturn of the market, the implication of Mr. Turnbull's interpretation of the data is that Mr. Jones's performance in the 12 months immediately preceding the 2008 Accident was not on par with his performance in the early part of 2007.

**197**  In simple terms, Mr. Turnbull's methodology was to examine Mr. Jones's actual sales results rather than his earnings as a baseline for projecting his lost sales prior to trial. Drawing on statistics from the Real Estate Board of Greater Vancouver, he estimated the average units sold per month, which he then relied on to produce a market unit sales index. That index was intended to show the relative market activity in terms of average monthly sales compared to the pre-2008 Accident average. By comparing that index to his tabulation of Mr. Jones's unit sales index, Mr. Turnbull calculated Mr. Jones's expected unit sales.

**198**  Mr. Turnbull presented projections of Mr. Jones's unit sales, absent the accidents, using two time periods as a baseline: January 1, 2007 to August 8, 2008, and August 9, 2007 to August 8, 2008. Applying the former baseline, he determined that Mr. Jones's actual unit sales for the remainder of 2008 after the 2008 Accident actually exceeded the projected sales for that time period. For the balance of the period through to the date of trial, however, he calculated a loss of sales of 33 units. Applying the same methodology, but using the 12-month period immediately preceding the 2008 Accident, resulted in a loss of only six sales to the date of trial.

**199**  Relying on Mr. Jones's sales history from January 31, 2006 to October 12, 2011, Mr. Turnbull then calculated Mr. Jones's average commission earned as $5,862 per unit. Deducting an amount equal to 14.79% to reflect saved variable expenses and 20% for income tax, he arrived at a net after tax loss per transaction of $4,000 (rounded up from $3,996). Multiplying that figure by the 33 lost transactions resulted in a net past loss estimation of $132,000. Applying the same formula using the 12 month period immediately before the 2008 Accident as the baseline resulted in a significantly smaller net loss of $24,000.

***(iii)*** ***Discussion***

**200**  Formulation of an appropriate methodology to assess Mr. Jones's past and future loss that sufficiently contemplates the multiple variables at play was challenging, even for the experts. Their divergent approaches have commendable attributes as well as shortcomings. For example, neither model made allowance for the fact that Mr. Jones had the authority to decrease his commissions to an amount less than the standard rate (including zero), and had done so in the past.

**201**  The Ranking Approach devised by Mr. Benning was tied to a performance achievement that Mr. Jones had attained only once and reflected his best year as a realtor. The proposition that, had the 2008 Accident not occurred, Mr. Jones would have maintained his stature as the sixth highest producer in his office, year in and year out, is highly speculative.

**202**  Apart from gross commission numbers, Mr. Benning did not have adequate information about the agents who were ranked as the sixth salespersons in any given year apart from 2007 when Mr. Jones occupied that slot. He, therefore, had no means of comparing who moved in and out of that placement or whether any one realtor was able to retain that standing for more than one year at a time. Mr. Jones was likewise not able to shed much light on the subject beyond agreeing that the top producers were not the same year-to-year.

**203**  Mr. Benning likewise acknowledged that the performance of individual salespersons can fluctuate in any given year, and from year to year. That simple but obvious truth undermines the Ranking Approach. When considered in light of the fact that Mr. Jones had a relatively brief sales history as a realtor prior to the 2008 Accident, its validity is even more dubious. I do not endorse it.

**204**  Of the two methodologies, I have greater confidence in the soundness of Mr. Benning's Earnings Approach. However, it too is constructed on problematic underpinnings. The main one, and I consider it to be a serious deficiency, is that Mr. Benning projected Mr. Jones's loss before trial with reference solely to the benchmark of his performance in 2007, which was his best year. It, therefore, necessarily assumes that Mr. Jones would have continued to attain those results (subject to fluctuations in the market) had the 2008 Accident not occurred. In so doing, it effectively overlooks the more than seven months of 2008 predating the 2008 Accident where, according to Mr. Turnbull, Mr. Jones's performance was inferior even where market place considerations are accounted for. To this, I would add that Mr. Jones's earnings in that year also represented his highest earnings not only from real estate, but from any type of work for at least nine years preceding the 2008 Accident and perhaps ever (leaving aside his receipt of the sizable stock options from Envirotest).

**205**  It is also worth mentioning that Mr. Turnbull suggested that Mr. Benning had done more than merely ignore that factor in that he had estimated the 2008 loss on the footing that the superior 2007 results (after adjusting for market changes) would have been achieved across the entire 2008 year. In Mr. Turnbull's view, that approach not only glossed over the poor results actually achieved by Mr. Jones in the early part of 2008. It also appeared to inadvertently capture the effects of those inferior results in the overall loss estimate. The skewed effect of using this narrow of a baseline is compounded by the fact that Mr. Benning does not appear to have made any allowance for fees paid by the average agent to the brokerage firm out of commissions, and yet the figures he used for Mr. Jones were net of the fees paid to Royal LePage.

**206**  In my view, Mr. Turnbull's scenario that encompasses the entire time frame of January 1, 2007 until the date of the 2008 Accident as a baseline provides the most reasonable starting point of assessment. That said, his model is not flawless. For example, in tabulating the average commission of an average realtor, Mr. Turnbull took into account the years 2006 and 2007 only, even though he had knowledge that real estate prices, and potentially the amount of commissions, would have increased between 2006 and 2011. At trial, he conceded that it would have been preferable to calculate the average commission per sale using the period from August 9, 2008 to October 12, 2011 as it offered a better indicator of the market. That adjustment resulted in a net average commission for Mr. Jones of $4,635 per unit rather than $4,000, and increased the estimated loss accordingly.

**207**  I do not accept that Mr. Jones merely had a "lucky" year in 2007 in the sense that it was an aberration. But even he agreed that one's performance in sales is seldom constant. While he was certainly not insulated from a market decline, according to Mr. Turnbull's analysis, which I accept, he not only slipped from the sixth spot but actually underperformed the market average in 2008 before the 2008 Accident. In my view, expanding the baseline to encompass the longer duration beginning on January 1, 2007 as Mr. Turnbull has done, does not fully address that point.

**208**  Although information about Mr. Jones's historical earnings and sales transactions is useful in evaluating the substantial possibilities of what could have happened in the absence of the accidents, it is not determinative of the measure of his past or future loss. Contingencies both positive and negative inform the analysis.

**209**  Mr. Jones had enjoyed a successful career with Envirotest for about six years. Details of his prior employment were not developed in the evidence. Although he is an educated man with management experience, his work ethic, at least from about 1998 to 2006, and employment achievements have been spotty and are not impressive. After he left Envirotest, Mr. Jones irresponsibly frittered away an enormous sum of money, evidently triggered by his then unchecked addiction to gambling, and thereafter spent a number of years in his own small business enterprise that had negligible financial success. He also demonstrated an ineptness in applying fiscal management to his personal financial situation.

**210**  On the other hand, Mr. Jones has been able to overcome his substance abuse addictions and has demonstrated a commendable level of sheer determination in pursuing a fresh career in the face of near financial ruin. He worked hard at honing his presentation skills and enhancing his networking opportunities and proved to be a motivated and high achieving salesperson in just two years.

**211**  The unpredictable nature of the inherently volatile real estate market, acknowledged fluctuations in the performance of individual sales agents, and Mr. Jones's relatively brief time spent as a realtor before the 2008 Accident, militate against assessing his past loss with the degree of precision reflected in the mathematical formulae utilized by the experts.

**212**  Allowing for non-speculative contingencies and aiming for overall fairness, I quantify Mr. Jones's net loss to trial as $70,000.

1. ***Future Loss***

**213**  My task is to compare the likely future of Mr. Jones's working life if the accidents had not happened to his likely future working life afterwards: *Gregory v. I.C.B.C.*, [*2011 BCCA 144*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1K8-00000-00&context=) at para. 32.

**214**  The defendants submit that Mr. Jones has failed to show, on a substantial possibility basis, a future event leading to an income loss and that, consequently, he is not entitled to an award under this head.

**215**  Many of the considerations material to the assessment of past loss of earning capacity have application to his future loss claim. For the reasons already given in addressing Mr. Jones's entitlement under other heads of damages, the evidence amply establishes that the accidents are responsible for an impairment of Mr. Jones's future earning capacity spanning the next several years, with a gradual lessening of the degree of his functional impairment over that timeline. He has also proven a real and substantial possibility that his diminished capacity caused by the accidents will generate a pecuniary loss into the future. As Mr. Jones has established a real and substantial possibility of a future event leading to an actual income loss, there is a proper foundation to take the next step and quantify his loss: *Morgan v. Galbraith*, [*2013 BCCA 305*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JW09-M12P-00000-00&context=).

**216**  Using January 1, 2007 to August 8, 2008 as the baseline, Mr. Turnbull estimated that Mr. Jones would lose nine transactions per year. Applying an average commission per transaction of $6,797 (which he agreed at trial was the proper figure) produced a net value per sale of approximately $5,792. That sum, multiplied by nine lost transactions, amounted to an estimated annual future loss of $52,128. The future income loss multipliers to ages 65, 70 and 75 respectively were provided by Mr. Benning in his report.

**217**  As between the proposed models used to assess Mr. Jones's future loss, I prefer Mr. Turnbull's approach; although it too has problematic elements. For example, his calculations presume a static level of performance on the part of Mr. Jones and a static degree of impaired functioning going forward, neither of which are supported by the evidence. The expected fluctuations in Mr. Jones's performance unconnected to the accidents, together with the vagaries of the real estate market, make a predominantly mathematical assessment of Mr. Jones's loss inappropriate in this case. While I accept Mr. Jones's intention is to continue working in real estate into the foreseeable future and that he currently has no plans to retire given his less than desirable financial situation, I am also mindful of the lack of any evidence that he has ever been employed continuously for more than six years.

**218**  To my mind, it is not appropriate to engage the "earnings approach" to assess Mr. Jones's damages. It is instead preferable to quantify his loss by taking into account the factors that inform the capital asset approach laid out in *Brown v. Golaiy* [*(1985), 26 B.C.L.R. (3d) 353*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61TX-00000-00&context=) (S.C.), mindful of the fact that his diminished capacity is not permanent and will continue to improve over time and eventually be resolved. That assessment involves considering factors such as whether he: (i) has been rendered less capable overall of earning income from all types of employment; (ii) is less marketable or attractive as a potential employee; (iii) has lost the ability to take advantage of all job opportunities that might otherwise have been open; and (iv) is less valuable to himself as a person capable of earning income in a competitive labour market. The evidence establishes that at least three, and probably all four, of these factors have application to Mr. Jones.

**219**  As mentioned, the evidence does not demonstrate that Mr. Jones's pre-existing low back difficulties or depression impaired his capacity to fulfill his duties as a realtor, or that there is a measurable risk that either or both of those conditions would have caused him a loss in the future, absent the accidents.

**220**  Bearing in mind the applicable legal principles, including the *Brown* criteria, in light of the evidence, I conclude that in all the circumstances the sum of $110,000 is the present value of a fair and reasonable measure of Mr. Jones's loss of future earning capacity.

1. ***Special Damages***

**221**  Mr. Jones is permitted recovery of the out-of-pocket expenses he reasonably incurred as a result of his injuries. His entitlement is derived from the fundamental principle that an injured person is to be restored to the position he would have been in had the ***negligence*** not happened: *Milina* *v. Bartsch* [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=) at 79 (S.C.), aff'd [*(1987), 49 B.C.L.R. (2d) 99*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-JTNR-M3X3-00000-00&context=) (C.A.) at 78.

**222**  Mr. Jones seeks an award of $20,820.20 in special damages to cover expenses incurred for massage therapy, acupuncture, chiropractic treatment and IMS. He provided supporting invoices for the majority of those items. From the claimed sum, I have deducted the amount of $1,000 to reflect the fact that Mr. Jones would have had a small number of chiropractic treatments during this period even if the accidents had not taken place.

**223**  Accordingly, Mr. Jones entitled to special damages in the amount of $19,820.20.

1. ***Cost of Future Care***

**224**  The approach to be taken in assessing future care costs was settled 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 paras. 21-22:

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.

The resulting award may be said to reflect the reasonable or normal expectations of what the injured person will require. Jane Stapleton, "The Normal Expectancies Measure in Tort Damages" (1997), 113 L.Q.R. 257, thus suggests, at pp. 257-58, that the tort measure of compensatory damages may be described as the "'normal expectancies' measure", a term which "more clearly describes the aim of awards of compensatory damages in tort: namely, to re-position the plaintiff to the destination he would normally have reached ... had it not been for the tort". The measure is objective, based on the evidence. This method produces a result fair to both the claimant and the defendant. The claimant receives damages for future losses, as best they can be ascertained. The defendant is required to compensate for those losses. To award less than what may reasonably be expected to be required is to give the plaintiff too little and unfairly advantage the defendant. To award more is to give the plaintiff a windfall and require the defendant to pay more than is fair.

**225**  The purpose of damages for the cost of future care is to compensate for a financial loss reasonably incurred to sustain or promote the mental and/or physical health of an injured plaintiff: *Gignac* *v. ICBC*, [*2012 BCCA 351*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S2D4-00000-00&context=) at para. 30. The services and items must be justified as reasonable in the sense of being medically required or justified, and in the sense that the plaintiff will be likely to incur them based on the evidence: *Milina*; *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=); *Kuskis v. Tin*, [*2008 BCSC 862*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G35Y-00000-00&context=).

**226**  Recommendations made by a medical doctor or made by various other health care professionals are relevant in determining whether an item or service is medically justified: *Gregory* at para. 38. An evidentiary link between the medical assessments and the recommended treatment is essential: *Gregory* at para. 39; *Gignac* at paras. 31-32. General contingencies and those specific to the plaintiff are to be taken into account where appropriate: *Gignac* at para. 52.

**227**  Mr. Jones seeks an award in the amount of $7,500 to cover the cost of his future care. The breakdown is $2,000 for the pulsed electromagnetic field therapy recommended by Dr. Herschler, with the balance allocated to the recommendations made by Dr. le Nobel. The latter include access to an exercise facility, guidance from a kinesiologist, massage therapy, a TENS machine, a heated vehicle seat and the use of back support for prolonged sitting.

**228**  I am satisfied that the therapy recommended by Dr. Herschler would be beneficial to Mr. Jones and is medically justified within the meaning contemplated by the authorities and would likely be incurred by him. I am similarly convinced that massage therapy to alleviate his symptoms is an appropriate and beneficial therapy that he would use. Based on the evidence of his special damages, I award the sum of $ 1,600 in respect of that treatment expense.

**229**  There was virtually no cogent evidence that Mr. Jones would avail himself of any of the other recommendations made by Dr. le Nobel or the cost of them. Accordingly, there is no proper basis for any additional award under this head.

**230**  In sum, Mr. Jones is entitled to an award of $3,600 for the cost of his future care.

1. ***Mitigation***

**231**  Mr. Jones has a positive duty to act reasonably in minimizing his losses caused by the Accidents: *Janiak v. Ippolito*, [*[1985] 1 S.C.R. 146*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2361-00000-00&context=); *Chiu (Guardian ad litem of) v. Chiu*, [*2002 BCCA 618*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-FH4C-X381-00000-00&context=); *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=).

**232**  The defendants say that Mr. Jones has not mitigated his loss by failing to follow a basic treatment option in the form of an active exercise program recommended by Dr. le Nobel.

**233**  In *Antoniali v. Massey*, [*2008 BCSC 1085*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M34T-00000-00&context=) at para. 31, Preston J. discussed the concept of mitigation in the context of an alleged failure by the plaintiff to implement a particular conditioning program:

In order to conclude that Ms. Antoniali's damages should be reduced by application of the principle that a plaintiff has a positive duty to mitigate his or her injuries, I would have to find that the defendant has established:

1. that a program of stretching and conditioning under the guidance of a personal trainer would have reduced or eliminated the effect of the injuries;
2. that the reasonable plaintiff in Ms. Antoniali's circumstances would have followed such a program;
3. that Ms. Antoniali unreasonably failed to follow such a program and;
4. the extent to which Ms. Antoniali's damages would have been reduced if she had followed such a program.

**234**  While it is true that Mr. Jones had not taken up an active exercise program at the time of trial, on a medical referral he had enrolled in a multi-disciplinary program at a pain clinic and had been awaiting its start date (set to begin after completion of the evidence portion of the trial) for a considerable period of time. Moreover, Dr. le Nobel clarified that it may have been beneficial to Mr. Jones to have undertaken such a program earlier, but it also had the potential of making him worse.

**235**  In my view, the defendants have not discharged their onus to establish, on a balance of probabilities, that Mr. Jones failed to act reasonably by not participating in an active exercise program prior to trial in addition to his enrollment at the pain clinic, or that his damages would have been reduced had he followed such a program.

**COSTS**

**236**  If the parties are unable to agree as to costs, they may file written submissions implementing a time table of their choosing that incorporates a final deadline of October 18, 2013.

S.K. BALLANCE J.

**End of Document**

[***Sharpe v. Koomson, [2019] B.C.J. No. 633***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5VX9-3C91-JNCK-23Y1-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Crossin J.

Heard: September 4-7, 10-14 and 17-21, 2018.

Judgment: April 12, 2019.

Dockets: M154600, M170201

Registry: Vancouver

**[2019] B.C.J. No. 633** | [*2019 BCSC 558*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5X9Y-7XW1-FBFS-S2KD-00000-00&context=)

Between Adam Eric Sharpe, Plaintiff, and Christopher Koomson, Abraham Essuman Koomson, Defendants And between Adam Eric Sharpe, Plaintiff, and Naushad Mohamed, Rahim Jinah, Defendants

(380 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Neck — Soft tissue — Head injuries — Headaches — Psychological injuries — Depression — Considerations impacting on award — Pre-existing injury — Action by plaintiff for damages for injuries suffered in 2013 motor vehicle accident allowed — Plaintiff was injured in motor vehicle accidents in 2009, 2013 and 2016 — Plaintiff was continuing to complaint about injuries from 2009 accident at time of 2013 accident — 2013 and 2016 accidents exacerbated pain to plaintiff's neck and back — Accidents also caused headaches, tinnitus, visual vestibular mismatch, poor sleep, mood disturbance, fatigue, and cognitive difficulties — Plaintiff developed psychiatric symptoms and somatic sleep disorder.**

**Damages — Types of damages — General damages — For personal injuries — Cost of future care — Loss of housekeeping ability — Special damages — Past loss of income — Employment income — Expenses and expenditures — Medical — Medications — Therapy or rehabilitation — Non-pecuniary loss — Pain and suffering — Affecting social relationships — Affecting recreational activities — Prospective pecuniary loss — Action by plaintiff for damages for injuries suffered in 2013 motor vehicle accident allowed — Accident exacerbated pain to plaintiff's neck and back — Accident caused headaches, tinnitus, and myriad of other injuries — Injuries affected plaintiff's social relationships and active lifestyle — Plaintiff lost time from work and future work life was compromised — Plaintiff was awarded non-pecuniary damages of $175,000, $115,000 for past loss of income and $275,000 for future loss of earning capacity — Cost of future care was fixed at $80,000 and loss of housekeeping capacity at $23,000 — Special damages were agreed at $34,941 — Insurance (Vehicle) Act, s. 98.**

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| Action by the plaintiff for damages for injuries suffered in a 2013 motor vehicle accident. The plaintiff suffered from musculoskeletal injuries and a myriad of other symptoms following the 2013 accident. Although the plaintiff slowly began improving with rehabilitative efforts and time, he was involved in another motor vehicle accident in 2016. Liability for both accidents was admitted. The plaintiff was 39 years old and lived with his wife and newborn baby. At the time of the 2013 accident, he worked at HSBC as an IT Analyst. The plaintiff's long term plan was to take over his father's two sound production companies. Prior to the accidents, the plaintiff was an athlete and lived a no car lifestyle. He enjoyed playing softball in the summers, pick-up soccer, and football. He skied, was an avid runner and enjoyed cycling. The plaintiff submitted that, shortly following the 2013 accident, he experienced headaches and pain in his neck, back, and ribs. He would subsequently experience imbalance problems, tinnitus, light and noise sensitivity, sleeping difficulties, poor memory, anosmia, depression, and anxiety. Although the plaintiff made several attempts to return to HSBC after the 2013 accident, his symptoms precluded a successful return. He was largely out of work from the 2013 accident until May 2015 when he began his graduated return to work. Prior to the 2016 accident, he was working full-time hours at HSBC but was still experiencing headaches and had difficulty concentrating. The injuries the plaintiff suffered in the first accident were aggravated by the 2016 accident. The plaintiff was laid off at HSBC in February 2016. He would not return to work until January 2017 at one of his father's companies. The defendants submitted that the plaintiff was still suffering from injuries and symptoms associated with a 2009 accident at the time of the 2013 accident. The defendants conceded that the plaintiff likely suffered and sustained soft tissue injuries to his neck and back as a result of the accidents but those difficulties had largely resolved. The defendants similarly conceded that the plaintiff likely suffered from depression and anxiety related to the accidents but that they have largely resolved as well. They submitted that the plaintiff was already working for his father and was likely to fulfill his career trajectory.  HELD: Action allowed.  The plaintiff was continuing to complain about persistent neck, shoulder, and back pain caused by the 2009 accident in 2012. The 2013 and 2016 accidents exacerbated the pain to the plaintiff's neck and back. The plaintiff suffered, and continued to experience, headaches and significant pain of his neck and back. His tinnitus, visual vestibular mismatch, poor sleep, mood disturbance, fatigue, and cognitive difficulties were, on a balance of probabilities, caused directly or indirectly by the accidents. The plaintiff developed significant psychiatric symptoms that adversely affected his ability to return to work and, later, to perform his work duties. He also developed a somatic symptom disorder. It was not without struggle that the plaintiff performed his job, despite the accommodations and support provided by his family. The plaintiff's social relationships were effected and he was unable to maintain his prior active lifestyle. He was no longer competitively employable and was limited to working in an accommodated position at his family business where he was severely limited in his ability to advance. An appropriate award for non-pecuniary damages was $170,000. The plaintiff's past wage loss was fixed at $115,000, subject to relevant deductions. There was some prospect that the plaintiff's tinnitus, imbalance problems and chronic pain would affect his career and employability in the future. The sum of $275,000 was fair and reasonable compensation to the plaintiff for loss of future earning capacity. The sum of $80,000 was awarded for the cost of future care and $23,000 was awarded for loss of housekeeping capacity. Special damages were agreed at $34,941. |

**Statutes, Regulations and Rules Cited:**

Court Order Interest Act, *R.S.B.C. 1996, c. 79*,

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

**Counsel**

Counsel for the Plaintiff: S.J .Turner, N. Tsoi.

Counsel for the Defendants: K. Armstrong, R.S. Wallia.

**Reasons for Judgment**

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| **CROSSIN J.** |

**1**   This is a motor vehicle accident case. The trial, like many in this area, is, in essence, an exercise in assessing how, and to what extent, damages will, and can, compensate a plaintiff for the ramifications flowing from the injuries suffered.

**2**  To this end, the court was presented with opinion evidence of expert witnesses in various fields of endeavour. Counsel for the plaintiff called 11 expert witnesses; counsel for the defendant was satisfied with six. There was some agreement among the experts, but much more divergence in opinion than common ground.

**3**  The narrative in this matter begins in 2013.

**4**  The plaintiff, Mr. Adam Sharpe, was injured in a motor vehicle accident on July 24, 2013 when his vehicle was rear ended by one of the defendants, Mr. Koomson, at an intersection in Surrey, British Columbia (the "2013 accident"). The plaintiff suffered from musculoskeletal injuries and a myriad of other symptoms following the 2013 accident.

**5**  Although the plaintiff slowly began improving with rehabilitative efforts and time, he was involved in another motor vehicle accident on January 18, 2016 with the other defendant, Mr. Mohamed (the "2016 accident").

**6**  Liability for both the 2013 accident and the 2016 accident (together, "the Accidents") was admitted. There was some dispute as to causation of the plaintiff's symptoms; however, the majority of the trial proceeded on an assessment of damages on which the parties differed significantly.

**7**  The plaintiff is 39 years old and currently resides in North Vancouver with his wife and newborn baby. At the time of the 2013 accident, the plaintiff worked at HSBC as an IT Analyst. He had worked in this position since 2009.

**8**  Paul Sharpe, his father, is the owner of two sound production companies, Sharpe Sound Studios and Sharpe Sound Television (the "Sharpe family business"). His father operates the Sharpe family business with Ms. Jacqueline Cristianini, the plaintiff's stepmother. For decades, the Sharpe family business has offered, and continues to offer, sound and recording services to the film and television industry.

**9**  The plaintiff submits that it was his long-term plan, and the long-term plan of the Sharpe family, to have the plaintiff return to take over and operate the Sharpe family business, perhaps as his father and stepmother transitioned into retirement. In his early 20's, the plaintiff worked at Sharpe Sound Studios ("SSS") full-time for a number of years and part-time while he attended school. The plaintiff and various witnesses testified to his early aptitude in relation to the craft. They asserted that the plaintiff was well situated to take over the Sharpe family business in due course.

**10**  Prior to the Accidents, the plaintiff was an athlete and lived a "no car lifestyle". He enjoyed playing softball in the summers, pick-up soccer, and football. He admitted, however, that he no longer played touch football at the time of the 2013 accident. He skied. He was an avid runner and enjoyed cycling. He would partake in exercise and weight training.

**11**  The plaintiff submits that, shortly following the 2013 accident, he experienced headaches and pain in his neck, back, and ribs. He would subsequently experience imbalance problems, tinnitus, light and noise sensitivity, sleeping difficulties, poor memory, anosmia, depression, and anxiety. Although the plaintiff made several attempts to return to HSBC after the 2013 accident, his symptoms precluded a successful return. He was largely out of work from the 2013 accident until about May 2015 when he began his graduated return to work.

**12**  Rehabilitative efforts were underway but were interrupted by the 2016 accident. Prior to the 2016 accident, the plaintiff was working full-time hours at HSBC but was still experiencing headaches and had difficulty concentrating. The plaintiff submits that the same or similar difficulties he experienced after the first accident were aggravated by the 2016 accident. The plaintiff was laid off at HSBC shortly thereafter, on February 3, 2016. He would not return to work until January 2017 at SSS.

**13**  The plaintiff has continued comprehensive rehabilitative efforts following the Accidents. Counsel for the plaintiff submits that despite these dedicated efforts, the plaintiff continues to experience headaches, dizziness, nausea, tinnitus, neck and back pain, certain light sensitivity that requires special glasses, fatigue, and cognitive and emotional difficulties. The plaintiff submits that the persistence of his symptoms indicates their chronic nature and it is therefore unlikely that the plaintiff will ever fully recover from them. There is some expert opinion evidence to support this contention which I will address in due course. The plaintiff submits that these symptoms prevent him from taking over the Sharpe family business as was his plan but for the Accidents.

**14**  The defendants take a more skeptical position on the severity of the Accidents and the physical and emotional consequences associated with the Accidents.

**15**  In August 2009, the plaintiff was injured in a separate motor vehicle accident (the "2009 accident"). The defendants take the position the plaintiff was still suffering from injuries and symptoms associated with the 2009 accident at the time of the 2013 accident. While the defendants concede the plaintiff likely suffered and sustained soft tissue injuries to his neck and back as a result of the Accidents in issue, these difficulties, the defendants submit, have largely resolved. The defendants similarly concede that the plaintiff likely suffered from depression and anxiety related to the Accidents but that they have largely resolved as well. The defendants do not concede that the plaintiff suffered from a concussion as a result of the Accidents.

**16**  On the whole of the evidence, the defendants submit that the plaintiff is on a career trajectory that will allow him to fulfil his reasonable and realistic employment opportunities, be it in the financial or film industry. In fact, the plaintiff is currently working at SSS as an ADR Recorder and has undertaken many managerial tasks required to operate the Sharpe family business. For this reason, the defendants submit that the plaintiff has not proven causation on all of the plaintiff's alleged symptoms nor a real and substantial possibility of a loss of future earning capacity.

**I. EVIDENCE OF NON-EXPERT WITNESSES**

**A. Adam Sharpe**

**1. Employment**

**17**  After the plaintiff graduated from Handsworth Secondary School, he worked at several jobs. The plaintiff testified that he devoted a great deal of time working at the Sharpe family business, starting from the bottom and moving up to learn various aspects of the business. His long-term goal was to take over his father's position as the senior Rerecording Mixer, which is the critical role of finalizing the sounds for movies and television. His father became one of the leading figures in the industry as a Rerecording Mixer and is credited for the success of the Sharpe family business. The plaintiff testified that it was always his intention, and the intention of his family, that he continue the Sharpe family legacy in this position.

**18**  The plaintiff testified that he decided to attend Capilano University for a diploma in business administration in order to increase his knowledge for the benefit of one day running the Sharpe family business. He also wanted to succeed on his own. There was some evidence before me that the plaintiff struggled with the perception of colleagues at SSS who viewed him as only the boss' son. While he attended Capilano University, the plaintiff worked at SSS on the odd weekend each month.

**19**  Following his graduation from Capilano University, the plaintiff obtained employment with HSBC. The plaintiff testified that he did not immediately return to the Sharpe family business because employees were being laid off due to the recession and he did not want to leave someone without a job. He also testified that the position at HSBC gave him the opportunity to live in downtown Vancouver, to seek further financial independence, and to gain more experience about the business side of running the companies. The plaintiff was still employed at HSBC at the time of the 2013 accident.

**20**  At HSBC, he started at the help desk as an IT analyst for internal staff and also assisted as an operations analyst doing quality assurance. Over the years, the plaintiff progressed in the company and began to work with department heads. His bilingual skills served him well in this position. His evidence is that, in 2013, he planned to continue his ascent at HSBC to enhance his understanding of the operation of a large corporation. His long-term plan continued to be his return to the Sharpe family business, although there was no structured timeline for this return. In 2013, his father was 60 years of age and his stepmother was 70.

**21**  With respect to the 2013 accident, the plaintiff testified that his vehicle was rear-ended at an intersection, which pushed his vehicle into the middle of the intersection. The plaintiff said that when he realized what had happened, he drove away from the intersection and into a mini mall. The plaintiff did not recall whether he hit his head upon impact. There was no evidence that the plaintiff lost consciousness. No emergency first responders attended. The damage to the plaintiff's vehicle was approximately $3,000. Indeed, photographic evidence revealed modest damage to the plaintiff's vehicle.

**22**  The plaintiff testified that he spent some time at the mini mall and spoke to the defendant, Mr. Koomson. He testified to experiencing neck pain and that Mr. Koomson brought him a bag of ice to alleviate some of that pain. He also said he felt overwhelmed, dizzy, and confused. Despite these symptoms, the plaintiff thereafter drove himself to his girlfriend's place of employment and she subsequently drove him home.

**23**  The plaintiff did not return to work the day after this accident. He called his family physician's office two days after the accident, but she was out of town. He subsequently attended at a walk-in clinic where he was advised by the physician to use ice and ibuprofen for the pain in his neck, back, and ribs. Around this time, the plaintiff said he vomited unexpectedly while out walking with his girlfriend.

**24**  Shortly thereafter, the plaintiff attended at the office of his family physician, Dr. Clark, but was examined by Dr. Gaede in her absence. The plaintiff complained that his symptoms became more severe, testifying that his short-term memory was affected, he felt overwhelmed with simple tasks, and was unable to return to work.

**25**  The plaintiff made several unsuccessful attempts to return to work before May 2015; however, he was often overwhelmed. He had trouble following conversations. His headaches and the ringing in his ears made it difficult for him to concentrate. Tasks that he had no problem performing prior to the 2013 accident became difficult and time consuming. This difficulty contributed to his low mood and feelings of helplessness. He was prescribed anti-depressants shortly thereafter. The plaintiff was on and off the anti-depressants until March 2017.

**26**  His return to work was further delayed when, in January 2015, the plaintiff underwent ACL surgery and recovery for his knee which he injured on August 15, 2014 when the plaintiff miscalculated the height of a porch step and fell. The plaintiff testified that his knee was improved and was not interfering with his life.

**27**  The plaintiff testified to returning to HSBC in the spring of 2015, although in a slightly different and more isolated capacity. The work was difficult and he considered applying to a different department before the 2016 accident.

**28**  The 2016 accident involved the defendant driving into the front of the plaintiff's car after misjudging the distance between the vehicles while switching from the left lane into the right lane where the plaintiff was driving his vehicle. The front left and front side of the plaintiff's vehicle was struck. Similar to the 2013 accident, little damage to the vehicle resulted. In fact, the plaintiff said, at his examination for discovery, that his vehicle remained within his lane. The vehicle underwent some repair but was not written off. No emergency first responders attended at the scene of the accident, nor did the plaintiff attend at a hospital or to see Dr. Clark. The plaintiff testified to being alert and cognizant, even taking the initiative to follow-up with the defendant, Mr. Mohamed, to ensure he admitted fault and to find witnesses. He said he began to feel pain and confusion thereafter.

**29**  Following the second accident, the plaintiff said his tinnitus was louder and that his back felt tight. He said that his headaches and depression worsened following the 2016 accident. Although the plaintiff said some injuries and symptoms from the 2013 accident were aggravated by the 2016 accident, he admitted on cross-examination that some of his difficulties had improved as of March 2018 such that the symptoms were better than they were prior to the 2016 accident. These symptoms include his difficulty following conversations, his dizziness, his cognitive challenges, and his neck pain. The plaintiff said that the 2016 accident did not worsen his light sensitivity, his "brain fog", and short-term memory problems.

**30**  Although Dr. Clark's notes included an expression from the plaintiff that he was "overall feeling well", the plaintiff did not adopt this statement on cross-examination. Furthermore, although the plaintiff had not seen Dr. Clark in respect of the Accidents from August 2017 to May 2018, the plaintiff disagrees with the suggestion that he was doing well.

**31**  A week or so following the 2016 accident, the plaintiff was laid off from HSBC. The plaintiff said that this undermined his confidence and caused him distress. He was prescribed antidepressants again shortly thereafter.

**32**  The plaintiff did not return to work again until January 2017 when he returned to SSS. Although he had some difficulty that first month, the plaintiff testified to the fact that he was able to work full-time as an ADR Recorder which gave him more control over his environment, permitting him to take breaks during the day and starting and finishing early before the fatigue set in. The plaintiff also said he was taking on managerial tasks, and that his long-term goal was to be in charge of the Sharpe family business operations but not as the critical creative person, the Rerecording Mixer. Although he testified to wanting the Rerecording Mixer position, his symptoms, particularly the tinnitus, make it unlikely he will ever be able to.

**2. Symptoms**

**33**  The plaintiff's medical history is relevant.

**34**  Prior to the 2013 accident, the plaintiff suffered from rheumatoid arthritis over the years which caused his hands and feet to swell. The problem apparently dissipated by 2010. He also suffered from migraines as a young man but they were alleviated with a change in diet. The plaintiff further testified, following his education on concussion-related symptoms, that he likely sustained undiagnosed concussions in his youth while playing contact sports and skiing.

**35**  In addition, as I have said, the plaintiff suffered from soft-tissue injuries and other related injuries caused by the 2009 accident. The plaintiff asserts, however, that the only symptoms still troubling him from the 2009 accident, prior to the 2013 accident, were tension headaches that occurred a few times a month. These headaches were not so severe as to interfere with his work. I note, however, that there is documentary evidence from Dr. Clark and a neurology report by a Dr. Stewart that the plaintiff was still complaining about difficulty focusing, headaches, and neck and back pain caused by the 2009 accident prior to the 2013 accident.

**36**  The plaintiff concedes that there has been improvement in his symptoms. In particular, his sense of smell and taste has returned. His mood has improved. He has indicated the range of motion in his neck has improved with physiotherapy.

**37**  He says he continues to experience neck and back pain, headaches, fatigue, dizziness and imbalance problems, intermittent sleep difficulty, light sensitivity, and tinnitus.

**38**  The tinnitus is of particular focus in this case and was described by Dr. Longridge as an internal sound created by the individual. The plaintiff has described it as a constant ringing in both ears. The plaintiff wears "maskers" which generate a louder noise to alleviate the tinnitus outside of work and says they are effective. They do not assist, however, when he must remove them to perform his ADR Recorder duties at SSS. The plaintiff also said that the use of tinted glasses alleviates his light sensitivity.

**39**  The dizziness and imbalance have also played a role in the plaintiff's life post-accident. He was diagnosed by Dr. Longridge as having visual vestibular mismatch, which I will discuss in due course. As a result of these symptoms, the plaintiff has recounted numerous instances in which dizzy spells and imbalance problems have caused him to fall at his sister's home, in the park, and by his car. Some of these falls caused him to hit his head which exacerbated the severity of his headaches for a time. Other falls have aggravated his soft tissue injuries. The plaintiff suspects, for example, that the August 2014 fall that injured his knee was due to his imbalance issues.

**40**  Although the plaintiff says that his back and neck pain have improved, he still has daily tightness and pain that he relieves with essential oils, heat packs, and ibuprofen, among other things. The plaintiff testified that the pain impaired his work "to some extent" since his return to SSS. He continues physiotherapy and exercises.

**41**  For example, the plaintiff receives Botox injections to manage his headaches, which last approximately three months. During that period, his headaches are less frequent and easier to manage. Although the plaintiff has reported some difficulty sleeping, he testified at trial that he takes zoplicone once every one to two months when he has such difficulty.

**42**  When addressing his other symptoms, the plaintiff testified that he experienced two big dizzy episodes in the last 18 months before trial but that the dizziness symptoms had begun to improve as of May 2016. The plaintiff no longer has issues with blurred vision unless he stares at a screen for too long. He continues to experience light sensitivity and some deficits in concentration. He continues to deal with his tinnitus with the use of maskers.

**3. Social relationships**

**43**  Prior to the Accidents, the plaintiff enjoyed socializing with friends. Following the Accidents, the plaintiff has had difficulty following conversations. The combination of his symptoms made it difficult for him to socialize as often and to the same extent that he used to. The plaintiff said he made an effort to go out and to "not be forgotten".

**44**  The relationship with his family has remained relatively the same, if not better. The plaintiff has described the close, positive, and supportive relationship he has with both his parents and stepmother. Although he described his relationship with his sister as not being "close", the plaintiff said at trial that his relationship with his sister was about the same as it was prior to the Accidents. He testified that he tried to see his nieces when he could, but was unable to see them as much as he would like.

**45**  Of some importance, however, is the plaintiff's romantic relationship. At the time of the 2013 accident, the plaintiff was in a romantic relationship with a Ms. Erin Maher. The two separated when Ms. Maher was offered a job on Vancouver Island. At the end of 2013, the plaintiff met Mrs. Rosanna Sharpe online and began a romantic relationship with her. Despite his symptoms and difficulties, the plaintiff started and nurtured a long distance relationship with Mrs. Sharpe from December 2013, about six months after the 2013 accident, until June 2016 when they were married. At the time of trial, Mrs. Sharpe was due to have their first child.

**46**  The plaintiff has described his relationship with Mrs. Sharpe as being one of great support and understanding.

**B. Rosanna Sharpe**

**47**  Mrs. Sharpe testified to the fact the two became acquainted online following the 2013 accident. As such, Mrs. Sharpe has no firsthand knowledge of the plaintiff prior to the Accidents. She was working in Seattle at the time; however, the two began a long distance relationship thereafter. Early on in their relationship, they would see each other once or twice monthly until they were married.

**48**  In due course, the plaintiff disclosed to Mrs. Sharpe that he had been involved in the 2013 accident and had difficulties associated with the accident. She testified that, at times, the plaintiff had a short temper. He had difficulty being around large groups of people and difficulty socializing in general. He had to wear special tinted glasses and hearing aids which made him self-conscious. He had difficulty following conversations and he stumbled a lot. Following the 2016 accident, Mrs. Sharpe testified that he was more anxious about being in a vehicle. She said he was more irritable and emotional.

**49**  When she moved in with the plaintiff in 2017, she noted that he was sedentary and focused his energy on doing well at work. Mrs. Sharpe testified to cooking and cleaning, although the plaintiff tried to assist at times.

**50**  Mrs. Sharpe also testified that the couple learned to communicate better once she obtained a better understanding of his symptoms and difficulties. She expressed particular concern about the potential difficulties ahead for the plaintiff, but also for their family, as they enter parenthood. She testified that the plaintiff had difficulties being around his nieces at times, that he already had some difficulty sleeping, and that the responsibilities of being a parent may be more onerous for the plaintiff than one might normally expect.

**C. The plaintiff's parents**

**51**  The plaintiff's parents spoke generally about the plaintiff's physical and emotional state prior and subsequent to the Accidents.

**52**  In particular, Ms. Lynn Sharpe, the plaintiff's mother, testified that the plaintiff was always physically active and added some evidentiary support concerning the plaintiff's list of sports and physical activities since he was a high school student until prior to the Accidents.

**53**  A few days following the 2013 accident, Ms. Sharpe saw the plaintiff and testified that he complained of headaches and pain. Thereafter, the plaintiff was often tired. He had gained weight. He was not as active as he once was. Following the 2016 accident, Ms. Sharpe testified that he could not cook. He was forgetful. He was more emotional. He was confused. He had difficulty with noises and, in fact, reduced visits with his nieces because the activity bothered or overwhelmed him. He was more judgmental. Overall, Ms. Sharpe testified that the plaintiff's disposition and lifestyle had changed.

**54**  Mr. Paul Sharpe, the plaintiff's father, largely corroborated the evidence of Ms. Sharpe and the plaintiff of his disposition and lifestyle prior to the Accidents. He testified that he was shocked when he saw the plaintiff after the 2013 accident. He described the plaintiff as "emotionally frail". He was depressed, lethargic, and confused. Mr. Sharpe noted, however, a slow improvement when the plaintiff returned to work at SSS in January 2017 but continued to have difficulty adjusting with too many people in a room as there was too much stimulation and distraction.

**55**  Ms. Jacqueline Cristianini, the plaintiff's stepmother, owns Sharpe Sound Television ("SST"). She described the plaintiff as passionate while a worker at SSS in or around 2000 to 2006 and she confirmed that it was always her intention, and the intention of Mr. Sharpe, that the plaintiff would take over the Sharpe family business in due course. She largely corroborated Mr. Sharpe's evidence as to the plaintiff's change in disposition and lifestyle. After the Accidents, she described him as depressed, emotional, and lethargic. Like Mr. Sharpe, Ms. Cristianini noticed improvement in the plaintiff upon his return to SSS in January 2017.

**D. HSBC witnesses**

**1. Ms. Jolene Boisvert**

**56**  Ms. Jolene Boisvert is a senior manager at HSBC. She testified that she made the decision to hire the plaintiff in 2009 and that he was a good worker, reliable, and willing to excel. He worked reasonably well with his co-workers and in large groups.

**57**  Following the 2013 accident, and the plaintiff's return to work in May 2015, Ms. Boisvert described the plaintiff as "quite different". She testified that he required accommodations at work, as he had difficulty with noise and lights. He was subsequently given a room of his own where he could control his environment by dimming the lights and filtering out the noise. Ms. Boisvert also described Adam as emotional. She observed him crying on numerous occasions. He also had difficulty with pressure at work.

**2. Mr. Kenji Konno**

**58**  Mr. Kenji Konno was a co-worker of the plaintiff at HSBC. Mr. Konno held a position in IT security in 2011 before he became a manager in 2012. At that time, the plaintiff reported to Mr. Konno.

**59**  Mr. Konno testified that the plaintiff was smart, friendly, and reliable. He took the initiative and had potential. Mr. Konno conceded, however, that at times the plaintiff had issues with his coworkers.

**60**  Following the 2013 accident, Mr. Konno testified that the plaintiff struggled and required work accommodations. Shortly thereafter, Mr. Konno testified that the plaintiff went on long-term disability. At the time, Mr. Konno observed the plaintiff's speech was slow, that he complained of dizziness/vertigo, and had difficulty looking at computer screens.

**E. Sharpe Sound Studios**

**1. Mr. Sharpe**

**61**  Mr. Sharpe separated from the plaintiff's mother and thereafter lived in Los Angeles during the plaintiff's formative years and was successful in the sound production business. He returned to Vancouver in the 1990s to build and operate SSS. He was successful as a Rerecording Mixer, having attracted customers in the movie and television industry to his sound production business. He had built up a reputation in the industry, and many of his clients knew and trusted him. New clients came to SSS for his name and reputation.

**62**  Mr. Sharpe gave evidence that the plaintiff began working full-time at SSS as a young man in 2000 until about 2006. He began his career at SSS at the lower rung and slowly began learning and adjusting to new roles within the company. The plaintiff then made the decision to obtain a business administration diploma at Capilano University.

**63**  Mr. Sharpe testified, however, that it was understood that the plaintiff would return to take over SSS one day. Indeed, Mr. Sharpe spoke to financial and other professionals for advice for the prospective transfer of SSS to the plaintiff, albeit without the plaintiff's knowledge. When the 2008 financial crisis struck, Mr. Sharpe was happy to support the plaintiff in his role at HSBC. Mr. Sharpe indicated that there was no set timeline for the plaintiff's return to SSS.

**64**  In Mr. Sharpe's opinion, the plaintiff will never be able to be a Rerecording Mixer and would not be able to run the company, at least in that role. He described the plaintiff in his current role as "not a detriment, but not an asset". He testified, however, that there was potential for the plaintiff to work in sales.

**65**  Mr. Sharpe testified and described the financial position of the Sharpe family business. He conceded that the business experienced a downturn following the 2008 financial crisis. He further conceded that he has not taken a salary from the company since 2010. Mr. Sharpe stated that he had no need to take a salary due to the "purification" process they were undertaking with respect to the company. Mr. Sharpe further stated that he was confident that the company was expected to see an increase in business and profit. As such, he was confident the plaintiff would remain in a good position in the company, but that the plaintiff would be unable to demand a salary equivalent to a Rerecording Mixer.

**66**  Although Mr. Sharpe testified that the company was in a good position even if it had to potentially replace their current senior Rerecording Mixer, Mr. Kelly Cole, he later testified that if Mr. Cole left the company, their key clients would leave with him. I note, however, that Mr. Cole has worked at SSS for approximately 25 years and has not indicated an intention to leave, particularly since replacing Mr. Sharpe as the senior Rerecording Mixer at SSS.

**2. Mr. Kelly Cole**

**67**  Mr. Kelly Cole, the senior Rerecording Mixer at SSS, has been employed at SSS for approximately 25 years. He described the Rerecording Mixer as the critical role in the company of finalizing and creating the soundtrack for a movie. He described the role as requiring technical and creative skills, with a strong psychological component.

**68**  Mr. Cole testified that he remembered the plaintiff performing well in 2000-2006 when he first began working for SSS; however, Mr. Cole's opinion was that the plaintiff would not, today, be successful in the Rerecording Mixer role as the plaintiff had difficulty with loud sounds, long hours, and fatigue. He also testified that the plaintiff was doing well in his position as ADR Recorder, and that they were attempting to transition the plaintiff into a management role.

**II. THE EXPERT EVIDENCE**

**69**  Both counsel tendered the opinion evidence of experts.

**70**  Counsel for the plaintiff tendered opinion evidence from five medical experts: Dr. Cynthia Clark, Dr. Janette Lindley, Dr. Neil Longridge, Dr. Zohar Waisman, and Dr. George Medvedev. Counsel for the plaintiff also tendered opinion evidence from six non-medical experts: Dr. Ursula Wild, Dr. Sean Pritchard, Dr. Sherri Hayden, Mr. Richard Carlin, Ms. Beverley Wilson, and Mr. Darren Benning.

**71**  Counsel for the defendants tendered opinion evidence from three medical experts: Dr. Roy O'Shaughnessy, Dr. Alistair Prout, and Dr. Desmond Bell. Counsel for the defendants also tendered opinion evidence from three non-medical experts: Mr. Doug Hildebrand, Dr. Sherri Hayden, and Dr. Colleen Quee Newell.

**A. Family physician**

**72**  Dr. Clark is a medical doctor, tendered by the plaintiff and qualified as an expert in family medicine. Dr. Clark has been the plaintiff's family physician since 2002 or 2003. She prepared two reports. The opinions expressed in the first report, dated March 14, 2016, were based on in-person assessments of the plaintiff by Dr. Clark and, at times, her colleague Dr. Gaede, following the 2013 accident and a review of other records. It provided a brief history of the plaintiff's 2009 accident, Dr. Clark's assessments and recommendations, and her opinions concerning diagnosis and prognosis.

**73**  In her first report, Dr. Clark set out the observations of her colleague, Dr. Gaede, who was the first to assess the plaintiff following the 2013 accident. In light of her observations and the plaintiff's reported symptoms, Dr. Gaede's impression was that the plaintiff had sustained a concussion and musculoskeletal injuries to his neck, lower back, and ribs. However, as of August 13, 2013, the plaintiff reported his brain felt "clearer" and lumbar spine x-rays were reported as normal.

**74**  Dr. Clark's first assessment of the plaintiff in relation to the 2013 accident was on August 26, 2013. Neurologic exam results were normal except for slight loss of balance on the toe-heel walk. However, there was still persistent back and neck pain. Dr. Clark noted, however, that the plaintiff reported neck and upper back discomfort related to the 2009 accident at this time. The plaintiff also noted some difficulties with his speech fluency and word reversal.

**75**  Dr. Clark's opinion, at this time, largely reflected Dr. Gaede's impression: that the plaintiff had sustained strains to his neck and back and had symptoms consistent with a concussion. Over the course of the following weeks and months, the plaintiff had further complaints of depression, tinnitus, light sensitivity, poor sleep, dizziness, and balance problems along with persistent complaints of pain.

**76**  Some of his symptoms waxed and waned in intensity. As of August 26, 2013, the plaintiff reported general improvement, including reduced headaches and better memory and as of September 12, 2013, the plaintiff had reported improved memory and ability to focus. Chest and rib x-rays ordered due to complaints of pain revealed normal findings. As of January 8, 2014, the plaintiff reported worsening headaches in the three weeks prior. On April 17, 2014, the plaintiff reported depressive symptoms and was prescribed Cipralex, an anti-depressant medication.

**77**  On May 22, 2014, the plaintiff reported a slip-and-fall where he may have hit his head and strained his neck. His nausea and headaches worsened following this fall. As of July 14, 2014, the plaintiff reported improvement to his back and noted less tightness. He also reported less sound sensitivity and improved mood and motivation. However, the plaintiff noted that he still had daily headaches and light sensitivity.

**78**  As of September 11, 2014, the plaintiff reported improvement to his short-term memory and mood, but persistent back pain. By October 23, 2014, the plaintiff reported "overall feeling better, in that he was able to accomplish more in a day", had less back pain and on some days, he had no pain. Neurological exam results were normal following another fall on stairs without impact to his head. In Dr. Clark's opinion, the plaintiff's post-concussion symptoms were improved. On December 18, 2014, the plaintiff reported tinnitus but no ear pain.

**79**  The plaintiff underwent surgery for his right knee ACL injury on January 22, 2015 and was to recover for eight weeks. By May 2015, the plaintiff had begun a graduated return to work. However, as of September 10, 2015, the plaintiff reported difficulty performing in his prior job and fatigue from working full-time. Both Dr. Clark and Dr. Wild (reports below) advised the plaintiff that a four day workweek was appropriate.

**80**  The plaintiff was involved in his second motor vehicle accident on January 18, 2016.

**81**  Dr. Clark's first assessment of the plaintiff in relation to this accident was on January 21, 2016. Neurologic exam results revealed normal findings. In Dr. Clark's opinion, the plaintiff had sustained "a mild strain of his neck and left mid-back" and possibly a minor concussion due to his prior history of concussions. Subsequent visits affirmed the impression of a mild strain from the accident as well as aggravation of prior headaches, although examination revealed full range of motion of the neck and mild muscle tenderness of the mid and lower back.

**82**  As of March 10, 2016, the plaintiff reported soreness of his mid back only in the morning and daily headaches. He reported feeling mentally clear. On examination, Dr. Clark reported full range of motion of the neck and mid back and mild tenderness of the right neck.

**83**  Although it was Dr. Clark's opinion that the 2013 accident was significant in causing the plaintiff's neck and back pain, she did not consider the accident to be the sole cause. Indeed, Dr. Clark noted that the plaintiff reported ongoing neck and upper back pain from the 2009 accident at the time of the 2013 accident. Similarly, in Dr. Clark's opinion, the plaintiff's ongoing headaches were not solely caused by the 2013 accident, but were multifactorial in etiology, although the intensity and frequency of the headaches were likely a result of the accident.

**84**  With regard to the plaintiff's other concussion-related symptoms, including his depression and anxiety, it was Dr. Clark's opinion that they were largely attributable to the 2013 accident, although Dr. Clark noted that the plaintiff may have been predisposed to post-concussion symptoms due to his history of prior concussions. In Dr. Clark's opinion, these symptoms accounted for the plaintiff's inability to work after the accident, although she was reluctant to comment on the extent to which the accident impaired the plaintiff's ability to perform his work duties and the prognosis for these concussion-related symptoms.

**85**  In Dr. Clark's opinion, it was possible that the plaintiff's impaired sense of balance following the 2013 accident contributed to his fall and subsequent ACL injury on August 8, 2014.

**86**  In Dr. Clark's opinion, the prognosis for the plaintiff's musculoskeletal symptoms of neck and back pain was that they would likely continue to improve, particularly with future physiotherapy and other physical therapies targeting those symptoms. It was her opinion that such musculoskeletal symptoms were unlikely to limit his future work opportunities or his recreational activity in the long-term.

**87**  Dr. Clark's second report, dated May 27, 2018, largely responded to specific questions posed by the plaintiff's counsel, including the status of the plaintiff's recovery, his symptoms and complaints following the first report, and prognosis.

**88**  On June 6, 2016, the plaintiff reported feeling depressed and was prescribed Cipralex once again by Dr. Glen. At a follow-up appointment with Dr. Glen six weeks later, the plaintiff reported feeling more positive and optimistic and by June 15, 2017, the plaintiff reported that he had weaned himself off of the Cipralex about three months prior and felt "fantastic".

**89**  On August 29, 2016, the plaintiff reported an episode of dizziness while loading the trunk of his car which led to a fall that resulted in him hitting the right side of his head on the car. He reported right-sided headaches and dizziness. As of June 15, 2017, the plaintiff reported feeling well due to Botox treatments for his headaches administered by Dr. Dommann.

**90**  In response to whether the plaintiff's injuries from 2013 caused impairment that resulted in disability from work and normal activities, Dr. Clark's opinion reflected her previous report although she was not aware of the plaintiff's current status with regard to normal activities or ability to exercise.

**91**  According to Dr. Clark, as of May 27, 2018, the plaintiff had not seen Dr. Clark since August 17, 2017 with regard to the Accidents. In Dr. Clark's opinion, the plaintiff reported continued improvement and ongoing resolution of his symptoms since September 2016.

**92**  With respect to anticipated future treatment and costs, diagnoses and prognosis of the plaintiff, Dr. Clark made reference to her prior report and deferred to experts where specific questions regarding future treatment and costs fell outside her expertise. At trial, Dr. Clark deferred to Dr. Hayden's opinion following a clinical neuropsychological assessment.

**B. Psychiatrists**

**1. Dr. Waisman**

**93**  Dr. Waisman is a medical doctor and a certified specialist in forensic psychiatry with extensive experience in objective evaluation in personal injury litigation, mainly in Ontario. Dr. Waisman was tendered by the plaintiff and qualified as an expert to give evidence regarding the plaintiff's psychiatric issues relating to the accident. Dr. Waisman carried out an independent psychiatric evaluation of the plaintiff on March 4, 2017. The plaintiff also completed psychometric testing.

**94**  Dr. Waisman described the plaintiff as a pleasant man with depressed affect and obvious pain behaviours. During the interview, the plaintiff reported, among other complaints, constant pain to his neck, back and shoulders, tinnitus, depressed mood, disturbed sleep, symptoms of anxiety, cognitive difficulties such as poor memory and diminished attention and concentration, and a sense of loss of control.

**95**  On psychometric testing, the plaintiff scored above average for pain patient depression and anxiety scales, and above average on the somatization scale. According to Dr. Waisman, such results indicate that the patient tends to experience chronic fatigue, a sense of hopelessness or helplessness, significant agitation or generalized fear or apprehension, and is preoccupied by pain or health-related issues. The plaintiff's results reflected diagnostic complexity and severity of impairment.

**96**  In his first and main report dated June 21, 2017, Dr. Waisman concluded that the plaintiff was the type of person to minimize his psychological injuries and to cope by keeping busy with work and physical pursuits. Due to the nature of his injuries and symptoms from the Accidents, Dr. Waisman's opinion was that the plaintiff could not cope with his symptoms in the manner with which he was comfortable or familiar. This, too, added to his distress.

**97**  In light of the plaintiff's combined impairments, it was Dr. Waisman's opinion that the plaintiff suffered significant compromise of his competitive employability due to the symptoms arising from the Accidents, including his chronic pain and cognitive inefficiencies exacerbated by unstructured work settings. These symptoms would result in lower levels of work efficiency and affect the performance of his work duties. The plaintiff's experience of pain over time combined with his psychiatric symptoms would require him to draw on his energy resources and leave them increasingly depleted. Fatigue would cause further symptoms such as feelings of depression, helplessness, and lack of motivation.

**98**  In Dr. Waisman's opinion, the prognosis for the plaintiff was guarded, given that he continued to show significant and pervasive psychological symptoms and pain-related difficulties that, on a balance of probabilities, indicated he would be left with ongoing symptoms and functional limitations. Dr. Waisman noted that physical and psychological impairment tended to affect employability generally when chronic symptoms arise.

**99**  In terms of general treatment, Dr. Waisman recommended that comprehensive management of the plaintiff's chronic pain across multiple disciplines be considered. Dr. Waisman also recommended that the plaintiff attend cognitive behavioural therapy to address issues of pain management, sleep hygiene and adjustment to disability. Careful pharmacotherapeutic management and continued active therapy were also recommended.

**100**  In his addendum report dated May 23, 2018, Dr. Waisman answered specific questions posed by the plaintiff's counsel. In particular, it was Dr. Waisman's opinion that the plaintiff "continued to present with the similar clusters of symptoms to other assessors and treatment providers since June 21, 2017" and that the accident was the cause of those injuries.

**101**  In response to the plaintiff's counsel's direction to indicate the period of partial or total disability, Dr. Waisman responded only that there was currently total disability. Dr. Waisman's opinion was that the plaintiff's current psychiatric conditions make him more vulnerable to the effects of future trauma and that continued psychotherapy for at least one year was recommended to be followed by reassessment.

**102**  In a final addendum report dated August 27, 2018, Dr. Waisman stated that his opinion in his two previous reports remained unchanged despite further review of medical and expert documentation.

**2. Dr. O'Shaughnessy**

**103**  Dr. O'Shaughnessy is a medical doctor and psychiatrist. Dr. O'Shaughnessy has been designated a founder of forensic psychiatry and was tendered by the defendants and qualified as an expert in the area of forensic psychiatry, qualified to give evidence regarding the plaintiff's psychiatric symptoms relating to the accident. Dr. O'Shaughnessy carried out an independent psychiatric evaluation on the plaintiff on January 19, 2015.

**104**  During the interview, the plaintiff reported complaints of neck and back pain, poor sleep, depression, dizziness and imbalance issues, and cognitive difficulties, including concentration and memory. However, the plaintiff also reported that his ongoing pain from his soft tissue injuries were relatively mild and did not appear to interfere with functioning. Dr. O'Shaughnessy described the plaintiff as presenting himself as "being quite disabled" during the interview.

**105**  Dr. O'Shaughnessy's opinion was that the plaintiff did not suffer a concussion at the time of the 2013 accident. In reaching this conclusion, Dr. O'Shaughnessy considered the plaintiff's account of the events in question to be inconsistent with a concussion or traumatic brain injury, including no suggestion of direct trauma to the head and the lack of affirmation of any significant symptoms of impaired awareness or memory beyond a microseconds' duration upon impact. This was a tentative opinion to be re-evaluated upon receiving information regarding the plaintiff's demeanour and behaviour immediately following the accident from the defendant and persons at the Greek restaurant where both parties had stopped to exchange information.

**106**  In Dr. O'Shaughnessy's opinion, the plaintiff's complaints and symptoms are subjective. The symptoms described as "post-concussive" were non-specific and could be observed in trauma, pain, depression, anxiety or a variety of non-concussive events. Screening cognitive tests were within normal limits.

**107**  Furthermore, it was Dr. O'Shaughnessy's opinion that Dr. Clark committed a methodological error when she confirmed a diagnosis of concussion based on the plaintiff's reported symptoms some time after the accident occurred without basing her opinion on evidence of impairment in awareness, memory, or consciousness at the time. Dr. O'Shaughnessy considered the criteria for diagnosing concussions from organizations such as the World Health Organization (WHO), the American Psychiatric Association (APA), and the American Congress of Rehabilitation Medicine (ACRM), and noted that the plaintiff would not have met the criteria set out by the WHO or APA. Dr. O'Shaughnessy stated that the plaintiff may have arguably met the criteria set out by the ACRM on a liberal analysis of the criteria, but only at the mild end of the spectrum which would not have led to the difficulties subsequently described by the plaintiff.

**108**  In Dr. O'Shaughnessy's opinion, the plaintiff did not have disabling memory difficulties and the memory difficulties the plaintiff did affirm were extremely mild and would not cause any major problems. Rather, the plaintiff's complaints of memory difficulties were consistent with, or properly described as, focus or attention problems.

**109**  Dr. O'Shaughnessy also questioned whether the plaintiff suffered from severe depression in light of his behaviour and account of events that appeared to be inconsistent with such a diagnosis.

**110**  In particular, Dr. O'Shaughnessy noted that the plaintiff started a serious, long distance relationship shortly after his last relationship terminated; that the plaintiff was unable to describe his depressive symptoms in any detail beyond that he was feeling depressed; and that he did not present any signs or symptoms of depression at the interview. Dr. O'Shaughnessy noted, however, that this may have been a good response to the anti-depressant medication prescribed by Dr. Clark and considered a review of Dr. Clark's records as to his symptoms to be helpful in determining whether the diagnosis of severe depression was appropriate.

**111**  Dr. O'Shaughnessy noted difficulties clarifying and understanding the plaintiff's symptoms of dizziness and imbalance. He noted, however, that Dr. Lindley, ophthalmologist, may be able to clarify or explain.

**112**  In light of the plaintiff's demeanour during the interview, it was Dr. O'Shaughnessy's opinion that the plaintiff might have somatic symptoms disorder which made him preoccupied with his injuries and led him to perceive greater disability than one would expect. In Dr. O'Shaughnessy's opinion, anxiety symptoms were likely the plaintiff's principal deficit. Dr. O'Shaughnessy noted, however, that the plaintiff denied more focused symptoms of anxiety such as phobias, panic attacks, symptoms of post-traumatic stress disorder, or generalized anxiety symptoms.

**113**  It was Dr. O'Shaughnessy's view that there was no major disability, from a psychiatric perspective, preventing the plaintiff from returning to his IT position at HSBC.

**114**  In his second report dated June 4, 2018, following a review of medical and expert documentation, Dr. O'Shaughnessy confirmed and affirmed his previous opinion that it was unlikely that the plaintiff suffered a concussion from the July 2013 accident, consistent with Dr. Prout's opinion on this point (report below).

**115**  With respect to the diagnosis of depression, Dr. O'Shaughnessy relied on review of medications to assume that the plaintiff did suffer a depressive illness following the accident. In light of this, it was Dr. O'Shaughnessy's opinion that the plaintiff's depressive illness was more likely than not to be caused by the injuries he sustained from the accident. Dr. O'Shaughnessy noted, however, that the plaintiff had weaned himself off of the anti-depressant medication as of March 2017 following the 2016 accident and that he had reported to his family physician that he was "feeling fantastic".

**116**  Dr. O'Shaughnessy deferred to the expertise of Dr. Longridge and Dr. Bell in regard to the plaintiff's complaints of hearing loss, tinnitus, and dizziness.

**C. Ophthalmologist, otolaryngologist, and otologist**

**1. Dr. Lindley**

**117**  Dr. Lindley is a medical doctor and ophthalmologist. Dr. Lindley was tendered by the plaintiff and qualified as an expert in ophthalmology to give opinion evidence concerning the treatment and diagnosis of eye disorders. Dr. Lindley saw the plaintiff on May 13, 2014 for an assessment and prepared the report on November 18, 2014.

**118**  During the interview, the plaintiff reported increased difficulty with depth perception and headaches prompted by reading and light sensitivity following the 2013 accident. He reported blurred vision when he arose too quickly. The plaintiff also reported nausea when following moving objects, even in his peripheral vision, and difficulty reading or picking out individual words. Vision difficulties began the first week or two after the accident. CT scan of the head arranged by Dr. Dommann were normal.

**119**  Upon an examination of the plaintiff, Dr. Lindley noted only one "mildly abnormal finding" of his vestibulo-ocular reflex which "supported a diagnosis of visual vestibular mismatch in concert with the symptoms described". Dr. Lindley noted:

In summary, Mr. Sharpe's symptoms can often be associated with traumatic brain injury or post-concussive states, and visual-vestibular mismatch. No other findings on examination suggested alternate diagnoses. It is therefore my opinion that this accident triggered these symptoms...

**120**  In Dr. Lindley's opinion, the plaintiff was at greater risk of increased symptomatology should further injuries be sustained.

**121**  It was Dr. Lindley's opinion that the plaintiff continue with the vestibular therapy, convergence exercises, mild readers, and amber brown polarized sunglasses out of doors to treat his ongoing symptoms.

**122**  Dr. Lindley deferred to other specialists with respect to the prognosis related to his post-concussive symptoms.

**2. Dr. Longridge**

**123**  Dr. Longridge is a medical doctor and otolaryngologist. Dr. Longridge was tendered by the plaintiff and qualified as an expert to provide opinion evidence on otolaryngology, including the diagnosis, prognosis and recommendations for treatment of tinnitus, hearing loss, hyposmia, dizziness and imbalance following the Accidents. Dr. Longridge carried out on independent medical evaluation of the plaintiff on February 16, 2016.

**124**  All tests conducted yielded normal results. In particular, basic hearing testing was normal. Dr. Longridge did not rule out damage to the cochlea at a more sophisticated level which the pure tone tests would not detect; however, Dr. Longridge failed to conduct such testing for completeness (this central auditory processing testing was done by Dr. Bell's audiologist below). Furthermore, Dr. Longridge's opinion was that return of the plaintiff's sense of smell likely indicated no further hyposmic difficulties.

**125**  During the assessment, the plaintiff reported tinnitus in both ears, more so in the left than the right for which he used maskers to generate white noise. He reported poor sleep due to the tinnitus for which he was prescribed medication. Among his other complaints, the plaintiff reported difficulty focusing in conversation, dislike of loud environments, dizziness, balance problems, nausea, headaches, and difficulty riding as a passenger in a vehicle.

**126**  Dr. Longridge described the prognosis of tinnitus in his report as follows:

...My experience with tinnitus is that it is usually at its worst when it first comes on, it can be expected to improve for a period of approximately a year and at the end of that time whatever is present is likely to be present on a long-term, permanent basis... Although the majority of patients find tinnitus is worst at the beginning and slowly improves, it has been my experience that there is a significant minority who once aware of tinnitus find that it gradually increases to become symptomatic over a period of weeks or months.

**127**  Dr. Longridge described visual vestibular mismatch in his report as follows:

...The individual has... an awareness of visual information misinterpreted into the feeling that they are moving... Where there is a lot of movement around the individual this causes confusion, distress and dizzy symptoms. The reason for this dizzy symptomatology is that the information from the balance system of the ear, as the patient is moving, does not synchronize or mesh with the information that the patient receives from their own vision resulting in awareness that there is a difference between the two and a sensation of dizziness is produced. Particular situations where this occurs are ones with a lot of movement.

**128**  In Dr. Longridge's opinion, the plaintiff's complaints of tinnitus and visual vestibular mismatch subsequent to the accident and its absence prior to the accident, in the absence of any other explanation, indicated that the accident was the probable cause of both. In Dr. Longridge's opinion, in light of the plaintiff's reported symptoms and complaints, the tinnitus should be regarded as being of moderate severity and likely to persist on a long-term, permanent basis. With respect to the plaintiff's imbalance and dizziness complaints, it was Dr. Longridge's opinion that the presence of such complaints for two years also indicated a likelihood of persisting on a long-term, permanent basis.

**129**  With respect to prognosis for the plaintiff, Dr. Longridge opined that the plaintiff had a disturbance of his balance system and he was likely to develop further difficulties with balance and unsteadiness than someone without such a disturbance. It was also Dr. Longridge's opinion that further injury to the plaintiff's balance system would make him more vulnerable to vestibular damage compared to individuals without such a previous injury.

**130**  In his second report dated July 8, 2016, Dr. Longridge reviewed hearing tests undertaken in the Neurology Unit at Vancouver General Hospital on March 17, 2016 which confirmed mild hearing loss in the mid and upper frequencies, approximately symmetrically. Tests completed were normal with the exception of distortion product otoacoustic emissions which were abnormal with low amplitude responses bilaterally. Despite this review, Dr. Longridge confirmed the opinions expressed in his main report respecting the plaintiff's tinnitus and dizziness.

**3. Dr. Bell**

**131**  Dr. Bell is a medical doctor and otologist. He was tendered by the defendants and qualified as an expert to provide opinion evidence concerning the complaints of injuries related to the ear suffered by the plaintiff in the accident. Dr. Bell carried out on independent medical examination of the plaintiff on August 26, 2015.

**132**  During the interview, Dr. Bell reported that the plaintiff provided perfectly coherent responses to questions posed, although he had the "unusual" habit of closing his eyes when asked a question or when thinking intently.

**133**  Audiometric tests were carried out on the same morning by an audiologist, Ms. Gibson. Audiometric tests showed bilateral, mild sensorineural hearing loss. It was Dr. Bell's opinion that the mild to moderate sensorineural hearing loss was compatible with familial type hearing loss rather than trauma. The plaintiff also passed or received normal results on numerous tests. The stapedius reflexes were not tested, however, due to reported complaints from the plaintiff of noise sensitivity. Dr. Bell also noted in his main report that the plaintiff passed the central auditory processing SCAN-3 screening test which, in the presence of a hearing loss, suggested good central auditory function. As I understand it, the results of this test conflict with Dr. Longridge's concern that there may be damage to the cochlea "at a more sophisticated level".

**134**  In light of the aforementioned results and a review of the documentation, it was Dr. Bell's opinion that the plaintiff did not sustain a significant vestibular or cochlear injury at the time of the 2013 accident. In particular, Dr. Bell considered the plaintiff's account of the accident and immediate subsequent events and found them to be incompatible with a traumatic vestibular injury where there should be "immediate onset of true vertigo, nausea, nystagmus and an unwillingness to move the head". Dr. Bell further noted that there were no objective clinical tests results which would support such an injury when carried out by himself, Dr. Dommann, and Dr. Nunez.

**135**  In Dr. Bell's opinion, a large number of the plaintiff's symptoms were subjective. He noted that the plaintiff's symptoms "did not seem to improve with time and treatment which would suggest either a substantial injury or psychological factors". Dr. Bell, in his report, appeared to rule out severity of accident or injury due to no loss of consciousness, no airbag deployment, no emergency first responders' attendance, no medical assistance or advice sought until a day or two following the collision and the plaintiff's reported ability to exchange information and drive his car immediately after the collision.

**136**  Dr. Bell also found little medical support for several listed diagnoses that often appeared to be assumed by numerous physicians on account of solely the plaintiff's word, such as concussion and visual vestibular mismatch.

**137**  In his report, Dr. Bell's opinion was that the plaintiff's tinnitus was likely caused by his mild familial sensorineural hearing loss rather than trauma. In cross-examination, however, Dr. Bell conceded that the plaintiff's tinnitus was likely caused by the accident if it were true that the plaintiff had no tinnitus until the 2013 accident.

**138**  In his main report, Dr. Bell described his experience with tinnitus patients:

... In my experience patients with tinnitus rarely tolerate the use of hearing aid/masker combinations (especially in the presence of a complaint of noise intolerance so severe that a ticking clock in my waiting room is uncomfortable). It is also rare to find someone accepting the use of two hearing aids when their hearing test shows such a mild loss that I would not normally prescribe hearing aids for some years to come, and then only if the hearing loss increases. Patients who tolerate devices such as maskers this readily often having psychological reasons for doing so.

... It is a common symptom affecting about 15% of the population over the age of 45 and even earlier if there is a hearing loss present. After a thorough explanation virtually all patients accept it as a "minor nuisance" and get on with their lives. Those who become focussed on it, to the point where they need counselling, treatment or masking devices almost invariably have issues with anxiety, depression or other psychological difficulties.

**139**  In the absence of objective results, it appeared to be Dr. Bell's opinion that many of the plaintiff's complaints were subjective and had a psychological basis. In Dr. Bell's opinion, the plaintiff may suffer from chronic subjective dizziness which belongs in the somatoform disorders group best understood by psychiatrists.

**140**  In Dr. Bell's second report, he opined that the plaintiff's reported abilities and complaints were inconsistent. In particular, Dr. Bell noted that the plaintiff's reported difficulties bagging groceries or watching television were inconsistent with his ability to operate a motor vehicle following the accident, which involved more complex visual and vestibular stimuli. Dr. Bell also noted the plaintiff's ability to play catch with a baseball a week following the accident, which caused his hand injury, was inconsistent with his reported difficulties with depth perception, headaches, light sensitivity, blurred vision, dizziness, imbalance, noise intolerance, and visual vestibular mismatch, among other symptoms.

**141**  Dr. Bell confirmed the opinion expressed in his main report. However, Dr. Bell noted new concerns regarding the significant differences between the plaintiff's reported symptoms, the timing of these reported symptoms, and the abnormalities that may or may not be associated with these reported symptoms.

**142**  In particular, Dr. Bell noted that his complaints of visual vestibular mismatch and light sensitivity were incompatible with his ability to drive a car and maneuver in traffic. Dr. Bell also readdressed the plaintiff's willingness to wear hearing aids and maskers. In particular, Dr. Bell noted that the plaintiff's complaints of noise sensitivity were inconsistent with his willingness to tolerate the use of hearing aids which would amplify all sounds. The maskers drew similar concern. Dr. Bell recalled only one patient with tinnitus who persisted with the use of maskers; this person also had significant psychological issues. Dr. Bell noted that his other tinnitus patients, without exception, tried and ultimately rejected the use of maskers, preferring to tolerate their own tinnitus sounds rather than the hissing generated by the maskers.

**D. Neurologists**

**1. Dr. Medvedev**

**143**  Dr. Medvedev is a medical doctor and neurologist. He was tendered by the plaintiff and qualified as an expert to provide opinion evidence relating to neurological issues associated with the plaintiff's injuries from the Accidents. Dr. Medvedev carried out a neurological examination of the plaintiff on May 31, 2018.

**144**  From the interview, Dr. Medvedev reported that the plaintiff had suffered some neck and back pain from an accident in 2009 but that this pain "virtually completely resolved" by the time he was involved in the 2013 accident.

**145**  Dr. Medvedev also noted that the plaintiff had no history of prior concussions, cognitive dysfunction, psychiatric problems, hearing dysfunction or balance dysfunction pre-dating the 2013 accident. The plaintiff did have minor orthopaedic surgeries and had a history of migraines in his youth but they no longer posed a problem. Dr. Medvedev also noted no family history of significant migraines, neurological illness or psychiatric conditions.

**146**  Dr. Medvedev however conceded in cross-examination that he omitted the plaintiff's history of concussions prior to the Accidents because they had not been diagnosed at the time. Dr. Medvedev also conceded in cross-examination that the plaintiff in fact admitted to ongoing pain symptoms from the 2009 accident at the time of the 2013 accident.

**147**  Dr. Medvedev concluded that the plaintiff's neurological examination yielded normal results. Specifically, Dr. Medvedev said:

On neurological examination, he had full range of movement in the neck and low back. He did not have abnormalities of motor, sensory or autonomic functions of the cranial nerves. His saccades and smooth pursuit movements were all preserved. There was no obvious nystagmus. His pupillary responses were equal and symmetrical.

His motor examination demonstrated no pronator drift. He had full power, normal tone and normal reflexes.

Finger-to-nose testing was accurate. Romberg was negative. He was able to stand on either one of his feet. He was able to perform tandem gait.

**148**  With respect to investigations conducted by other health professionals, Dr. Medvedev noted that multiple tests of his hearing demonstrated mild-to-moderate hearing loss at several frequencies in both ears. Dr. Medvedev also recounted that an MRI of the plaintiff's spine was unremarkable, a CT scan of his head showed no significant structural abnormalities, and a detailed vestibular evaluation showed no clear dysfunction.

**149**  Following a review of the records, Dr. Medvedev's opinion was that the plaintiff likely suffered traumatic injury to his vestibular system resulting in hearing impairment and tinnitus, a concussion resulting in post-concussive symptoms, and soft tissue sprain and strain to the neck and back. It was Dr. Medvedev's opinion that his symptoms were a direct consequence of the 2013 accident due to their presence immediately following the accident and without pre-accident history of such symptoms.

**150**  However, in Dr. Medvedev's opinion, the majority of the plaintiff's persistent symptoms were not directly related to his concussion but were manifestations of persistent tinnitus and mild vestibular dysfunction which Dr. Medvedev had seen in other tinnitus patients. Dr. Medvedev confirmed this opinion in cross-examination.

**151**  In Dr. Medvedev's opinion, the prognosis for the plaintiff was that his physical, psychological, and cognitive symptoms would likely persist indefinitely, although there could be some improvement over time.

**152**  With respect to future treatment, Dr. Medvedev recommended the use of a PoNS device to provide sustained and effective control of balance dysfunction resulting from disturbances of a vestibular system, including vestibulo-ocular mismatch. Dr. Medvedev also recommended increasing exposure to physical activity to improve on the plaintiff's physical symptoms and ongoing Botox treatment for the plaintiff's headaches. In cross-examination, however, Dr. Medvedev admitted that good results from Botox injections were typical only after six to nine months of therapy.

**2. Dr. Prout**

**153**  Dr. Prout is a medical doctor and neurologist. Dr. Prout was tendered by the defendants and qualified as an expert to provide opinion evidence relating to neurological issues associated with the plaintiff's injuries from the Accidents. Dr. Prout carried out an independent medical examination of the plaintiff on February 21, 2018.

**154**  Dr. Prout described the plaintiff as fully alert and attentive with entirely normal speech and language, although he put on tinted glasses approximately 10 minutes into the interview. Dr. Prout described the plaintiff as fully cooperative during the history taking and physical examination, although there was slightly flattened affect. There were no non-organic signs detected on examination. Dr. Prout noted that the plaintiff was able to provide a clear history of the Accidents and the events that unfolded subsequent to the collision to him and other examiners.

**155**  In Dr. Prout's opinion, there was no evidence that the plaintiff struck his head in the accident, no loss of consciousness nor abnormal mentation following the accident, such as post-traumatic amnesia relating to the accident. Dr. Prout's opinion, like Dr. O'Shaughnessy's opinion, was that the plaintiff's various symptoms post-accident were non-specific and not a result of a concussion. In particular, Dr. Prout said:

A concussion (mild traumatic brain injury) must by definition be diagnosed based on clinical indicators surrounding the mechanism of the accident and the state of the patient immediately post-accident. Although it could be argued that Mr. Sharpe may have suffered a concussion based on the fact that he does not recall the impact at the time of the accident, there is no other evidence contained in the medical records nor contained in the history provided by Mr. Sharpe that he meets criteria for having suffered a concussion or any other degree of traumatic brain injury in the subject accident.

**156**  During the interview, the plaintiff reported the following symptoms following the 2013 accident: significant neck and back pain, difficulty focusing, visual vestibular mismatch, tinnitus, stimulus sensitivity, headaches, subjective cognitive difficulties, emotional symptoms like depression, and sleep difficulties. In Dr. Prout's opinion, the headaches originated from structures in the cervical spine and were due, in turn, to the effects of a whiplash neck injury, which would explain significant ongoing neck pain.

**157**  Dr. Prout noted that subsequent testing, including detailed vestibular testing, failed to reveal any injury to the central or peripheral vestibular system. Audiology testing revealed mild sensorineural hearing loss that would not be attributable to the Accidents but was more likely related to aging and prior noise exposure. It also raised the possibility of a musculoskeletal component to the tinnitus.

**158**  In light of the history, examination, and review of the records, it was Dr. Prout's opinion that the plaintiff suffered a whiplash injury and developed whiplash associated disorder rather than a concussion. Symptoms of whiplash associated disorder could be extremely varied and non-specific akin to those reported by the plaintiff, such as headaches, blurred vision, visual vestibular mismatch, tinnitus, and sleep difficulties.

**159**  In his report, Dr. Prout described the difference in prognosis of patients with a traumatic brain injury and those with whiplash injuries as follows:

... Patients who suffer a traumatic brain injury and have lasting symptoms years post-accident are frequently left with persistent symptoms that do not resolve and are refractory to treatment. Patients who have the varied symptoms that occur in conjunction with a whiplash injury are far more likely to have a good prognosis with respect to an eventual resolution of the associated symptoms that occur in the setting of a whiplash associated disorder.

In Dr. Prout's opinion, the plaintiff's prior injury to the neck likely caused him to be more susceptible to the effects of subsequent injuries sustained in the 2013 accident.

**160**  With respect to the plaintiff's headaches and poor sleep, Dr. Prout deferred to experts in the field of psychology and psychiatry to explain and consider the best management of these symptoms. Dr. Prout noted that musculoskeletal injuries to the plaintiff's back have improved with the passage of time.

**161**  It was also Dr. Prout's opinion that the plaintiff's significant emotional difficulties, including probable depression, combined with his other symptoms resulted in perceived, but not actual, cognitive deficits. In Dr. Prout's opinion, the plaintiff's ongoing belief that a brain injury caused his persistent symptoms negatively affected his recovery and outlook of the future. As such, Dr. Prout considered that it would be beneficial for the plaintiff to be reassured that no actual brain injury was sustained. In Dr. Prout's opinion, the plaintiff was not impaired with respect to his ability to continue in his current work.

**162**  In Dr. Prout's opinion, the plaintiff had no neurological impairments or deficits as a result of the 2013 accident. His persistent symptoms have, in general, improved.

**163**  With respect to prognosis, Dr. Prout's opinion was that it was reasonable that further improvement may result from ongoing treatment of the plaintiff's emotional difficulties, sleep difficulties, and ongoing pain.

**164**  With respect to treatment, Dr. Prout recommended ongoing psychological and psychiatric treatment, ongoing treatment by his treating neurologist for his headaches, and physical exercise.

**E. Psychologist and neuropsychologist**

**165**  The plaintiff was independently assessed by two psychologists. Dr. Wild, a psychologist, is an expert for the plaintiff. Dr. Hayden, neuropsychologist, is an expert on behalf of the defendants.

**166**  Dr. Hayden's report made its way to the court in a somewhat circuitous manner. Counsel for the plaintiff first approached Dr. Hayden for an independent neuropsychological assessment and later decided not to rely on Dr. Hayden's report. Counsel for the defendant, however, sought to tender and rely on this report. Following discussion between counsel, the notice requirement was waived.

**167**  I have set out the details of their opinions below.

**1. Dr. Wild**

**168**  Dr. Wild is a registered psychologist. She was tendered by the plaintiff and qualified as an expert in neuropsychology with a specialty in rehabilitative neuropsychology to give opinion evidence concerning the plaintiff's psychological and emotional functioning following the Accidents. She completed three reports.

**169**  At the time of her first report dated March 27, 2014, Dr. Wild had seen the plaintiff for the initial intake session on November 7, 2013 and seven treatment sessions between November 15, 2013 and March 25, 2014. The plaintiff completed seven self-report questionnaires during the initial intake session.

**170**  During the sessions, the plaintiff described significant problems with emotional dysregulation. Dr. Wild concluded that there were indications of depression, anxiety, and psychophysiological hyperarousal. Dr. Wild described the plaintiff as being very concerned with his slow recovery, his future, and the uncertainty associated with both, and described him as a "highly distressed individual who was in urgent need of psychological treatment".

**171**  In Dr. Wild's opinion, the plaintiff gave the impression of being a high functioning independent individual who was used to being in charge. Following the 2013 accident, the plaintiff no longer felt in control and struggled with confidence, security, anxiety and depression. Dr. Wild noted that the plaintiff was cooperative and highly motivated. He could perform well in controlled environments. He would follow up on recommendations. In Dr. Wild's opinion and based on self report from the plaintiff, the sessions geared toward improving self-regulation ability were a positive experience and resulted in some improvement. However, this required treatment, in Dr. Wild's opinion, was directly related to the injuries sustained in the 2013 accident which triggered the neuropsychological and psychological symptoms at issue.

**172**  With respect to prognosis, Dr. Wild was "cautiously optimistic" that the plaintiff would eventually improve in his physical, cognitive, and emotional functioning and that he would be able to return to his position at HSBC with the help of comprehensive mild traumatic brain injury ("mTBI") management. However, Dr. Wild considered this to be a long-term process.

**173**  With respect to rehabilitation treatment, Dr. Wild recommended ongoing psychological treatment on a bi-weekly basis until a comprehensive rehabilitation program was implemented to provide clear guidance and supervision to prevent reinjury and provide support to the plaintiff during his physical activation. Psychological treatment thereafter could be scheduled on an as-needed basis with a return to bi-weekly sessions leading up to the graduated return to work.

**174**  In her second report dated October 18, 2016, Dr. Wild's opinion was that the plaintiff had benefited from the various treatment modules introduced to him, notably showing improvements to his day-to-day functioning and his confidence. With respect to his return to work in mid-May 2015, the plaintiff reported feeling overstimulated due to his sensory sensitivity and overwhelmed by job responsibilities that were too demanding or draining post-accident. He considered applying to less demanding positions at HSBC before the 2016 accident.

**175**  Despite a possible mild concussion and pain in his neck and back, the plaintiff continued to work until he was laid off in February 2016 along with 30-50% of his colleagues. His job loss caused a strong emotional reaction. The plaintiff reported that many of his symptoms had improved or resolved, but that he continued to experience mental fatigue, overstimulation, and headaches as significant limitations to his employability. The uncertainty of his job prospects and his future were significant stressors in his life.

**176**  In Dr. Wild's opinion, the plaintiff sustained a mTBI and continued to present with persistent post-concussive symptoms and heightened levels of anxiety and depression. It was Dr. Wild's opinion that such persistent problems continued to impact his functioning. These symptoms combined with the plaintiff's reduced mental endurance and associated compromised cognitive functioning together with his reduced stress resilience presented a vicious cycle preventing a return to his pre-injury level of functioning.

**177**  With respect to treatment, Dr. Wild recommended ongoing assistance by a vocational counselor to set realistic goals for the plaintiff's future employment with appropriate regard to his functioning and current abilities. Dr. Wild also recommended ongoing psychological treatment sessions.

**178**  With respect to prognosis, Dr. Wild was still cautiously optimistic, although she considered the plaintiff's ongoing physical, cognitive, and emotional functioning problems to be permanent. Dr. Wild considered competitive employment to be challenging but possible particularly with the benefit of comprehensive vocational rehabilitation.

**179**  In her third report dated August 1, 2017, Dr. Wild disagreed with Dr. O'Shaughnessy's diagnostic conclusions and considered him to be at a disadvantage in respect of the information available to him at the time of his evaluation and report of the plaintiff which was approximately a year and a half post-accident. By contrast, Dr. Wild first met and assessed the plaintiff three and a half months post-accident. It was Dr. Wild's opinion that her multiple early assessments of the plaintiff provided her with a clearer picture with respect to the plaintiff's symptoms.

**180**  Dr. Wild largely confirmed the opinions expressed in her two previous reports. Dr. Wild also reiterated that mTBI was a highly individualized injury. As such, the persistence of the plaintiff's post-concussive symptoms years following the accident should not be considered reason to doubt the diagnoses of concussion made by his treating medical practitioners. Dr. Wild also disagreed with the basis upon which Dr. O'Shaughnessy concluded that a concussion was not sustained. In particular, it was Dr. Wild's opinion that concussion symptoms may not be noticed for days or months post-injury. She therefore disagreed with Dr. O'Shaughnessy's conclusion that the plaintiff did not suffer a concussion merely because he did not report symptoms of impaired awareness or memory immediately following the accident.

**2. Dr. Hayden**

**181**  Dr. Hayden is a neuropsychologist. She was tendered by the defendants and qualified as an expert in psychology and neuropsychology to give opinion evidence concerning the plaintiff's cognitive and emotional functioning and neuropsychological status. Dr. Hayden conducted a clinical neuropsychological interview with the plaintiff on April 2, 2016. Psychometric testing was conducted on the same date.

**182**  Dr. Hayden described the plaintiff as pleasant, open, and responsive to questions. She noted that the plaintiff demonstrated anxiety and tearfulness during the interview and labile affect. Based on testing she administered, Dr. Hayden concluded that there was no exaggeration of symptoms, which was consistent with her observations of the plaintiff during the assessment. During the interview, the plaintiff reported that the symptoms he experienced following the 2013 accident were intensified following the 2016 accident.

**183**  Based on testing she administered, Dr. Hayden observed that the plaintiff scored average or above average on cognitive performance with below average performance in some aspects of attention, processing speed, and recall of verbal material. In Dr. Hayden's opinion, these results were not consistent with cognitive deficits. Dr. Hayden's opinion was that the plaintiff's lack of memory of impact at the time of the 2013 accident may reflect post-traumatic amnesia associated with a concussion, but that this could not be ascertained without evidence of his neurological status at the scene. Although possible, Dr. Hayden observed that there was little cognitive impairment evident from testing.

**184**  Dr. Hayden also concluded that the plaintiff's scores on mood tests reflected significant somatization, anxiety, and post-traumatic stress symptoms, although only mild indices of depression were noted. In Dr. Hayden's opinion, this mood disturbance would impact function and likely contributed to the plaintiff's variable attention and processing speed performance and would also adversely impact memory.

**185**  In Dr. Hayden's opinion, the mood disturbance appeared to be related to the 2013 accident and was likely exacerbated by the 2016 accident.

**186**  With respect to prognosis of his cognitive functioning, Dr. Hayden's opinion was that the plaintiff's cognitive symptoms from the 2013 accident had largely resolved. With respect to his emotional functioning, Dr. Hayden's opinion was that persistent mood symptoms remained problematic but that further functional improvement remained possible with psychological treatment.

**187**  Dr. Hayden recommended further psychological treatment to stabilize accident-related mood symptoms and psychiatric consultation.

**F. Counsellor and occupational therapist**

**1. Dr. Pritchard**

**188**  Dr. Pritchard is a registered professional counselor with a doctorate in clinical psychology. He was tendered by the plaintiff and gave opinion evidence concerning the plaintiff's cognitive and emotional functioning following the 2013 accident from their counselling sessions. He completed one progress report and one medical report.

**189**  Dr. Pritchard described the plaintiff as pleasant, articulate, and willing to engage. The plaintiff reported feeling overwhelmed, depressed, anxious, and fearful. He described life after the accident as "tough" but that he generally feels "happy to be alive". He reported improvement to his concentration but that his concentration was still difficult to maintain in group settings. He reported difficulty sleeping, chronic pain, light sensitivity, tinnitus, cognitive challenges, fatigue, and somewhat nervous driving.

**190**  The opinions expressed in the progress report, dated October 23, 2017, were based on in-person sessions with the plaintiff following the 2013 accident. Dr. Pritchard provided the plaintiff with the following treatment sessions listed in his first report: mindfulness-based training techniques, mood management, non-pharmaceutical pain management techniques, and cognitive behavioural therapy. Dr. Pritchard described the purpose of such treatments as learning to activate the relaxation response. Such a response may be triggered when emotions such as worry, fear, and anxiety begin to trigger the stress response.

**191**  Dr. Pritchard described the plaintiff as diligent and compliant with mindfulness-based interventions presented to him. The plaintiff reported feeling empowered by these techniques and reported improvements to his quality of life and ability to manage his mood. Similarly, the plaintiff embraced pain management techniques and developed an understanding of pain that made it less debilitating. Dr. Pritchard had recently begun cognitive behavioural therapy sessions and did not report the beneficial effects for the plaintiff at the time the report was completed.

**192**  With respect to treatment, Dr. Pritchard recommended at least ten more cognitive behavioural therapy sessions to be scheduled on a bi-weekly basis with reassessment to follow. Dr. Pritchard also recommended additional follow-up sessions concerning the other treatment protocols as needed by the plaintiff.

**193**  In terms of vocational possibilities, Dr. Pritchard deferred to Mr. Carlin's report. It was Dr. Pritchard's opinion, however, that the plaintiff's constellation of symptoms impacted his ability to "be wholly functional in the working environment". Dr. Pritchard also appeared to defer to Dr. Longridge with respect to the possibility, risk, danger, or likelihood of future injury. With respect to the plaintiff's cognitive problems and prognosis, Dr. Pritchard testified at trial that he preferred to defer to Dr. Hayden's opinion.

**194**  With respect to general prognosis, Dr. Pritchard reiterated the plaintiff's compliance and engagement in treatment sessions. However, Dr. Pritchard's prognosis for recovery was uncertain. In particular, Dr. Pritchard opined that the plaintiff's physical symptoms would negatively impact his recovery and progress and observed that, in his experience, patients with both psychological and physical symptoms fared worse than patients with psychological symptoms only.

**195**  Without alternative incidents of clinical significance and no previous significant psychological condition prior to the accident, Dr. Pritchard's opinion was that the accident contributed to the plaintiff's current and ongoing symptoms and impacted his ability to improve due to the plaintiff's ongoing stress, fears of reinjury, and frequent fatigue following the accident.

**196**  Finally, I note that it was also Dr. Pritchard's opinion that the plaintiff's symptoms, including dizziness, headaches, light sensitivity, sleep difficulties, anxiety, stress and depression, were consistent with mTBI or concussion. I do not, however, give much weight to this particular opinion as mTBIs and concussions are beyond Dr. Pritchard's area of expertise.

**197**  I also note that Dr. Pritchard stated in his medical report, and at trial, that he did not have counselling sessions with the plaintiff for approximately two years, between April 2014 and February 2016.

**2. Beverley Wilson**

**198**  Ms. Wilson is an occupational therapist and a certified life care planner. Ms. Wilson was tendered by the plaintiff and qualified as an expert to give opinion evidence in the areas of occupational therapy, life care planning, and costs of future care. Ms. Wilson assessed the plaintiff personally and undertook functional and objective testing on April 16, 2018. Her first report was prepared on May 16, 2018 and an addendum report was prepared on June 21, 2018. Her cost of future care assessment will be considered later in these reasons.

**199**  During the interview, the plaintiff reported being responsible for his daily cooking and grocery shopping, housework, and general home maintenance prior to the Accidents. The plaintiff also reported being active, attending at the gym and participating in various sports prior to the Accidents.

**200**  According to the plaintiff's results on the self-report questionnaires administered by Ms. Wilson, pain and cognitive difficulties affect his thoughts and feelings at a significant level. His perception of injustice was also clinically relevant. The plaintiff's neck pain and permanent functional disability were rated as a "severe disability". His results also indicated borderline clinical depression, low anxiety, and moderate overall fatigue.

**201**  As the plaintiff completed the questionnaires, Ms. Wilson observed that the plaintiff exhibited behaviours suggesting difficulty reading the content and concentrating on answering the questions. During this assessment, the plaintiff had to make use of a heat pack to relieve neck pain. At the conclusion of this assessment, the plaintiff reported feeling fatigued physically and cognitively, pain in his back and neck, dizziness, and imbalance.

**202**  Results of objective or physical testing indicated normal range of motion with some localized pain in certain specified positions. Ms. Wilson objectively tested the plaintiff's functional abilities and noted his ability to function "well as needed"; however, she observed the plaintiff's inability to sit for more than an hour and consequent preference to stand. The plaintiff also reported some difficulty climbing stairs, bending, and with balance due to dizziness. Ms. Wilson observed that the plaintiff had greater stamina early in the day rather than evening.

**G. Vocational consultants**

**1. Richard Carlin**

**203**  Mr. Carlin is a vocational consultant with a Master's degree in counselling psychology, and was tendered by the plaintiff and qualified as an expert to provide opinion evidence in vocational consulting and rehabilitation. Mr. Carlin met with the plaintiff on April 20, 2016 and September 3, 2016. At the time of the vocational assessment, the plaintiff had not yet found gainful employment.

**204**  Mr. Carlin was asked to provide an opinion concerning the plaintiff's prospective career but for the injuries sustained in the Accidents and an opinion concerning the plaintiff's current employment prospects following the Accidents. In forming his opinion, Mr. Carlin relied on his own interview findings and behavioural observations, the plaintiff's vocational battery test results, and a review of the records. Mr. Carlin also utilized information within the National Occupational Classification resource ("NOC").

**205**  In his report, Mr. Carlin said:

... As noted from the NOC, Mr. Sharpe's occupation has critical elements in dealing with data, people and things that he was unable to perform. He was laid off from this job within two months of his return.

It should be noted however that in reviewing Mr. Carlin's report, and hearing his evidence at trial, it is clear Mr. Carlin was unaware that 30-50% of the HSBC workforce had been laid off as well. At trial, Mr. Carlin testified that he was aware that only one other person had been laid off.

**206**  With respect to the plaintiff's vocational prospects post-accident, Mr. Carlin was pessimistic. In Mr. Carlin's opinion, the plaintiff "was likely not competitively employable as an IT Analyst" and would "not meet standards associated with competitive employment for any other occupations in our labour market" due to his constellation of symptoms.

**207**  In Mr. Carlin's opinion, a clerical position would be inappropriate due to required and regular computer use, reading, and communication which the plaintiff would find difficult with his sensory sensitivities, dizziness, and neck pain. Manual labour positions would be similarly inappropriate due to the plaintiff's difficulties with balance and dizziness that would make him more susceptible to falls and further injury. In Mr. Carlin's opinion, the plaintiff needed assistance from a vocational rehabilitation professional to determine a work environment consistent with his vocational interests and preferences and his current abilities. At the time of his assessment, Mr. Carlin's opinion was that the plaintiff's future employability was very uncertain unless he could find an employer willing to accommodate his situation.

**208**  With respect to accommodation, it was Mr. Carlin's opinion that the plaintiff would need a sympathetic employer, flexible hours, and a modified work environment. Mr. Carlin noted that the plaintiff would need work consistent with his cognitive capabilities and his sensory sensitivities. I note that Mr. Carlin's first report relied solely on the reports prepared by the plaintiff's experts.

**209**  Mr. Carlin prepared a second report dated June 10, 2018 based on interviews with the plaintiff on May 16, 2018 and May 24, 2018, the plaintiff's vocational test battery results, previous interview notes, and a review of additional documentation.

**210**  At the time, the plaintiff had reported returning to work at SSS in January 2017, now working approximately a year and a half, as an ADR Recorder. The plaintiff also reported performing more managerial tasks. Mr. Carlin noted that the plaintiff was able to arrange his work schedule to enable him to leave work at 3:00 pm when fatigue and stamina issues began to interfere with his work. The plaintiff described the work as challenging due to his physical, cognitive, and emotional symptoms.

**211**  In Mr. Carlin's report, he opined that the plaintiff was in a strong position to take over the senior Rerecording Mixer position and run the Sharpe family business given their long-term family plans, the plaintiff's previous experience working at SSS, and his Business Administration Diploma. Now, Mr. Carlin's opinion is that it is highly unlikely that the plaintiff will ever be in a position to take on the Rerecording Mixer role at SSS. Mr. Carlin admitted on cross-examination, however, that he was not trained or qualified to predict whether specific opportunities such as this would come to fruition in the future. I agree and give little weight to this aspect of Mr. Carlin's opinion, as this question is precisely the question before the Court to decide.

**212**  Mr. Carlin's opinion regarding the plaintiff's vocational prospects remained unchanged from his first report. In Mr. Carlin's opinion, it was more likely than not that the plaintiff was not competitively employable as an IT analyst due to his persistent symptoms which would also likely adversely affect his competitiveness in the open labour market. Mr. Carlin acknowledged at trial, however, that there were degrees of competitive employment rather than merely competitive employment and unemployability. It was also Mr. Carlin's opinion that the plaintiff was performing well in his current role due to the accommodations and support provided by his family.

**213**  In Mr. Carlin's opinion, the plaintiff's long-term employability was still uncertain. Mr. Carlin considered it questionable that another sound studio would be willing to provide equivalent accommodations and support should the plaintiff remain an ADR Recorder following his father and stepmother's retirement. Mr. Carlin considered the plaintiff's long-term employability to be dependent on his ability to take over the Sharpe family business without assuming the Rerecording Mixer role.

**2. Dr. Colleen Quee Newell**

**214**  Dr. Quee Newell is a registered clinical counsellor and vocational rehabilitation consultant with accreditation by the B.C. Association of Clinical Counsellors and good standing with the Vocational Rehabilitation Association of Canada respectively. Dr. Quee Newell was tendered by the defendants and qualified as an expert to give evidence concerning vocational assessment and methodology. Dr. Quee Newell did not meet or assess the plaintiff. The purpose of her report was to provide an analysis of Mr. Carlin's vocational assessment based on a review of the records and Mr. Carlin's reports.

**215**  Dr. Quee Newell cautioned against the over-reliance on self-reporting data due to studies indicating that individuals with post-concussion syndrome tended to report significantly more symptoms when asked to complete a questionnaire than when asked similar questions during an interview. Dr. Quee Newell considered that subjective self-report questionnaires were not objective measures of an individual's functional abilities and that open-ended interviews were more resilient to biases and potentially provided more realistic appraisal of an individual's symptoms post-injury.

**216**  With respect to methodology, Dr. Quee Newell took issue with Mr. Carlin's approach to divergent medical opinion from Dr. Waisman and Dr. O'Shaughnessy. In particular, Dr. Quee Newell stated in her report:

From a vocational assessment perspective, when faced with divergent medical and/or psychiatric information, it is beyond the scope of the vocational assessor to determine which medical and/or psychiatric opinion should be relied upon to inform one's opinion regarding an individual's current and future vocational capacity. In these situations, an individual's vocational capacity should be analysed on the basis of the divergent medical and/or psychiatric information. It would appear from the preceding paragraph that "*in the final analysis*", Mr. Carlin has elected to base his opinion on Dr. Waisman's psychiatric opinion and disregard the opinion offered by Dr. O'Shaughnessy. This is methodologically problematic, in my view.

**217**  Dr. Quee Newell also appeared to take issue with several of Mr. Carlin's conclusions. In particular, Mr. Carlin reported the plaintiff's scores were average on vocabulary development and reading comprehension relative to those with similar educational levels, but opined that further interpretation of these scores were required in light of the plaintiff's ongoing difficulties related to the accident. This caveat, in Dr. Quee Newell's opinion, was provided without explaining the reason for skepticism or concern regarding the plaintiff's results which indicated that the plaintiff's abilities were consistent with his educational attainment.

**218**  It was also Dr. Quee Newell's opinion that it was erroneous, or at least misleading, to discuss the plaintiff's symptoms in the context of his termination from HSBC in a way that may be construed as causative of his termination. Dr. Quee Newell considered a review of the plaintiff's HSBC employment records to be useful in clarifying the circumstances of the plaintiff's termination, particularly in light of the fact that 30-50% of the HSBC staff were similarly laid off, and in determining whether the plaintiff was competitively employable in the open labour market.

**219**  Finally, Dr. Quee Newell drew attention to discrepancy in Mr. Carlin's first and second reports. In his 2016 report, Mr. Carlin described the plaintiff's stated plans as remaining with HSBC for the foreseeable future and returning to SSS as an alternative. In Mr. Carlin's second report, he opined that the plaintiff's pre-accident career plan was always to take over the Sharpe family business once his father retired. I note, however, that they are not necessarily contradictory.

**220**  In Dr. Quee Newell's opinion, the plaintiff's measured occupational interests were not compatible with his previous work nor his current employment at SSS. Instead, the plaintiff's results from Mr. Carlin's assessment suggested greater job satisfaction in occupations that involved assisting other people. This was unchallenged in cross-examination.

**221**  Dr. Quee Newell further observed that the plaintiff delayed a job search until autumn after being laid off at HSBC in February 2016. No reason for the delay was given and this was not considered or addressed by Mr. Carlin. Dr. Quee Newell also noted that, in the circumstances, the plaintiff's employment at SSS for his father could not be considered competitive employment.

**H. Economists**

**1. Darren Benning**

**222**  Mr. Benning is the president of PETA Consultants Ltd., a firm of consulting economists specializing in the provision of litigation support services. He was tendered by the plaintiff and qualified as an expert in economics to provide opinion evidence on the plaintiff's past and future income loss. Mr. Benning prepared three reports dated June 12, 2018, August 2, 2018, and September 10, 2018.

**223**  In Mr. Benning's first report, he set out various assumptions he was instructed by counsel to assume in the calculation of past and future income loss. In particular, counsel for the plaintiff instructed Mr. Benning to assume that the plaintiff's with-accident income would be $50,000 annually until retirement at no later than 65 years of age.

**224**  Furthermore, counsel for the plaintiff instructed Mr. Benning to assume that the plaintiff would have earned $150,000 to $250,000 annually at the Sharpe family business starting in January 1, 2017 until retirement at no later than 65 years of age. For this reason, Mr. Benning calculated past and future income loss from January 2017 using $150,000, $200,000, and $250,000 annual values. He assumed, as well, that the plaintiff would have returned to SSS in January 2015 and that it would have taken him three years to revive the Sharpe family business from many years of reported losses.

**225**  In the alternative, Mr. Benning calculated past and future income loss assuming that the plaintiff did not return to the Sharpe family business and would have earned the equivalent annual income of a BC male with a college diploma from a program of 1-2 years in duration and of a BC male User Support Technician.

**226**  From these values, accounting for particular labour-market contingencies and tax, but without court ordered interest for past wage loss, Mr. Benning's calculation for past wage loss ranged from $82,915 to $158,900 and his calculation for future wage loss ranged from $615,956 to $3,568,854.

**227**  In Mr. Benning's second report, counsel for the plaintiff provided him with the financial statements for the Sharpe family business and asked him to provide a report estimating the historical income for both SSS and SST. Mr. Benning then calculated the average annual income for SSS between 2000 to 2016 as being $45,365 and the average annual income for SST between 1997 to 2017 as being $205,039. He also said:

... we have calculated the average annual income for the two businesses as being $253,765 from 1999-2013 (the last year prior to Mr. Sharpe started working for the family businesses), and $657,300 from 1993-2007 (the last year the businesses were profitable)...

**228**  In Mr. Benning's third report, counsel for the plaintiff provided Mr. Benning with additional documents, including the T4 records of Mr. Sharpe and Ms. Cristianini as owners of SSS and SST respectively. Mr. Benning calculated the average annual income for both owners of the Sharpe family business together as being $469,939 from 1999-2016, $577,682 from 1999-2013 (being the last year prior to the plaintiff starting to work for the family businesses), and $991,793 from 1999-2008.

**229**  In my view, there are numerous difficulties in the assumptions that Mr. Benning was instructed to consider and the values that Mr. Benning calculated in his report. I will only refer to some of these problems below.

**230**  First, I could find no basis or explanation for choosing the $50,000 income as the plaintiff's "with-accident" income until retirement. This is particularly confusing since the initial letter to Mr. Benning was sent on February 26, 2018 and a letter with further instructions was sent on June 5, 2018, instructing Mr. Benning to use this value, despite the fact that, in 2018, the plaintiff was making approximately $64,000 at SSS.

**231**  Second, and relatedly, the $150,000, $200,000, and $250,000 annual "without-accident" income values at SSS are similarly arbitrary and speculative, particularly in light of testimonial evidence that the Sharpe family business has reported losses every year since about 2008 to 2016 and that Mr. Sharpe and Ms. Cristianini have not taken an income from the Sharpe family business for multiple years. These losses from the Sharpe family business were confirmed in Mr. Benning's second report.

**232**  Third, although Mr. Benning asserted positive average incomes for the Sharpe family business following a review of their financial statements in his second report, it is clear that this was due to the business' success prior to 2008. Following that year, the norm for the Sharpe family business was to report annual losses.

**233**  Finally, in Mr. Benning's third report, although Mr. Benning asserted positive average incomes for the owners of the Sharpe family business, it is clear that these values were due to the businesses' success prior to 2008 and because their incomes were calculated together. In fact, Mr. Benning's third report shows that Mr. Sharpe did not take an income from SSS since 2010 and Ms. Cristianini did not take an income from SST since 2012. Indeed, Mr. Sharpe's average annual income from 1999 to 2016 was $87,692 while Ms. Cristianini's average annual income from SST from 1999 to 2016 was $382,247.

**234**  I consider these problems to figure prominently within my ultimate assessment and analysis under future loss of earning capacity.

**2. Doug Hildebrand**

**235**  Mr. Hildebrand was tendered by the defendants and qualified as an expert in the assessment of damages. He prepared two reports dated July 24, 2018 and September 12, 2018 in response to Mr. Benning's reports.

**236**  In Mr. Hildebrand's first report, he indicates that the basis of the assumptions in Mr. Benning's reports are unclear. He points out that the plaintiff's highest annual income earned, in 2012, was $56,000 which was higher than considered by Mr. Benning. Furthermore, the $50,000 "with-accident" income used by Mr. Benning fell short of the expected earning of someone of the plaintiff's education and ability to work in a semi-skilled occupation requiring light or limited strength (which Mr. Hildebrand considered the plaintiff to be capable of). Under the National Occupational Classification system, such an employee made approximately an average of $58,785 annually. Light or limited strength work involved handling less than 10 kg or 5 kg loads respectively.

**237**  Mr. Hildebrand considered that Mr. Benning's multipliers were comparable to his own and used the latter's economic multiplier to calculate future income loss based on the plaintiff's current (at the time) annual income of $64,000 as compared to the annual income of a BC male working in a semi-skilled occupation requiring light or limited strength. As such, Mr. Hildebrand's future wage loss calculation ranged from $240,209 to $441,952.

**238**  In Mr. Hildebrand's second report, he indicated again that Mr. Benning's future wage loss earning projections were based on above-average earnings for a BC male with a college diploma from a program of 1-2 years in duration and of a BC male User Support Technician. Mr. Hildebrand considered it inappropriate to calculate future wage loss using the above-average earnings attributable to those in a higher referent group when the plaintiff's pre-accident earnings were equivalent to those below this referent group.

**III. FINDINGS AND CONCLUSIONS ABOUT THE PLAINTIFF'S INJURIES**

**239**  As I have said, liability has been admitted. The main dispute concerns the nature and extent of the plaintiff's accident-related injuries and whether those injuries and the effects of those injuries contributed to the plaintiff's current level of functioning and ability, both vocationally and domestically.

**240**  Madam Justice Stromberg-Stein set out the legal principles applicable in *Khudabux v. McClary*, [*2018 BCCA 234*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5SJD-51G1-F016-S1Y7-00000-00&context=) at para. 41:

[41] Considering first principles of tort law, a plaintiff is entitled to be put in the same position he or she would have been absent the defendant's ***negligence***: *Athey* at para. 35. This entails determination of his or her original position, and the effects of pre-existing conditions and intervening events, to ensure the tortfeasor compensates only for the injury he or she caused and the plaintiff is not left in a better position than he or she otherwise would have been...

**A. Causation**

**241**  The legal principles with respect to causation and the assessment of damages were succinctly stated by Chief Justice McLachlin 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=):

[78] It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway...

**242**  The burden is therefore on the plaintiff to establish, on a balance of probabilities, that the defendant's ***negligence*** caused or materially contributed to their injuries. The defendant's ***negligence*** need not be the sole cause of the injury so long as it contributed to the plaintiff's injury beyond the *de minimus* range: *Farrant v. Laktin*, [*2011 BCCA 336*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22RP-00000-00&context=) at para. 9. The "but for" test articulated in *Snell v. Farrell*, [*[1990] 2 S.C.R. 311*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-655K-00000-00&context=) remains the basic test for causation in ***negligence*** as it recognizes that only a substantial connection between the defendant's conduct and the plaintiff's injury will be sufficient to find the defendant liable for that damage: *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. The "but for" test requires the court to be satisfied the plaintiff would not have suffered the injury but for the defendant's ***negligence***. The test for causation does not demand scientific precision and need not be applied too rigidly: *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 467.

**243**  It is trite law that a tortfeasor must take their victims as they find them ("thin skull rule"). This means that a tortfeasor is liable for a plaintiff's injuries "even if the injuries are unexpectedly severe owing to a pre-existing condition": *Athey* at 473.

**244**  The thin skull rule is not to be mistaken for the "crumbling skull" rule, however, which recognizes that the defendant need not put the plaintiff in a better position than their original position. Put another way, the defendant is liable for any *additional* damage caused to the plaintiff but need not compensate for any suffering or effects of a pre-existing condition from which the plaintiff would have suffered in any event: *Athey* at 473.

**245**  In this case, the plaintiff must establish, on a balance of probabilities, that his injuries were caused by the Accidents and that those accident-related injuries caused his loss. As I have said, the defendants submit that many of the plaintiff's ongoing symptoms were not caused by the Accidents.

**B. Positions of the parties**

**246**  Generally, it is the plaintiff's position that but for the defendants' ***negligence***, he would not be suffering from persistent neck and back pain, tinnitus, headaches, dizziness and imbalance problems, light sensitivity, fatigue, mood issues, and intermittent sleep difficulty.

**247**  A main focus of the defendants was the issue of the causation of the plaintiff's tinnitus. The defendants tendered evidence by Dr. Bell that hearing loss, rather than trauma, was the most common cause of tinnitus. From examinations conducted by Dr. Bell, Dr. Nunez, and Dr. Longridge, there was evidence that the plaintiff suffered from mild to moderate sensorineural hearing loss. Testing done by Dr. Bell appeared to rule out damage to the cochlea necessary to establish tinnitus by trauma.

**248**  Ultimately, however, Dr. Bell conceded that absent evidence that the plaintiff suffered hearing loss prior to the 2013 accident (and there was no such evidence to make such a finding), it was probable that the tinnitus was caused by the accident.

**249**  The defendants also argued that the plaintiff's original position included headaches and neck and back pain caused by the 2009 accident. They further submitted that the plaintiff's current stress and mood issues were largely a combined result of the death of his dog, building a new house, preparing for a baby, and this litigation.

**C. Credibility**

**250**  The court is guided in assessing credibility and reliability in accordance with well known principles and observations: see for example *R. v. Morrissey*, [*[1995] O.J. No. 639*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCK1-FGJR-24HB-00000-00&context=) (C.A.) at para. 33 and *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 at [*2012 BCCA 296*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24KX-00000-00&context=).

**251**  The matter of the credibility of witnesses in this trial was not a particularly controversial point. In my view there was no attempt by any of the witnesses to deceive or purposely obfuscate; and the issue of credibility was not really pressed by either counsel.

**252**  Counsel took some issue with the reliability of some aspects of the expert evidence where that evidence ran into a direct conflict. The attacks, however, in my opinion, did not undermine the fundamental integrity of the various conclusions as contained in the expert reports. This is to be expected. The expert assessments concerning many of the issues in this case involve as much an art form as it does a science.

**253**  The plaintiff was the primary focus of the submissions of the defendants in relation to the issue of reliability. Counsel for the defendants, in his very able submissions, did not frame the issue as one of credibility, but reliability.

**254**  In my view, the plaintiff attempted to provide his evidence in an honest and straight forward manner. There were occasions where the plaintiff was vague and uncertain in giving his evidence. I recognize that, and take all that into account in weighing his evidence in the context of the whole of the evidence, but overall, I found the evidence of the plaintiff generally reliable. I accept the evidence of the plaintiff concerning the description of his difficulties, and his feelings and reactions to those difficulties.

**D. Findings of fact**

**255**  The parties provided conflicting evidence on whether the plaintiff's pain symptoms in relation to the neck and back from the 2009 accident persisted up until the 2013 accident. This was an area where the evidence of the plaintiff was vague and somewhat unsatisfactory. He was unable to say definitively that he did not advise medical experts, for example, Dr. Medvedev, that his symptoms from the 2009 accident persisted at the time of the 2013 accident. Most of the experts agreed at trial that the neck and back pain from the 2009 persisted at the time of the 2013 accident.

**256**  I note in particular, that Dr. Hayden reviewed a neurology report by Dr. Stewart, dated March 22, 2012, at which point in time the plaintiff was continuing to complain about persistent neck, shoulder, and back pain caused by the 2009 accident; approximately three years after the accident. I find on a balance of probabilities that the plaintiff continued to experience pain caused by the 2009 accident at the time of the 2013 accident.

**257**  I find, however, that more likely than not, the Accidents exacerbated the pain to the plaintiff's neck and back. Medical examinations from Dr. Gaede shortly after the 2013 accident revealed tenderness to the spine, neck, ribs and back, reduced range of motion of the neck, and spasms in the upper back and right low back. Approximately a month following the accident, Dr. Clark carried out a medical examination of the plaintiff and observed persistent tenderness to the neck and back. The pain which was described as "discomfort" prior to the 2013 accident had now intensified, requiring the plaintiff to use heating packs on his neck and shoulders to relieve the pain. I note here that I refer to the observations of Ms. Wilson, occupational therapist, who conducted a four and half hour assessment of the plaintiff for the purposes of her report.

**258**  There is no real dispute that the plaintiff suffered, and continues to experience, headaches and significant pain of his neck and back. In particular, I accept Dr. Clark's summary and opinion in relation to the plaintiff's headache and pain symptoms. Dr. Clark opined:

The MVA of July 24, 2013, was significant in causing neck, upper back, and low back pain and reduced range of motion. In my opinion, these symptoms impaired Mr. Sharpe's ability to exercise, and disturbed his sleep. However, as Mr. Sharpe reported ongoing discomfort of his neck and upper back, up to 5 days per month, from the prior MVA of 2009, at the time of the MVA on July 24, 2013, I do not think his neck and back musculoskeletal symptoms were solely caused by the MVA in question.

With regard to headaches, Mr. Sharpe had reported headaches after the MVA of 2009. I am not sure if he was still symptomatic with headaches at the time of the accident on July 24, 2013. In addition, Mr. Sharpe had a prior history of migraine headaches. In my opinion, the headaches Mr. Sharpe experienced after the MVA of July 2013 were likely multifactorial in etiology. However the significant increase in intensity and frequency of his headaches were likely a result of the MVA of July 24, 2013.

**259**  The expert evidence is divided on the question of whether the plaintiff suffered a concussion or mTBI.

**260**  The plaintiff did not recall suffering any head trauma in the Accidents. There is, in fact, no direct evidence the plaintiff struck his head. The expert witnesses, with one exception, did not provide evidence of head trauma. Dr. Longridge stated in his report that the plaintiff likely hit his head on the headrest of his vehicle. I find this evidence somewhat speculative and Dr. Longridge was alone in this opinion. I note that the plaintiff saw a neurologist, Dr. Dommann, approximately three weeks after the 2013 accident and it was Dr. Dommann's opinion that neuroimaging was not needed. Subsequent CT scans of the plaintiff's head revealed normal results.

**261**  There was evidence before me that loss of consciousness can be an indicator of concussion or traumatic brain injury. There is little concrete evidence of loss of consciousness. The plaintiff described a moment, upon collision, where he may have lost consciousness. Dr. Prout and Dr. O'Shaughnessy acknowledged that there may have been such a moment, a "microseconds" duration.

**262**  The majority of the evidence presented to support a finding of a concussion were symptoms that arose some time after the collision, including feelings of nausea, an episode of vomiting, cognitive difficulties, mood disturbance, and headaches. In this regard, I am alive to the evidence of Dr. Wild that concussion symptoms may not be noticed for some days or months after the event.

**263**  I conclude however, on the whole of the evidence, I cannot find it has been established, on the balance of probabilities, the plaintiff suffered a concussion or traumatic brain injury.

**264**  I also do not accept that the plaintiff's left hand injury was caused by the 2013 accident. There was no real dispute that the injury to the plaintiff's left hand was unrelated to the accident. Furthermore, the plaintiff was unable to explain how he injured his left hand, although he thought he dreamt that he caught a baseball with the same hand prior to discovering the injury. In any event, I am satisfied that there is insufficient evidence before me to find that the injury to the plaintiff's left hand was caused by the 2013 accident.

**265**  Upon a thorough review of the evidence, I am satisfied that the plaintiff's tinnitus, visual vestibular mismatch, poor sleep, mood disturbance, fatigue, and cognitive difficulties were, on a balance of probabilities, caused directly or indirectly by the Accidents.

**266**  I also find that it was more likely than not that the plaintiff's fall on August 8, 2014, which led to his ACL injury and subsequent knee surgery, was due to his imbalance problems.

**267**  In early August 2013, the plaintiff attempted to return to work but was unsuccessful. Subsequent attempts to return to work were unsuccessful or deferred due to general reports of dizziness, headaches, fatigue, and lack of confidence and ability to focus, concentrate, or make decisions.

**268**  The plaintiff began a graduated return to his IT Analyst position at HSBC in May 2015, although not full-time until July 2015. He reported difficulties working full-time due to his feeling of fatigue. He was advised to work four day workweeks in September 2015. The plaintiff experienced another setback when he was involved in the 2016 accident. However, he returned to work on January 26, 2016 despite recurrence of some of his previous symptoms. Shortly thereafter, on February 3, the plaintiff was laid off work.

**269**  The plaintiff testified, that along with himself, about 30-50% of the HSBC workforce was similarly laid off at the time. Ms. Boisvert supported this evidence. While I accept the evidence of Ms. Boisvert and Mr. Konno, his HSBC colleagues, that the plaintiff struggled in his position at HSBC following the Accidents, I am unable to conclude on the evidence that the plaintiff was laid off because his employer concluded he was unable to perform his duties by reason of his accident-related symptoms and injuries.

**270**  I find that, as a result of the Accidents, the plaintiff developed significant psychiatric symptoms that adversely affected his ability to return to work and, later, to perform his work duties. I accept the evidence of both forensic psychiatrists, Dr. Waisman and Dr. O'Shaughnessy, that the plaintiff developed a depressive illness and suffered from anxiety. I also accept their opinions that it is likely that the plaintiff developed a somatic symptom disorder which led him to dwell on his health and functioning and perceive greater disability than one would expect on an objective basis.

**271**  I find that, many of the plaintiff's persistent symptoms were, and are, a result of a vicious cycle of pain, anxiety, fatigue, and depression that serve to reinforce his somatic symptom disorder through a feedback loop that has resulted in the persistence of his symptoms for years. I rely on the express opinions of Dr. Waisman, Dr. Wild, and Dr. Hayden on this point.

**272**  In particular, I rely on Dr. Waisman's opinion of people suffering chronic pain:

...Individuals having persistent pain are commonly observed to have increasing difficulties with their energy resources as they age and so have to reduce participation level in the workforce. Fatigue can result in difficulties with memory, concentration and decision making. Sometimes fatigue can cause feelings of depression, helplessness, loss of control over one's life, lack of motivation and energy and apathy...

**273**  In her second report, Dr. Wild expressed the following opinion of the plaintiff:

... I see persistent problems with apprehension and heightened self awareness as important factors that continue to impact on Mr. Sharpe's level of functioning. This is despite what I have perceived as his willingness to put in maximum effort and exemplary determination to recover from the MA and its consequences to the best of his ability. However his problems with reduced mental endurance and associated compromised cognitive functioning together with his reduced stress resilience have led to a vicious cycle and prevented him to return to his pre-injury level of functioning in the workplace. [Emphasis added.]

**274**  Dr. Hayden expressed a similar opinion in her report:

However, the mood disturbance reflected on objective assessment is of considerable degree and would impact function. For instance, it seems likely these emotional issues would be contributing to Mr. Sharpe's variable attention and processing speed, which in turn would adversely impact memory on a functional basis.

Given available information, the mood disturbance appears related to the 2013 MVA with likely further exacerbation by the recent 2016 MVA.

**275**  This evidence together combined with Dr. Waisman's and Dr. O'Shaughnessy's evidence regarding somatic symptom disorder coincide with the plaintiff's evidence, and the corroborating evidence of multiple experts, as to the plaintiff's persistent impaired functioning. I accept this evidence.

**276**  The defendants placed significant weight on the fact that the plaintiff reported to Dr. Clark that he was "feeling fantastic" and that he had weaned himself off of the anti-depressant medication, Cipralex. They also placed considerable weight on the fact that the plaintiff has resumed full-time work at SSS with accommodations and support that have made him relatively successful in his position.

**277**  As I understand it, the plaintiff has had no continued need for Cipralex or an equivalent anti-depressant since March 2017 and up to the trial of this matter. However, I do not accept that his anxiety, fatigue, headaches or associated symptoms have resolved or that he no longer suffers from somatic symptom disorder.

**278**  Regardless, the plaintiff's current position has been accommodated due to his family ties. He suffers from considerable fatigue and his work takes up considerable time and effort due to his persistent headaches, flare ups of pain, tinnitus, and other symptoms. It is not without struggle that the plaintiff must now perform his job, despite the accommodations and support provided by his family. I also accept the evidence of the plaintiff, his father, and his stepmother that the plaintiff continues to struggle somewhat in his position as an ADR Recorder at the Sharpe family business.

**279**  There are conflicting accounts in respect of the plaintiff's without-accident career trajectory. Multiple experts have alluded or based their expert opinions on whether the plaintiff had always intended to take over the Sharpe family business or whether he had considered the Sharpe family business as a "Plan B" only. I find, however, that the plaintiff did always intend to return to the Sharpe family business at some point once his father and stepmother moved toward retirement or into retirement.

**IV. DAMAGES**

**A. Non-pecuniary damages**

**280**  The legal principles applicable are conveniently summarized by Mr. Justice Hunter, citing Justice Wedge at trial, in *Tisalona v. Easton*, [*2017 BCCA 272*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5P57-9BJ1-FCSB-S43T-00000-00&context=):

39 The trial judge correctly summarized the considerations for the assessment of non-pecuniary damages at paras. 80-83 of her judgment:

[80] The purpose of an award for non-pecuniary loss is to compensate the plaintiff for pain, suffering, disability and loss of enjoyment of life.

[81] Non-pecuniary loss must be assessed for both losses suffered by the plaintiff to the date of trial and for those she will suffer in the future. The award of a sum of money is to permit the plaintiff to substitute other amenities of life for those she has lost.

[82] In *Stapley v. Hejslet*, [*2006 BCCA 34*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1M7-00000-00&context=), Kirkpatrick J.A., writing for a majority of the Court, quoted at para. 45 *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, with respect to the underlying rationale for non-pecuniary damages and the considerations that should guide a court in awarding such damages. In *Lindal*, the Court emphasized that the amount of an award for non-pecuniary damages should not depend only on the seriousness of the injury. Rather, the amount of the award must depend as well on its ability to ameliorate the condition of the injured plaintiff considering his or her particular situation. For that reason, the gravity of the injury will not, of itself, be determinative of the amount of the award. An appreciation of the loss in the context of the specific plaintiff's circumstances is the key, and "the need for solace will not necessarily correlate with the seriousness of the injury."

**281**  The plaintiff seeks non-pecuniary damages of $200,000. The defendants submit that an appropriate award for non-pecuniary damages is $85,000 to $100,000.

**282**  Both parties provided me with numerous decisions to support their proposed range of non-pecuniary damages that serve as a rough guide. However, it is clear that each case must be decided on its own 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.

**283**  Counsel for both parties cited *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=) for the list of non-exhaustive factors to be considered in determining the appropriate award for non-pecuniary damages. I must consider the age of the plaintiff, the nature of the injury, the severity and duration of the pain, the emotional suffering, the level of disability, the impairment of family, marital and social relationships, the impairment of physical and mental abilities, the loss of lifestyle or impairment of life, and the plaintiff's stoicism: *Stapley* at para. 46.

**284**  In support of the plaintiff's position, counsel cited the following cases: *Lines v. Gordon*, [*2006 BCSC 1929*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-61K6-00000-00&context=); *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=); *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 *Owen v. Folster*, [*2018 BCSC 143*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5RKJ-9CN1-F60C-X1PM-00000-00&context=).

**285**  A review of these decisions support a range of $200,000 to $225,000; however, I consider these cases to award non-pecuniary damages for more substantial individual losses than the plaintiff in the case before me. For instance, *Burdett* and *Lines* were the only decisions involving plaintiff drivers. The three other decisions cited involved pedestrians or cyclists who suffered a mTBI, significant impairment to higher cognitive functions, and severe disability after having been struck by vehicles.

**286**  For example, in *Sirna*, Ms. Sirna was found to have suffered a mTBI following direct trauma to her head on the windshield and pavement when the defendant's vehicle struck her. Ms. Sirna suffered impairment to her higher cognitive functions which resulted in the development of a learning disability. Her mother had to take over all laundry, cooking, and grocery shopping duties. She was socially withdrawn and no longer active. Justice Macauley emphasized her age and constellation of injuries. Ms. Sirna was 25 years old at trial.

**287**  In *Dikey*, similar to *Sirna*, the plaintiff was a pedestrian who was struck by the defendant vehicle. He flew 50 feet and struck his head on a concrete wall. He was hospitalised for a week and required homecare service for two more weeks following his discharge from the hospital. His loss was similar to Ms. Sirna's; however, he was found to be unlikely to work again. He was only 26 years old.

**288**  I found *Burdett* to be of most assistance from the list of the plaintiff's cases. Mr. Burdett, 58 years old at trial, was involved in two different motor vehicle accidents. He was found to have suffered a concussion or mTBI and continued to suffer from severe cognitive impairments, including loss of high level executive functioning. Mr. Burdett had difficulty in decision-making, could no longer compose his own emails, or operate his business. There was remarkable change in his personality and temperament. He was no longer competitively employable. He was unable to maintain his prior active lifestyle or many of his prior hobbies, including skiing, sailing, and reading. His relationship with friends and family were negatively affected. The court awarded $200,000.

**289**  In support of the defendants' position, counsel cited the following cases: *Moukhine v. Collins*, [*2012 BCSC 118*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1NK-00000-00&context=); *Koltai v. Wang*, [*2015 BCSC 1346*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GNX-HSK1-FG12-625S-00000-00&context=); and *Christensen v. Jand*, [*2018 BCSC 1294*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5T04-FS01-JT99-2458-00000-00&context=).

**290**  A review of these decisions support a range of $85,000 to $90,000 in non-pecuniary damages; however, I found that *Koltai* suffered from significant distinguishing factors.

**291**  In *Koltai*, Justice Armstrong had "grave reservations about the plaintiff's reliability and credibility in his presentation to the Court" and that there were "inherent improbabilities in his testimony concerning his limitations": paras. 219-220. Ultimately, Armstrong J. accepted that the accident was significant with pain being his most significant symptom which has resulted in the development of somatic symptom disorder and associated psychological consequences. Mr. Koltai had rejected some remedial and rehabilitation suggestions of his doctors. Mr. Koltai was found likely to return to some form of work following compliance with the recommended treatments. The court awarded $85,000 in non-pecuniary damages.

**292**  In this case, the plaintiff has suffered significant consequences as a result of the Accidents. He is only 39 years old. He continues to suffer neck and back pain from soft tissue injuries sustained as a result of the Accidents, is preoccupied with his symptoms and his future, and experiences frequent headaches, dizziness, and fatigue. He has tinnitus from which he is unlikely to recover. These symptoms, in varying degrees, have persisted for approximately five years since the 2013 accident.

**293**  The plaintiff no longer suffers from a depressive illness, but he is preoccupied by his symptoms and experiences anxiety as a result. His dizziness and imbalance issues are particularly significant sources of anxiety and fear of reinjury. These symptoms have resulted in significant loss of enjoyment of life.

**294**  The plaintiff is not, however, severely disabled. He is still able to work and earn an income, to maintain the household, and function day-to-day. The relationship with his family has not been significantly impacted. In fact, the plaintiff continues to have a strong relationship with his parents and, to an lesser extent, his sister. After the 2013 accident, the plaintiff was able to meet, date, and marry his now-wife who was pregnant, with their first child, at the time of trial. His other social relationships, however, have been affected.

**295**  The plaintiff is also unable to maintain his prior active lifestyle. He used to enjoy playing sports like soccer and baseball, running, cycling and exercising at the gym, among other things. He can now only manage walking and perhaps the gym for rehabilitative purposes. His tinnitus and sensory sensitivity are significant distractions. He has some difficulty with attention, processing speed, and memory.

**296**  The plaintiff has also suffered vocationally. Prior to the accident, the plaintiff was a strong, young man with aspirations of advancing at HSBC. He was a diligent and good worker. He is no longer competitively employable and is limited to working in an accommodated position at his family business where he is severely limited in his ability to advance.

**297**  I conclude that an appropriate award for non-pecuniary damages in this case is $170,000.

**B. Past loss of earning capacity**

**298**  The plaintiff seeks past loss of earning capacity in the amount of $160,000. The defendants submit the appropriate award for past income loss to trial is $71,846.

**299**  Section 98 of the *Insurance (Vehicle) Act*, *R.S.B.C. 1996, c. 231* provides that a person who suffers a loss of income as a result of an accident is entitled to recover damages for income loss suffered after the accident up until the start of trial of any action brought in relation to it from the designated defendants. The relevant period, in this case, is July 2013 until the end of August 2018.

**300**  Past income loss is a claim of loss based on what a plaintiff would have, not could have, earned but for the injury that was sustained: *Rowe v. Bobell Express Ltd.*, [*2005 BCCA 141*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M463-00000-00&context=) at para. 30; *M.B. v. British Columbia*, [*2003 SCC 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YB-00000-00&context=) at para. 49. However, Justice Rowles said appositely at para. 29 of *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=):

... 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.

**301**  Counsel for the plaintiff submits that past loss of earning capacity should be calculated on the assumption that the plaintiff would have continued at HSBC until the end of 2014 and, thereafter, he would have "moved laterally to Sharpe Studios from 2015 through 2019".

**302**  To determine the appropriate quantum of damages for past loss of earning capacity, counsel for the plaintiff submits that the plaintiff would have likely earned:

**Year** **Without Accident Earnings**

From July 2013 $26,245

(from $60,000 per annum)

2014 $65,000

2015 (starting at SSS) $45,000

2016 $60,000

2017 $75,000

End of August 2018 $60,000

(from $90,000 per annum)

**1. July 2013 to January 2016**

**303**  After deducting tax, disability benefits, and actual income earned, counsel for the plaintiff estimated past wage loss for the remainder of 2013 to the end of 2015 as being approximately $81,948.

**304**  Counsel for the defendants says that the plaintiff received short-term and long-term disability benefits, and other income, for total employment earnings in the amounts of $49,978 in 2013, $6,226 in 2014, and $27,425 in 2015. The total employment earnings during this period was $83,629.

**305**  Counsel for the defendants noted that the plaintiff's highest annual income at HSBC was in 2012 where he earned a gross income of approximately $56,400. Counsel also noted that the plaintiff said he was to earn $65,000 for 2013. Assuming that the plaintiff would have earned $56,400 per year from 2013 to 2015, or $65,000 per year during that period, as he said he was earning at the time of the 2013 accident, the defendants say that the without-accident earnings for that period would be $169,200 or $195,000 respectively. The defendants therefore submit that past wage loss for this period would be $69,825.94 or $88,929.75 respectively, assuming the appropriate tax deductions. Counsel for the defendants considered the average of the two figures to fairly compensate the plaintiff for past wage loss from July 2013 to January 2016.

**306**  Counsel for the defendants also submits that the past wage loss calculations should not include the eight weeks' delay of his return to work following knee surgery. After this deduction, counsel for the defendant considered past wage loss from July 2013 to the end of December 2015 to be $71,845.16.

**307**  Counsel for the plaintiff notes, from Mr. Sharpe's testimony, that it was understood as of the summer of 2013 between the plaintiff and himself that the plaintiff would return to the Sharpe family business in the "near to medium" term to be trained as a Rerecording Mixer. In their submissions, counsel for the plaintiff urged me to find that he would have returned to the Sharpe family business as early as January 2015.

**308**  I find the evidence falls well short of providing an evidentiary foundation to conclude that the plaintiff was likely to have returned to SSS by January 2015. As I have stated, I accept that it was the plaintiff's plan to return to the Sharpe family business at some point. However, in light of the evidence before me, I do not consider that it was his intention to return there as early as January 2015.

**309**  There was little evidence to found this intention beyond the expressions of the plaintiff and his father at trial. Indeed, there was no evidence from the expert witnesses that the plaintiff ever expressed his intention to have returned to the Sharpe family business as early as 2015.

**310**  In fact, in his 2016 report, Mr. Carlin described the plaintiff as having said that "one possibility for the future was that upon his father's retirement he could take over and run the sound studios". In his examination for discovery, the plaintiff said his plans as of the spring of 2013 was to continue advancing within HSBC. He said he intended to return to SSS when his father was ready to retire. At the time of trial in September 2018, his father was 65 years old. At trial, the plaintiff's father further said that he "knew" the plaintiff would get bored at the bank "eventually" and that he intended to "leave it up to [the plaintiff] to make the move back".

**311**  Even following the 2013 accident, it was open to the plaintiff to return to SSS in 2015. He also could have returned to the Sharpe family business in January 2016. Instead, the plaintiff chose to continue at HSBC until he was laid off in February 2016. For these reasons, I am not satisfied that the plaintiff would have returned to the Sharpe family business as early as 2015.

**312**  I disagree with defendants' counsel, however, that the eight weeks' delay following the plaintiff's knee surgery should not be included in the past wage loss calculation. As I have said, I find that plaintiff's visual vestibular mismatch and imbalance problems were likely caused by the Accidents. On this point, I accept Dr. Longridge's opinion.

**313**  I also find that it was more likely than not that the plaintiff's fall on August 8, 2014, which led to his ACL injury and subsequent knee surgery, was due to these imbalance problems. For this reason, I would include this eight week period in the assessment of past wage loss.

**314**  I conclude that the plaintiff should be compensated for loss of earning capacity from July 24, 2013 to the end of January 2016. I consider that the $65,000 annual income amount, representing the annual income the plaintiff was projected to receive prior to the 2013 accident, is a reasonable value for the purposes of assessing past wage loss for this period. I am therefore satisfied that the plaintiff's without-accident earning capacity, from 2013 to 2015, would have been approximately $195,000 prior to tax and other deductions. I accept the $83,629 value as the plaintiff's actual income between 2013 and 2015. Past wage loss for this period would be approximately $111,371 prior to tax and other deductions.

**315**  I note that the plaintiff earned approximately $4,130 before tax in January 2016. The plaintiff's without-accident earning capacity, using the same $65,000 figure, would have been $5,416.67 before tax and other deductions. The loss of capacity for this month amounts to approximately $1,300. This amount should be added to the $111,371 figure for total past wage loss from July 2013 to January 2016. I would round this past wage loss award up to $115,000.

**2. February 2016 to December 2016**

**316**  The defendants submit that loss of earning capacity should not be calculated following February 3, 2016, when the plaintiff was laid off from HSBC.

**317**  In the alternative, the defendants say that if this court finds that the lay off from HSBC was not an intervening event, but caused by the Accidents, then his total employment income for 2016 would be $37,586 inclusive of the plaintiff's severance pay and his earnings from January 2016.

**318**  I find that it is more likely than not that the plaintiff was laid off at HSBC for reasons unrelated to the Accidents. I found Ms. Boisvert to be a credible witness and accept that 30-50% of the HSBC workforce was laid off due to global restructuring. For this reason, I agree with the defendants that this constituted an intervening event.

**319**  Counsel for the plaintiff submits that if this was an intervening event, past wage loss should still be calculated for the following period because, absent his injuries and symptoms, the plaintiff would have been able to find similar employment or returned to SSS after he was laid off.

**320**  I disagree. It is relevant that after the plaintiff was laid off at HSBC, he did not attempt to find employment before he began work at SSS in January 2017. For a period of 11 months, the plaintiff did not work. Mr. Carlin noted that, at the time of his interview for the September 5, 2016 report, the plaintiff told him that he intended to attempt "a job search in the fall". When asked by his counsel at trial whether he felt able to work prior to January 2017, the plaintiff said "not to an increased capacity" and that his doctor said to "take this time to work on relaxing and rehabbing".

**321**  However, there was no evidence of this recommendation from Dr. Clark in either of her reports nor in her testimony at trial. Dr. Pritchard testified to telling the plaintiff to take it easy; however, in my view, this is a far cry from a recommendation not to find work, even part-time work. There was evidence that the plaintiff was capable of working seven hours per day following his second accident, albeit for a week prior to being laid off. In light of the evidence before me and the burden of proof that rests on the plaintiff, I consider there to be insufficient evidence to conclude that the plaintiff was unable to work during this 11 month period, between February 2016 to December 2016, due to the Accidents.

**3. January 2017 to Trial Being September 2018**

**322**  Counsel for the plaintiff took the position that the plaintiff would have returned to SSS in January 2015 and begun earning $45,000, increasing every year thereafter by $15,000. Counsel for the plaintiff estimated that the plaintiff would have earned $75,000 in 2017 and $90,000 in 2018. Taking into account the plaintiff's actual total income between January 2017 and September 2018, of approximately $89,900, counsel for the plaintiff estimated past wage loss for this 20 month period as being approximately $36,100.

**323**  Counsel for the defendants took the position that the average between a $56,400 and $64,000 annual income for the purposes of assessing past wage loss would fairly compensate the plaintiff for this 20 month period.

**324**  I am not satisfied that counsel for the plaintiff has proven on a balance of probabilities that the plaintiff would have returned to SSS as early as 2017. I have considered the evidence and am satisfied that there was only an intention to return to the Sharpe family business at some point in the future. As such, I consider that this is the appropriate circumstance to calculate loss of earning capacity according to their relative likelihood of occurring: *Gao v. Dietrich*, [*2018 BCCA 372*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5TG0-RY01-F81W-22R8-00000-00&context=) at paras. 34-39.

**325**  In this case, I am satisfied that it was 50% likely that the plaintiff would have continued in a position equivalent to a BC Male User Support Technician and 50% likely that the plaintiff would have returned to SSS to begin training to take over the Sharpe family business.

**326**  I consider that the approximately $65,000 annual income earned by the plaintiff in 2013 prior to the 2013 accident is a reasonable estimate of his without-accident income for this period. As such, the plaintiff's gross earnings over this 20 month period should have been approximately $108,333.33 prior to taxes and other deductions. This amount is reduced to approximately $54,166.67, prior to taxes and other deductions, to reflect the 50% likelihood of this occurring.

**327**  I also accept the plaintiff's submissions on his projected annual incomes upon returning to SSS, starting at $45,000 in his first year and increasing to $60,000 in his second year at the Sharpe family business. As such, the plaintiff's gross earnings over this 20 month period should have been approximately $85,000 prior to taxes and other deductions. This amount is reduced to approximately $42,500, prior to taxes and other deductions, to reflect the 50% likelihood of this occurring.

**328**  The plaintiff's total without-accident income, accounting for the relative likelihood that he would have continued in an equivalent IT technician position or returned to the Sharpe family business, would be approximately $96,666.67 before taxes and other deductions. From that amount, I would subtract the plaintiff's actual income of $89,900 during this period leaving $6,766.67.

**329**  I consider that this $6,766.67 difference would have been deducted from the plaintiff's annual income for tax purposes, at the very least, and therefore decline to award loss of earning capacity for the period between January 2017 and August 2018.

**C. Future loss of earning capacity**

**330**  The plaintiff seeks future loss of earning capacity in the sum of $6,000,000. The defendants submit the appropriate award is between $125,000 and $135,000.

**331**  The assessment of future loss of earning capacity was summarized in *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 paras. 153-161.

[153] A claim for loss of future earning capacity raises two key questions: 1) has the plaintiff's earning capacity been impaired by his or her injuries; and, if so 2) what compensation should be awarded for the resulting financial harm that will accrue over time? The assessment of loss must be based on the evidence, and not an application of a purely mathematical calculation. The appropriate means of assessment will vary from case to case: *Brown v. Golaiy* [*(1985), 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.); *Pallos v. Insurance Corp. of British Columbia* [*(1995), 100 B.C.L.R. (2d) 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0K2-00000-00&context=) (C.A.); *Pett v. Pett*, [*2009 BCCA 232*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M2G2-00000-00&context=).

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

[155] Insofar as possible, the plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendant's ***negligence***: *Lines v. W & D Logging Co. Ltd.*, [*2009 BCCA 106*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3X8-00000-00&context=) at para. 185. The essential task of the Court is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after the accident: *Gregory v. Insurance Corp. of British Columbia*, [*2011BCCA 144*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1K8-00000-00&context=) at para. 32.

[156] There are two possible approaches to assessment of loss of future earning capacity: the "earnings approach" from *Pallos*, and the "capital asset approach" in *Brown*. Both approaches are correct. The "earnings approach" will generally be more useful when the loss is easily measurable: *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. Where the loss "is not measurable in a pecuniary way", the "capital asset" approach is more appropriate: *Perren* at para. 12.

[157] The earnings approach involves a form of math-oriented methodology such as i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value or ii) awarding the plaintiff's entire annual income for a year or two: *Pallos v. Insurance Corp. of British Columbia* [*(1995), 100 B.C.L.R. (2d) 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0K2-00000-00&context=) (C.A.); *Gilbert v. Bottle*, [*2011 BCSC 1389*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-62FG-00000-00&context=) at para. 233.

[158] The capital asset approach involves considering factors such as i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; ii) whether the plaintiff is less marketable or attractive as a potential employee; iii) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and iv) whether the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market: *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.); *Gilbert v. Bottle*, [*2011 BCSC 1389*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-62FG-00000-00&context=) at para. 233; *Morgan v. Galbraith*, [*2013 BCCA 305*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JW09-M12P-00000-00&context=) at paras. 53 & 56.

[159] Though the capital asset approach is not a "mathematical calculation", the trial judge must still explain the factual basis of the award: *Morgan v. Galbraith*, [*2013 BCCA 305*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JW09-M12P-00000-00&context=) at para. 56.

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

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

[161] The plaintiff may be able to prove a substantial possibility of future loss of income despite having returned to his or her usual employment and even where he has received a raise or obtained a promotion: *Perren v. Lalari, supra*; *Combs v. Bergen*, [*2013 BCSC 321*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JC5P-G1XT-00000-00&context=). There is no principle of law requiring the medical evidence to establish an impairment of earning capacity; rather, such impairment is established on the totality of the evidence: *Miscisco v. Small*, [*[2001] B.C.J. No. 2042*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F27X-615P-00000-00&context=).

**332**  The plaintiff has returned to the Sharpe family business and has begun to successfully take on the managerial duties of his stepmother. He is working and earning an income despite his injuries. The defendants submit his injuries have mostly improved. The defendants specifically refer to the significant recovery from his soft tissue injuries, the improvement in his mood, and his ability to nurture his relationships and start a family with his wife. The defendants submit that the plaintiff has not established a real and substantial possibility of loss of future earning capacity.

**333**  With respect to the plaintiff's ability to become the Rerecording Mixer at SSS, the defendants say that the plaintiff has failed to establish a real and substantial possibility that he had, or would have, the drive and inherent talent required to attain and succeed in this role. There was testimonial evidence from his father that indicated the plaintiff did not have the necessary drive or passion, such as explicitly stating that the "long hours weren't for him". By contrast, the plaintiff's current management responsibilities, of organizing projects and handling clients, and ADR recording work, of dealing with actors and directors, is suited to his stated aptitudes and interests and is consistent with the vocational profile provided by Mr. Carlin.

**334**  The defendants submit that taking over the operation and management of the Sharpe family business was always a two-person job. His father was the senior Rerecording Mixer and his stepmother was the manager in charge of administration of the business. The defendants say that the plaintiff would have had to hire someone to assist him in one of these roles when his time came to take over the Sharpe family business in any event, and that his prospects of earning a relatively substantial income in this managerial position is equally likely. As such, the plaintiff has not established a loss of future earning capacity.

**335**  Counsel for the plaintiff says that he would have risen to the role of senior Rerecording Mixer over a five-year period and that his success and abilities prior to attending Capilano University and working at HSBC demonstrate his ability to work hard and improve his skills in the Sharpe family business. They say that it was always the plaintiff's intention to take over the business and that he would have continued to do so through to age 70 (contrary to instructions given to Mr. Benning).

**336**  Counsel for the plaintiff, in their closing submissions, urges me to accept that the plaintiff would have earned approximately $375,000 as the senior Rerecording Mixer and owner of the Sharpe family business as of 2020. Despite the Sharpe family business recording losses from 2008 to 2016, counsel for the plaintiff submits that the Sharpe family business is expected to see an upward trend. SST has seen an approximate $260,000 profit for 2017, its highest since 2007.

**337**  They submit that, post-accident, the plaintiff will be unlikely to make the business successful without being able to do the most valuable job, and that it is likely that the Sharpe family business will be sold or closed down in the medium term. As such, counsel for the plaintiff submits that he will need to compete in the open job market where he is competitively unemployable. They say his loss of future earning capacity is $6,000,000 after subtracting $1,000,000 of his residual earning capacity, working at a job in the open market, from $7,000,000, his projected pre-accident earnings as the senior Rerecording Mixer.

**338**  I have considered the submissions of counsel and am satisfied that the plaintiff has proven a real and substantial possibility of loss of future earning capacity. As stated 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 58, the plaintiff has not suffered a complete loss of earning capacity but an impairment of a capital asset. It is clear that the plaintiff's capacity to earn an income has been diminished as a result of the Accidents, resulting in a pecuniary loss, despite the fact that he earns about the same income he did prior to his injury.

**339**  Loss of future earning capacity is not a determination that is "a precise or mechanical exercise": *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. 62. The facts in the case at bar make it particularly difficult to undertake an assessment under this head of damage using the earnings approach. Although the plaintiff worked at HSBC for approximately four years prior to the 2013 accident, it was not his stated intention to continue there or in that particular field. He always planned to return to the Sharpe family business. The difficulty with using an earnings approach and relying on the plaintiff's "projected" income as a senior Rerecording Mixer, however, is the fact that the income associated with this position, with or without the Accidents, is unreliable and speculative.

**340**  I do not accept the $375,000 figure asserted by the plaintiff as the plaintiff's likely income in this position for several reasons.

**341**  First, the Sharpe family business reported significant losses from 2008 to 2016. Although I was told the SST side of the business reported a profit in 2017, I was not given any such evidence for SSS. At trial, I was told the reported losses looked "worse on paper" and that they were in the process of digitizing their technology to better meet the needs of the film industry clients. No expert opinion evidence was tendered to analyze or deconstruct the financial information of the Sharpe family business that would lead me to conclude it was expected to begin a trend of increasing profit.

**342**  I pause to note that counsel for the plaintiff called Mr. Troy Nikolai, the accountant for the Sharpe family business, to explain aspects of the financial statements of the Sharpe family business, such as its operating losses, notes on dividends paid out, and the purification process. He did not give evidence, and was not qualified to give evidence, about the future success or failure of the business that would assist with a determination of the plaintiff's future loss. As such, I do not consider his evidence to be of assistance on the question of whether the plaintiff's future loss is sufficiently "measurable" for the purpose of using the earnings approach.

**343**  Second, counsel for the plaintiff further urged me to accept certain inferences that would lead me to conclude that the Sharpe family business would begin another successful trend due to the "cyclical" nature of the film industry. No expert evidence was tendered to explain the "cyclical" nature of the film industry.

**344**  Third, I consider it problematic to further accept that the Sharpe family business would succeed in a manner that would ensure a profit and an income for the plaintiff of $375,000, or a value even close to this amount, when counsel for the plaintiff has also submitted that the film industry is "cyclical" with evidence that, for almost a decade, the Sharpe family business has reported significant losses.

**345**  Finally, I consider it artificial to accept the $375,000 annual income figure proposed by counsel for the plaintiff as the plaintiff's likely, or realistic, without-accident income, when neither Mr. Sharpe nor Ms. Cristianini have reported an annual income figure even close to $300,000 since 2008, in either their T4 income or their total income for owner as represented in Mr. Benning's third report. Even the average annual income value from 1999 to 2016, as set out in Mr. Benning's third report, of the total income for Mr. Sharpe and Ms. Cristianini indicate a value of less than $250,000 each. The $375,000 value is therefore considerably inflated in light of this average and particularly so in light of close to a decade of reported losses in the Sharpe family business in its most recent years.

**346**  The financial circumstances of the Sharpe family business were present before, and unrelated to, the plaintiff's Accidents and injuries. For these reasons, I find the plaintiff's pre-accident earning capacity at the Sharpe family business to be fundamentally resting on speculation, conjecture, and optimism. This is not a case where the loss is "easily measurable".

**347**  I consider the capital asset approach to be appropriate in this case. When determining the appropriate quantum of damages for loss of future earning capacity using the capital asset approach, I am required to consider 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 otherwise might 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.

See *Brown v. Golaiy* (1985), [*[1997] 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 356 and *Morgan v. Galbraith*, [*2013 BCCA 305*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JW09-M12P-00000-00&context=) at paras. 53 and 56.

**348**  It is clear that the plaintiff has residual earning capacity. Although he is currently working at the Sharpe family business, he has proven to have the capacity to work hard and earn an income. He has made significant improvement with respect to his soft tissue injuries. His mood and the frequency of his headaches have markedly improved. He has begun to incorporate exercise back into his life. He has demonstrated his ability to adapt somewhat to his tinnitus and imbalance problems. He has a strong system of support from his parents and his wife. I have no doubt that he will continue to move forward with his life and with his recovery.

**349**  I do not, however, minimize or overlook how these injuries and symptoms have affected the plaintiff's life. I recognize that the tinnitus, visual vestibular mismatch, headaches, and lingering pain have made him less competitive as an employee and render him less capable overall from earning income from most types of employment. I accept that the plaintiff has lost the ability to at least attempt to pursue job opportunities that would have been open to him had he not been injured, such as the Rerecording Mixer position at the Sharpe family business. He is certainly less valuable to himself as a person capable of earning income in a competitive labour market.

**350**  In *Pallos v. Insurance Corp. of British Columbia* [*(1995), 100 B.C.L.R. (2d) 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0K2-00000-00&context=) (C.A.), Mr. Justice Finch considered various methods to assess the quantum of an award for loss of future earning capacity. He said at 271:

... One method is to postulate a minimum annual income loss for the plaintiff's remaining years of work, to multiply the annual projected loss times the number of year[s] remaining, and to calculate a present value of this sum. Another is to award the plaintiff's entire annual income for one or more years. Another is to award the present value of some nominal percentage loss per annum applied against the plaintiff's expected annual income. In the end, all of these methods seem equally arbitrary. It has, however, often been said that the difficulty of making a fair assessment of damages cannot relieve the court of its duty to do so...

**351**  The plaintiff is middle-aged and has some 25 years of future employment ahead of him. I consider that the plaintiff has great potential to continue to succeed with his strong work ethic. I recognize however that he continues to suffer from chronic symptoms that, although they may continue to improve, currently place him at a risk of loss of future earning capacity should he have to compete in the open labour market. I am satisfied that there is a possibility the plaintiff may have to compete in the open labour market should the Sharpe family business fail.

**352**  I consider that reasonable and fair compensation under this head of damage can be achieved by awarding the plaintiff's "entire annual income for one or more years": *Pallos* at 271. This method is appropriate primarily due to the speculative nature of the plaintiff's earning and future trajectory, in large part due to the unpredictable future of the Sharpe family business and the plaintiff's age.

**353**  I also consider there are various positive and negative contingencies to account for in this assessment, including further improvements in his health, economic decline and loss of employment. The task of the court is to assess the damages which is an exercise in judgment, not to engage in an exercise of formulaic, mathematical calculation: *Romanchych v. Vallianatos*, [*2010 BCCA 20*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X0R5-00000-00&context=) at para. 13.

**354**  I endorse and adopt the approach taken by Mr. Justice MacKenzie in *Miller v. Lawlor*, [*2012 BCSC 387*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-62BF-00000-00&context=):

137 However, I have found no authority that restricts an award for loss of future earning capacity utilizing this method to one or two years of annual income, and the defendant agrees. Mr. Justice Finch in *Pallos*, again, uses the phrase "one *or more* years" [emphasis added]. Indeed, in *Phoutharath v. Moscrop*, [*2002 BCSC 686*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F900-G13K-00000-00&context=), Garson J. (as she then was) referred at para. 57 to *Kahle v. Ritter*, [*2002 BCSC 199*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JC5P-G1D9-00000-00&context=), and *Letourneau v. Min*, [*2001 BCSC 1519*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F27X-61HG-00000-00&context=), as well as *Pallos*, and concluded that Mr. Phoutharath's "risk of demotion is greater than" the plaintiffs' in those three cases, adding that if she chose that method she "would award three years' lost income."

**355**  Although the plaintiff has begun working at the family business as he had always planned and is earning about the same income he did prior to the Accidents at HSBC, the plaintiff is unable to take on the duties of a Rerecording Mixer and is less competitive in the open labour market by reason of his tinnitus and other symptoms.

**356**  Although I am cognizant of the advice of our late Chief Justice McEachern, 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 period", I am satisfied that the plaintiff's tinnitus and other symptoms are distressing and an obstacle to him in any future work.

**357**  Dr. Longridge, and others, have concluded, in reports and testimony, that the plaintiff's tinnitus and imbalance issues are likely to persist on a long-term, permanent basis. There is therefore some prospect that both symptoms, together with the plaintiff's chronic pain, will affect the plaintiff's career and employability in the future. If the Sharpe family business does not succeed, I am satisfied the plaintiff will have some difficulty competing in the open labour market due to his symptoms, as MacKenzie J. found in *Miller*.

**358**  For these reasons, I am satisfied that a fair award for the plaintiff for loss of future earning capacity is in the range of three years' annual income as projected for 2019 in relation to the position at the Sharpe family business: *Miller* at paras. 137-140; *Flores v. Burrows*, [*2018 BCSC 334*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5RTY-1871-JCBX-S0TG-00000-00&context=) at paras. 138-139.

**359**  The plaintiff's annual income as at trial was $64,000. It is projected to be, in 2019, $75,000 per annum according to the projected earnings for the plaintiff in his third year at the Sharpe family business (see para. 302 of these reasons for judgment). On the totality of the evidence, and attempting to determine a just and fair compensation in this regard, I am satisfied that the sum of $275,000 is fair and reasonable compensation to the plaintiff for loss of future earning capacity.

**D. Costs of future care**

**360**  The plaintiff seeks an award for costs of future care in the sum of $156,736.44, inclusive of housekeeping costs of $25,200. I will return to housekeeping costs shortly. The defendants submit the appropriate award for costs of future care is $56,700 to $57,700, inclusive of housekeeping costs of $23,000.

**361**  The test for assessing costs of future care was summarized by Madam Justice Newbury in *Paur v. Providence Health Care*, [*2017 BCCA 161*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5NDS-2931-F4GK-M0BP-00000-00&context=) at para. 109:

109 The law is clear that in order to be included in an award of damages, an item of future care must be medically necessary. In *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=), this court reviewed the applicable principles:

The test for assessing future care costs is well-settled: the test is whether the costs are reasonable and whether the items are medically necessary: *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 page 78; affirmed [*(1987), 49 B.C.L.R. (2d) 99*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-JTNR-M3X3-00000-00&context=) (C.A.):

1. The primary emphasis in assessing damages for a serious injury is provision of adequate future care. The award for future care is based on what is reasonably necessary to promote the mental and physical health of the plaintiff.

McLachlin J., as she then was, then went on to state what has become the frequently cited formulation of the "test" for future care awards at page 84:

The test for determining the appropriate award under the heading of cost of future care, it may be inferred, is an objective one based on medical evidence.

These authorities establish (1) that there must be a medical justification for claims for cost of future care; and (2) that the claims must be reasonable. [At paras. 62-3.]

While there must be some evidentiary link between a medical expert's assessment of disability and the care recommended, it is not necessary that a medical expert testify to the medical necessity of each and every item of care that is claimed: *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; *Aberdeen v. Zanatta* [*2008 BCCA 420*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3RY-00000-00&context=) at paras. 43, 63.

**362**  The onus is on the plaintiff to show that there is a reasonable likelihood that they will use the recommended services: see *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. However, no future care costs are to be awarded for costs that the plaintiff would have incurred in any event: see *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 paras. 51-55. Damages for costs of future care are a matter of prediction and therefore cannot be measured exactly: *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. Finally, a little common sense should inform the analysis despite the recommendations by experts in the field: see *Dzumhur v. Davoody*, [*2015 BCSC 2316*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HNF-8S81-JB7K-21HX-00000-00&context=) at para. 244.

**363**  In light of the applicable legal principles, the reports of Ms. Wilson, and the submissions of counsel, I assess the costs of future care as follows:

1. Occupational therapy sessions and reporting in the amount of $1,258.60;
2. Kinesiology sessions in the amount of $1,809.60;
3. Psychological intervention in the amount of $9,800;
4. Private multidisciplinary pain program in the amount of $14,500;
5. Be Calm Program in the amount of $27;
6. Massage therapy sessions in the amount of $3,780;
7. Physiotherapy sessions in the amount of $5,325;
8. Neurovisual rehabilitation sessions in the amount of $3,375;
9. Life coaching in the amount of $1,575;
10. Transportation costs in the amount of $2,250;
11. Medications (including Botox injections) in the amount of $24,100; and
12. Equipment and aides in the amount of $3,550;

**364**  I am not prepared to award future care costs for an additional occupational therapy program under the supervision of a kinesiologist. Ms. Wilson recommended the extended program to have a kinesiologist motivate the plaintiff and to prevent the plaintiff from participating in activities that trigger his dizziness and tinnitus. I consider the extended program to largely overlap with the kinesiology sessions for which costs have been allocated. The kinesiologist, in these sessions, is to prepare a personalized exercise program for the plaintiff and to attend with the plaintiff to the gym to instruct on gym safety and training in light of his symptoms. Given the plaintiff's background in personal training, I consider the kinesiology sessions to be sufficient.

**365**  Although Dr. Pritchard recommended driving counselling to address the plaintiff's driving anxiety, I consider that such anxiety may be sufficiently addressed with the generous allocation of costs for psychological intervention.

**366**  I am also not prepared to award damages for therapeutic yoga or aqua therapy in which the plaintiff expressed no need or interest at trial.

**367**  I conclude it is appropriate in the circumstances of this case to award an amount for a multidisciplinary pain program. The cost of the private program in this regard is $14,500. The cost of the public program is $2,500. Ms. Wilson, in a footnote to her costs of care report, advised there is an extensive waiting list for patients seeking to enter the public chronic pain program. In my view, the plaintiff ought not to be held hostage to the extensive waitlist and I award $14,500 for the private pain program. I do not say that a private avenue to care is always more appropriate if there is an extensive waitlist for the public option. It is however a factor to be weighed. In these circumstances, and given the conditions regarding the plaintiff as previously outlined, I conclude the private option is the fair and appropriate conclusion.

**368**  According to Dr. Clark and the plaintiff himself, the plaintiff had weaned himself off of Cipralex, the anti-depressant, in March 2017 and was still off of anti-depressants at the time of trial. With respect to the blood pressure medication, Ramipril, I note that Dr. Clark considered the plaintiff's high blood pressure to be unrelated to the accident and there was no suggestion that the plaintiff continued to require it. I award no costs for such medication.

**369**  I do, however, allocate costs for the sleeping medication zopliclone which the plaintiff has testified to taking once every one or two months and ibuprofen for the plaintiff's headaches which he testified to using approximately twice a week.

**370**  I note that the plaintiff sought an award of approximately $62,616 for Botox injections to be administered three times a year for 40 years accounting for the present value discount rate. I would, instead, allocate approximately $23,000 for Botox injections, which is the value of three injections per year for 10 years. I awarded the full $355 amount for the Magic Bag replacements.

**371**  Although the re-education, job coaching, labour market analysis, and vocational assessment were items that were recommended by Ms. Wilson in her report, and the plaintiff expressed some interest should the Sharpe family business fail or be sold, I consider that there is a real question as to whether the plaintiff will require such vocational or educational training. As Kirkpatrick J.A. said in *O'Connell*, the assessment of costs of future care requires a consideration of the losses that "may reasonably be expected to be required": see para. 70. As such, I endorse and adopt the approach taken in *O'Connell* and apply a 50% contingency to the $15,650 total award allocation for those items, reducing this award to $7,825.

**372**  I consider the gym membership costs to be costs that the plaintiff would have had to incur in any event, particularly since, I note, the plaintiff had a gym membership prior to the Accidents. I agree with the defendants that the cost of pillows, shower sponges, tinted glasses, and earphones are costs that the plaintiff would have, at least partially, incurred in any event. For this reason, I have deducted a modest amount that I consider to be the fair average cost of such items from the amounts provided by Ms. Wilson in her report. I decline to allocate an award for the PoNS device still undergoing trial and for which there was no projected cost.

**373**  In the result, I would award a rounded sum of $80,000 for costs of future care.

**E. Loss of housekeeping capacity**

**374**  The plaintiff seeks loss of housekeeping capacity of $25,200. The defendants submit the appropriate award under this head of damage is $23,000.

**375**  Loss of housekeeping capacity is conceptually different from costs of future care. In *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=), Justice Huddart discussed the principles to be applied in assessing compensation for loss of housekeeping capacity:

43 ... the majority in *Kroeker* quite clearly decided that a reasonable award for the loss of the capacity to do housework was appropriate whether that loss occurred before or after trial. It was, in my view, equally clear that it mattered not whether replacement services had been or would be hired. It did not adopt the analogy with future care as a general rule. Nor did it permit, nor in view of the authorities to which I have referred could it have permitted, a deduction for the contingency that replacement services might not be hired...

...

63 ... it is now well established that a plaintiff whose ability to perform housekeeping services is diminished in part or in whole ought to be compensated for that loss. It is equally well established that the loss of housekeeping capacity is the plaintiff's and not that of her family. When family members have gratuitously done the work the plaintiff can no longer do and the tasks they perform have a market value, that value provides a tangible indication of the loss the plaintiff has suffered and enables the court to assign a specific economic value in monetary terms to the loss. This does not mean the loss is that of the family members or that they are to be compensated. Their provision of services evidences the plaintiff's loss of capacity and provides a basis for valuing that loss. The loss remains the plaintiff's loss of economic capacity.

...

See *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=) at paras. 100-101 and *Kim v. Lin*, [*2018 BCCA 77*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5RTY-1871-JCBX-S0TB-00000-00&context=) at paras. 31-33.

**376**  According to Ms. Wilson's assessment and report, as well as the plaintiff's self-report, the plaintiff is capable of light housekeeping activities. Ms. Wilson considered, however, that the plaintiff would require assistance with heavier housekeeping and outdoor and seasonal maintenance at his new home in North Vancouver. Such assistance was recommended for a limited period of five years at which point the plaintiff will have adjusted with the help of the recommended rehabilitation provided for in the costs of future care assessment.

**377**  I note that the defendants did not oppose the loss of housekeeping capacity award put forward by counsel for the plaintiff. In fact, the defendants, with reference to Mr. Benning's evidence, submit that the $25,200 figure should be reduced due to the statutory discount rate. I agree. I therefore award $23,000 for loss of housekeeping capacity.

**F. Special damages**

**378**  Counsel for both parties agreed on the quantum of special damages to be set at $34,941.97.

**V. DISPOSITION**

**379**  In the result, the plaintiff, Mr. Adam Sharpe, is entitled to the following award of damages for the injuries and loss caused by the subject Accidents:

1. non-pecuniary damages in the sum of $170,000;
2. past wage loss in the sum of $115,000 (subject to related deductions);
3. loss of future earning capacity in the sum of $275,000;
4. cost of future care in the sum of $80,000;
5. loss of housekeep capacity in the sum of $23,000; and,
6. special damages in the sum of $34,941.97.

**380**  There will be pre-judgment interest in accordance with the *Court Order Interest Act*, *R.S.B.C. 1996, c. 79*.

CROSSIN J.

**End of Document**

[***Warren v. Morgan, [2013] B.C.J. No. 846***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-208H-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

L.D. Russell J.

Heard: April 10-13, 16-20, 23-27, 30-May 4, 8-10, 2012.

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**[2013] B.C.J. No. 846** | [*2013 BCSC 708*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JFDC-X1GY-00000-00&context=)

Between Camilla Warren, Plaintiff, and Geraldine Morgan, Defendant And between Camilla Warren, Plaintiff, and Mauro Gaetano Berretta, Defendant

(625 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Neck — Pelvis — Soft tissue — Head injuries — Brain damage — Concussion — Fibromyalgia and chronic pain — Psychological injuries — Cognitive impairment — Post-traumatic stress disorder (PTSD) — Considerations impacting on award — Credibility — Action for damages for injuries sustained in two motor vehicle accidents allowed in part — First accident minor tap causing no damages, so action dismissed against that defendant — Plaintiff claimed severe chronic pain, cognitive impairment and psychological injury, but not credible and there was no organic basis or corroboration beyond self-reporting — Plaintiff sustained mild soft tissue injuries to back and neck that resolved in one year, and concussion, which resolved after five months — Plaintiff awarded $50,000 non-pecuniary loss and $18,314 special damages, to be reduced to account for temporal limit on recovery — No income loss established.**

**Damages — Types of damages — General damages — For personal injuries — Considerations — Duration of loss — Cost of future care — Loss of earning capacity — Special damages — Past loss of income — Miscellaneous — Expenses and expenditures — Therapy and rehabilitation — Non-pecuniary loss — Pain and suffering — Affecting mobility — Action for damages for injuries sustained in two motor vehicle accidents allowed in part — First accident minor tap causing no damages, so action dismissed against that defendant — Plaintiff claimed severe chronic pain, cognitive impairment and psychological injury, but not credible and there was no organic basis or corroboration beyond self-reporting — Plaintiff sustained mild soft tissue injuries to back and neck that resolved in one year, and concussion, which resolved after five months — Plaintiff awarded $50,000 non-pecuniary loss and $18,314 special damages, to be reduced to account for temporal limit on recovery — No income loss established.**

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| Action for damages for injuries sustained in two motor vehicle accidents in 2008. Within two days, the plaintiff was rear ended by the two defendants. The first motor vehicle accident was a mere tap and the plaintiff felt minor and transient back pain, but was able to swim the next day. The second accident was a bit harder and caused no damage to the plaintiff's vehicle but $6,000 worth of damage to the defendant's. Both defendants admitted liability but argued the plaintiff did not sustain any damages. The plaintiff claimed she had severe chronic pain in her pelvis, neck, back, throat, chest, head and jaw, cognitive impairment and psychological issues. The plaintiff showed improvement for the first year and then her health declined and new symptoms emerged. An MRI showed lesions on the plaintiff's brain, leading to a suggestion of multiple sclerosis. The 46-year-old plaintiff was a married mother of three who was not employed outside the home at the time of the accidents, other than assisting the husband with his accounting practice. The plaintiff claimed the injuries affected every aspect of her life. The plaintiff sought $275,000 non-pecuniary loss, past and future loss of income, cost of future care and special damages. The defendant in the second accident testified he was travelling about five kph at the time of the collision and the plaintiff was upset when she emerged from her vehicle but seemed fine otherwise. The defendant adduced expert evidence to counter the plaintiff's.  HELD: Action allowed in part.  The first accident was minor and caused no damages, so the action was dismissed against that defendant. The second accident was also minor. The plaintiff's vehicle was not damaged and damage to the defendant's was not significant. The plaintiff claimed she was travelling 50 kph when struck, a claim she contradicted with her own evidence that traffic was crawling, and was inconsistent with the fact it was rush hour and with the evidence of the defendant and his wife, who were both credible. The plaintiff gave untruthful descriptions of the accident to her physicians. The plaintiff's credibility was concerning because there was no organic basis for any of her ongoing symptoms. The plaintiff was vague about the nature and progression of her symptoms, attempted to explain away issues and gave lengthy and tangential answers. There were significant gaps in the medical evidence and lay witnesses appeared to exaggerate. The trajectory of the plaintiff's symptoms seemed unreasonable and unlikely. The plaintiff did not call a neurologist, despite naming one on the witness list. All of the plaintiff's scans were normal, other than the lesions, which were not related to the accident or rendered symptomatic because of it. The second accident did cause mild soft tissue injuries to the plaintiff's back and neck, and a concussion. The concussion resolved and there was no evidence by a qualified expert to show any neurological injury. The plaintiff's alleged physical restrictions were proven unfounded by testing and a pelvis ultrasound was normal. The plaintiff failed to adduce evidence to establish she had a psychological disorder. The plaintiff's reaction was disproportionate to the severity of her accident and any corroborating medical evidence relied solely on her reported symptoms. The plaintiff's soft tissue injuries caused some impairment and soreness for a year and her concussion symptoms impacted her ability as a mother and homemaker for five months. The plaintiff was now completely recovered from injuries caused by the accident. The plaintiff was awarded $50,000 non-pecuniary damages. There was no past loss of income and no cost of future care. The plaintiff was not working at the time of the accident and did not plan to return to work until the youngest child was 13, by which time her injuries were resolved, so there was no loss of earning capacity. Special damages claims without receipts or for novel and unrelated treatments were disallowed. The plaintiff was awarded $18,314 for therapies related to the accident injuries, but this was to be reduced to account for the temporal limit on recovery. |

**Counsel**

Counsel for Plaintiff: D.C. Creighton.

Counsel for Defendants: K.N. Grieve, J.W.Joudrey.

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E. Dr. Cecil Hershler

F. Alice Rose

G. Dr. Kevin Loopeker

H. Dr. Chuck Jung

I. Dr. Pamela Michele Williams

J. John Oldham

K. Dr. Ulrich Lanius

L. Dr. Elliot Mintz

The Plaintiff's Vocational and Earnings Evidence

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Mauro Berretta

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

**Introduction**

**1**  The plaintiff Camilla Warren was involved in two motor vehicle accidents within two days. On February 5, 2008, her Ford Windstar van was hit from behind by the defendant Geraldine Morgan, who was driving a Toyota Corolla. On February 7, 2008, her van was hit from behind by the defendant Mauro Gaetano Berretta, who was driving a Mercedes SUV.

**2**  The first accident ("MVA #1") appears to have been no more than a tap to the back of Ms. Warren's vehicle and there was no discernible damage to either car. Although the plaintiff claimed she immediately suffered pain to her lower back, her car was not moved at all and her body was not moved by the impact. She was able to go swimming the next day and she visited a chiropractor. Her resulting pain seems to have been minor and transient.

**3**  The second accident ("MVA #2") caused almost no damage to the plaintiff's van but she suffered some injury from the impact. The damage to the front bumper of Mr. Berretta's vehicle cost $6,000.00 to repair.

**4**  There is no evidence of repair undertaken on the plaintiff's rear bumper following either accident.

**5**  Liability is admitted in both accidents. However, Ms. Morgan claims the plaintiff suffered no damage as a result. She argues the case against her should be dismissed.

**6**  I am satisfied that is the correct result for Ms. Morgan. The case against her is dismissed.

**7**  However, the case against Mr. Berretta is not as simply resolved and it is the subject of these Reasons for Judgment.

**Issues**

**8**  The issue in this case is causation. Ms. Warren alleges MVA #2 caused her severe chronic pain, profound cognitive dysfunction and psychological injury. However, the evidence supporting this allegation is heavily contested.

**9**  The severity of her alleged symptoms has been cast as suspicious by the defendants, in view of the minor nature of the accident.

**10**  Also, the trajectory of Ms. Warren's recovery has been unusual. Within the first half year, she experienced improvement. Her health subsequently declined. It is unclear whether her alleged symptoms reached a plateau or improved after that time. Furthermore, there is evidence that three years on, new symptoms have developed.

**11**  Adding to the complexity of this matter, an MRI scan of Ms. Warren's brain post-accident revealed ten white lesions, which raised suspicions of multiple sclerosis ("MS"). The evidence suggests this illness is unlikely. The evidence also establishes that these lesions were asymptomatic before MVA #2. The plaintiff submits the accident either rendered the lesions symptomatic or made her pre-disposed to developing a neurological condition.

**12**  These causation issues have in turn raised serious questions about the credibility and reliability of the plaintiff's evidence as well as the evidence proffered by the long list of medical experts called upon in this 22-day trial.

**13**  The heads of damages usually found in personal injury cases are also at issue but their extent depends fundamentally on my findings regarding causation.

**The Evidence at Trial**

**The Plaintiff: Before and After the Accident**

***Before the Accident***

**14**  The plaintiff gave evidence over a five day period.

**15**  She was born in 1961 and was 46 years old at the time of MVA #2. She is married to Brent Warren, a Chartered Accountant, and she is the mother of three sons - Andrew, Stuart and Gregory. The family home is located in Richmond, British Columbia.

**16**  Before marrying, Ms. Warren completed a degree in Commerce at the University of British Columbia ("UBC").

**17**  During and after graduating from university in 1985, she worked for a variety of different companies in sales and distribution positions. She eventually took a position with ACNielsen in Richmond as a Marketing/Research analyst in March 1987. For a short period of time she was an account manager in client services. After she returned from maternity leave for her first son she was promoted to business manager for the retail services western Canada division. She ceased working full time as of 1991, carrying a 60% work load from then to her resignation from the company in January 1996.

**18**  Ms. Warren also worked part-time as a sessional instructor in the business faculty of what was then Kwantlen College, beginning in 1991. She taught introductory marketing as well as upper level management and retail management. She taught until 1997 when she was pregnant with Gregory. She left the workforce to be a stay at home mother.

**19**  She was not employed at the time of MVA #2. Ms. Warren did earn some income from assisting her husband in his accounting practice. She also completed a project for a client of her husband's, organizing and disposing of the client's art work. She was paid a total of $30,000.00 for this work. Ms. Warren's work for her husband could not be considered as anything more than part-time. It is fair to say that her husband split some income with her for purposes of tax avoidance. She continues to earn income from Mr. Warren post-accident, as evident in her income tax returns. I note the PETA Consultants Ltd. expert report suspected this declared income was for income splitting purposes.

**20**  Ms. Warren mentioned in direct examination that she was going to undertake another project for the same client before her accidents. This evidence was vague and she did not adduce any evidence to show an agreement of some form was in place for this project.

**21**  Ms. Warren married Brent Warren in 1989. Before the accident, they had enjoyed a good relationship.

**22**  At the time of trial, her oldest son was 21 and attending a prestigious private university in the U.S. Her next son Stuart was 18 and completing his final year at St. George's, a local private school for boys. Her youngest son Gregory was 16. He intended to attend St. George's for the school year 2012 - 2013.

**23**  The Warrens bought their home after the birth of Andrew. This larger space allowed them to host larger family parties and Christmas dinners. She also hosted her husband's clients for lunches and dinners.

**24**  She recounted Andrew's birth to the Court. An emergency operation was performed upon her to deliver the baby without any anaesthetic. She also suffered from a painful repair. A resident doctor had taken on responsibility for this repair, apparently her first of the kind. She had forgotten to administer any "infiltration" to the pelvic floor and had proceeded to stitch Ms. Warren without any anaesthetic, until Mr. Warren had protested. Ms. Warren found the sudden procedure and subsequent repair very traumatic. At one point, the stitching was undone and redone. This repair was performed in front of a group of doctors in training, which she found to be painful and degrading. She experienced pain for approximately one year. She did not get therapy for this incident.

**25**  Other traumatic events preceding the accidents were related to the Court.

**26**  When Ms. Warren was a child, she had scarlet fever and suffered an allergic reaction to the penicillin administered.

**27**  She also recalled an incident where she had been playing with other children and had a stick hit the corner of her eye. The stick had pushed it out of its socket.

**28**  As a young adult, Ms. Warren had several individuals break into her apartment while she was present.

**29**  She lost contact with her father in her youth and re-connected with him when she had young children. He was 85 years old at the time and moved from Australia to Vancouver to be close to the Warrens after that time. She lost touch with her brother who suffers from schizophrenia when she was younger. It seems that she is estranged from her sister. When she was 26 years old her mother died from cancer, after a very brief illness.

**30**  Ms. Warren was in a motor vehicle accident in 1985 as a passenger in a vehicle. She sustained whiplash and bruising in her back. She did not miss any work as a result of that accident.

**31**  Otherwise, Ms. Warren claimed her health was excellent during the time when her boys were young, although she did suffer from post-partum depression after her second son was born. She did not have any therapy for this depression. She did report seeing a chiropractor before her accidents to treat back pain caused by lifting her children.

**32**  When the boys were young, the family would go on camping trips together. They took the boys hiking and, on at least one occasion, scuba diving. They would go biking and golfing as a family at their cabin in the Caribou.

**33**  Ms. Warren has always maintained an active lifestyle. She took ballet and did horseback riding when she was young. She was a swimmer and a cross country runner. In the year before to the accidents, she exercised three times a week, engaging in different types of activities.

**34**  The Warrens' sons are talented students and musicians, partly due to the intense involvement of their parents in their lives. Ms. Warren was heavily involved in their schooling and music lessons. All three sons play more than one musical instrument and are successful in their academic and artistic pursuits. Ms. Warren researched the appropriate schools for their talents, found the best music teachers, involved herself in volunteer activities at their schools, such as judging debating competitions, and drove them and their friends wherever they needed to go. This involved delivering her sons daily to schools far from home. She helped her sons with their homework, encouraged their interests to the extent that she would take them on trips to meet authors whose work they enjoyed, read their textbooks so as to improve her ability to assist them with their work and generally focused her life on enriching their knowledge and experience.

**35**  Ms. Warren herself studied music with her piano teacher, Phyllis, who became a close friend. She would also attend the opera and Vancouver Symphony with a group of women and friends.

**36**  She was an avid reader. She would read up on particular topics, including theosophy and nutritional science. She read the newspaper and The Economist. She read books together with her family and her husband, such as the Greek classics and the sciences.

**37**  Ms. Warren ran the house and even undertook some part in its renovation. She did the gardening and the housework. Her husband's involvement in the house was "virtually nothing". He has long hours in practice and is also involved in the community.

**38**  Ms. Warren hired a housekeeper when she was still teaching at Kwantlen College. Ms. Avila was hired to come and clean their home, one day a week.

**39**  A typical day for the plaintiff was to get up around 6:00 a.m. It was her responsibility to get her husband and older sons out of the house. She would make them breakfast and lunches. She would then take her youngest son to his school and drop him off. She would then do her errands for the day and meet with friends or exercise. Some days she would do housework.

***The First Accident - February 5, 2008***

**40**  Ms. Warren described the conditions as cool, windy and overcast. She was driving her son and two of his friends from the pool mid-day on Harvest Drive. As she was preparing to turn right onto Ladner Trunk Road, she was hit from behind. She felt as if she had been kicked.

**41**  She did not observe any damage to her vehicle.

**42**  She exited her vehicle and spoke to the driver, who explained she had not seen her. They exchanged information.

**43**  She claimed she experienced continuous pain as if she had been kicked afterward. She drove the children back to school and phoned the police. The police directed her to contact ICBC. She reported the incident to ICBC.

**44**  She saw a chiropractor after this accident. She then went to see her general practitioner ("GP") at the time, Dr. McKenzie, to discuss her back pain.

***Second Accident - February 7, 2008***

**45**  Ms. Warren does not remember anything leading up to the second accident. She knows she was driving to St. George's to pick up her son, Stuart. She was alone in her Ford Windstar van. It was about 3:20 p.m.

**46**  She was proceeding north on the Arthur Laing Bridge. She remembers being all of a sudden hit from behind. She was thrust forward hard, "violently". She remembers a flash of seeing the floor, her head flung downward, and then being thrust back into the seat with her head snapped upward. This all happened fast. She was wearing a seatbelt. When she thinks about how it felt, she said it makes her "feel sick".

**47**  After the immediate impact, she had to collect her glasses from the floor. She then stood on the bridge deck outside her car. She saw a large vehicle had hit her. She saw a driver sitting in the vehicle looking apprehensive and a woman running toward her. She next remembered the woman being kind to her and helping with the exchange of information, although she could not remember the specifics. She remembered her head hurting.

**48**  Her next memory is of being parked outside the Marpole Hotel. She felt confused and did not know what to do. She had a business card from ICBC and called that number. She also wanted to get in touch with her husband. She had no recollection of leaving a message on his answering machine. She next remembers being at St. George's, sitting on some leather couches with people trying to help her. Her head really hurt and she felt really drowsy. Her husband came to collect her and they went to see Dr. McKenzie. She remembered crying and not being able to express herself at the doctor's office. She felt the back of her head hurt. Her body was shaking. Her next recollection is of being at home and her head hurting. She felt frightened by the pain. She saw her husband asleep in the living room and she felt unsafe because no one was watching her.

**49**  In cross-examination, she denied being in rush-hour traffic; she claimed the traffic was only backed up in the southbound lane. She confirmed she was in the right hand lane.

**50**  However, she did describe the movement of traffic where it merged off the north end of the bridge as a shuffle. She was half way over the bridge when she was hit.

**51**  Ms. Warren estimated she was driving at 50 kph when she was hit. She surmised this was her speed based on the pattern of driving on the bridge.

**52**  Ms. Warren did not recall her vehicle being pushed forward upon impact. She was conscious before and after the accident.

**53**  A statement taken from Ms. Warren on February 11, 2008 (Exhibit 36) was brought to her attention by defence counsel. In that statement, she described pulling over to the side of the bridge because the traffic was building. She recalled the other driver saying that there was not much damage to the vehicle. She remembered driving off the bridge. When asked about this information in her statement, she was surprised by it. She explained this statement did not indicate whether she had actually recalled what had happened; it only reflects her logical construction of what had happened.

***After the Accident***

**54**  The first day after the accident, Ms. Warren recalled being on the floor in the living room and feeling as if the room was spinning. She was unable to pick up Andrew from the ferry. She felt she needed help. She felt pressure in her head and was uncoordinated and nauseous. She eventually went to the Richmond General Hospital emergency. She was driven by her friend. The next thing she remembers is being at a hotel and feeling as if she wanted to be in a dark room and away from noise. She had a restless sleep.

**55**  In the days after the accident, Ms. Warren was still pushing herself to perform her morning routine. She tried to make the lunches and she could not do it, so she would prepare them at night. It would take her an hour and a half to complete this task. Her husband was struggling to do more driving. She took taxis to get anywhere but this caused her pain because the seatbelt would aggravate her lower abdomen. She had to go to the bathroom a lot and this caused her a great deal of pain.

**56**  Ms. Warren recalled being propped in order to lie down.

**57**  She was experiencing a great deal of pain across her pelvis, bladder and back. She remembered her pelvis being swollen. She was limited in how she could sit and lie down as a result. She suffered from basic pelvic function problems.

**58**  In the first several months, she suffered from pain and pressure in her head directed toward her face. She could not stand noise. Ms. Warren could not tolerate the sound of her sons' concerts after the accident. She was sensitive to the noise and could not follow the music as a narrative any longer.

**59**  She had problems with walking and became easily fatigued. She would climb the stairs once a day. She was having difficulty sleeping because she kept feeling the thrusting of MVA #2. She described the arousal of other memories, including her birth pain.

**60**  Initially, she was prescribed Atavan in order to sleep. She was told to take over-the-counter pain killers. She took a prescription-strength muscle relaxant.

**61**  She had trouble breathing. She also maintained she had neck problems from the beginning, specifically, difficulties with swallowing and voice level. Around July 2008, her neck muscles became extremely painful. She consulted with Dr. McLeod, a chiropractor, about her neck problems as well as a massage therapist, Mike Murray.

**62**  She noticed problems with her jaw early on. It was stiff. She had difficulty eating and ate a lot of liquid food.

**63**  From May through the summer, Ms. Warren felt her functioning improved with regard to her pelvis and her overall pain level. She was able to walk further. She was beginning to feel optimistic about her recovery.

**64**  Ms. Warren described setbacks in the fall after she began gardening again. She described feeling nerve pain. She experienced "delayed pain" after doing activities.

**65**  She was eventually prescribed Gabapentin to treat her nerve pain and she had a bad reaction to it. She had three emergency hospital visits because of this medication. She believed it caused her to experience dizziness, vision problems and suicidal ideation.

**66**  At some point in time, which was not specified in her evidence, Ms. Warren began experiencing panic attacks over her muscles squeezing her throat and chest. These attacks lasted for ten to fifteen minutes.

**67**  She attempted to make a costume for Gregory on Halloween, but it turned out "a mess". She tried to participate in a limited way in the debating competitions, but she participated only insofar as commenting on style. She did three competitions post-accident.

**68**  She said her relationship with her children has been deeply affected by the accidents. As she was sensitive to noise, she was constantly reminding them to be quiet. She placed a great deal of responsibility on Andrew to watch over his brothers and order meals.

**69**  She did not involve herself in Andrew's applications for college. She described going on a trip to see Andrew's college in the U.S. She felt uneasy about being in a foreign place. She was short-tempered and had no patience for the presentation on the college.

**70**  Ms. Warren cannot handle a lot of movement in the car as it causes her pain. She cannot cycle, hike or walk for long distances on her trips with her family.

**71**  The garden is now deteriorating. She does very little housework these days. She can cook and can sit while doing it. She cannot do vacuuming, reaching upward or scrubbing as it causes pain to her muscles in her upper back. She was bedridden for five days after doing some housework in 2011 and took Tylenol with codeine.

**72**  Ms. Avila attended the house an additional two times a week in the initial few months after the accident. She did her standard four hours with additional hours. She did less in 2010. There were no extra hours in 2011.

**73**  Mr. Warren now pays attention to the boys' school activities, which were formerly Ms. Warren's domain.

**74**  The plaintiff used to go to events with her husband. Now he attends these events alone. If she does go with him, she takes her own car because she gets tired and needs to leave early. She cannot follow conversation because of the background noise of other people talking.

**75**  She described feeling forgetful and mixed up. For instance, she would forget to fill up the gas tank and she would miss events on the calendar.

**76**  Her intimacy with her husband eventually returned. However, she had trouble sleeping and eventually slept apart from him. They used to spend the evening together, discussing their day. Now she cannot be available in the evening because she has to go to bed.

**77**  She takes half hour-long walks now. It causes her to feel pain in the upper part of her chest and throat. She has to go slower and remain on flat paths. She said she does not have the power to do incline paths.

**78**  Ms. Warren has consulted with a great number of health professionals after the accident. Not all of this medical evidence is before the Court, which is apparent in the medical reports' lists of documents reviewed and in the plaintiff's evidence. Some of these consultations were recounted in direct evidence to provide some form of a timeline of the development of her symptoms, although this evidence was not specifically framed in dates. The timeline of her medical evidence seems to be a significant difficulty in this case.

**79**  A problem arose with the proposed admission of prior statements by the plaintiff recording her symptoms to corroborate her evidence. These were only found to be admissible for the purpose of establishing timeline, not the veracity of her symptoms.

**80**  I have made note of some of these health professionals Ms. Warren says she met with post-MVA #2:

1. Dr. Posen, naturopath;
2. Dr. McLeod; beginning February 21, 2008;
3. Dr. Wilensky, psychologist; she was referred to him immediately after MVA #2 for Posttraumatic Stress Disorder ("PTSD"); they worked on containing her memories in the early days; she described some success for this technique; initially, she was seeing Dr. Wilensky every week and then she says she did not need to see him as much; her despair about the return of pain in the fall of 2008 prompted her to see Dr. Wilensky again and she continued seeing him; eventually, these sessions were designed to provide her with support because she felt she had to hide her suffering from her family;
4. Jackie Wells, physiotherapist, "pelvic functional specialist"; March 6, 2008 to September 2009; she was referred to Ms. Wells by her GP; they worked on pelvic floor muscles; she stopped treatment because her pelvis was improving;
5. Mr. Murray, massage therapist; she was referred to him by Dr. McKenzie. Mr. Murray did gentle massage on the lower back; it was too painful in the lower back; he could not massage her neck at all;
6. Steve Mah, physiotherapist, osteopath; treatment was obtained between April 7, 2008 and June 16, 2008; she saw him for neck and jaw symptoms upon referral by her GP; she would suffer from serious pain, dizziness and tremors when he attempted to adjust her neck;
7. Kelli Lawson, trainer; she began sessions with her on September 8, 2008; they met until October 15, 2008; they worked on her core; Ms. Warren claimed these exercises made her feel worse afterward, so she stopped the exercises;
8. Dr. Loopeker, optometrist; she was having a hard time focusing her eyes and navigating through a room; she eventually did vision therapy with him, which improved her ability to think more quickly; she was delayed in obtaining this treatment because she was occupied by other health professionals;
9. Dr. Takeuchi, dentist, who referred her to a dental specialist, Dr. Leung, who in turn advised her to attend Dr. Michele Williams with regard to her jaw symptoms; it took a long time to schedule to meet with Dr. Williams;
10. Dr. Michele Williams, dentist; she saw her for a series of appointments in 2009; Dr. Williams referred her to Maria Zerjav for jaw treatment in early 2009 but it caused her too much pain so she discontinued the treatment; the nature of that treatment was unclear;
11. Dr. Christina Williams, gynaecologist, upon referral by her GP, to examine her pelvis;
12. Dr. Hossack, specialist in pain management; she was referred to Dr. Hossack by Dr. Christina Williams; she remembered seeing Dr. Hossack in the fall of 2008; she was prescribed pain medication, but stopped taking it because it made her feel fatigued and it interfered with her ability to drive; she undertook a pain management program, documenting her pain and emotional reaction to it in order to control her emotional reaction;
13. Dr. Mintz, her new family GP; she stopped seeing Dr. McKenzie sometime after the end of 2008; she said his practice was too busy to handle the file, which is hearsay as Dr. McKenzie was never called as a witness;
14. Dr. Hershler, pediatrist; she was referred to him in early 2009 by Dr. Mintz; she described him as her "answer" person; she undertook pulsed signal therapy with Dr. Hershler, which re-opened old symptoms, and she would go to Dr. Wilensky to cope with this pain, although eventually she felt improved; she continued the treatment in later 2009 for her pelvis; she felt it assisted her with walking; she also described having severe reactions in her throat as a result, although it was not specified when this occurred;
15. Mr. Oldham, physiotherapist; his records indicate she began seeing him in January 2010 upon referral by Dr. Hershler; after their first session, she had to call an ambulance after experiencing a panic attack arising from her inability to expand her ribs enough; she worked on breathing with Mr. Oldham, which she found to be "mentally challenging", but she did progress;
16. Mr. Siquera, physiotherapist, upon referral by Mr. Oldham; their sessions worked on improving balance, which caused her pain; it only improved the length of time that she could walk.

***Brain Lesions***

**81**  A month after the accidents, a MRI scan of Ms. Warren's brain revealed lesions on her brain. The report prepared on March 26, 2008 by Dr. Andrews, identified 10 high signal lesions, measuring up to 8 mm in size. The MRI did not reveal any evidence of cerebral contusion or extra-axial hemorrhage. Dr. Andrews opined that consideration be given to the possibility of MS.

**82**  The discovery of lesions on her brain rattled Ms. Warren. She saw a neurologist, Dr. John Stewart, for a neurological assessment.

**83**  Dr. John Stewart's report, dated April 2, 2008, was admitted as evidence at trial. In the report, he observed that Ms. Warren was "extremely anxious and intense, and completely anhedonic."

**84**  He saw nothing to suggest cognitive abnormalities. Her neurological exam was normal. Her reflexes, tone and power were normal. She walked normally and had a normal Romberg test; she could also hop on either foot.

**85**  Dr. Stewart concluded the lesions did not have the appearance of a recent brain injury. Nor were the lesions in an area of the brain that would be suggestive of MS.

**86**  He could not comment on her pelvic symptoms (which he placed in quotation marks) but he tended to doubt that she could have sustained damage to that area as a result of the MVAs. He noted her pelvic ultrasound was normal.

**87**  He opined, "I do believe this lady is pathologically anxious and it is quite likely that many of her symptoms stem from that." He said a referral to a psychiatrist seemed appropriate.

**88**  Ms. Warren also met with Dr. Weiss and Dr. Devonshire regarding her lesions.

**89**  Dr. Devonshire's evidence was not called upon for trial, although she was originally on the plaintiff's witness list.

**90**  Dr. Weiss's report was tendered as evidence, although he was not called upon to testify. His report was prepared one year after the initial MRI scan, on February 26, 2009.

**91**  He noted Ms. Warren's reported symptoms of severe back and pelvic floor pain following the MVAs. He also noted Dr. Christina Williams' clinical history of Ms. Warren that documented her complaints of urinary urgency, "for which she has accommodated over the years." He observed her 2008 MRI scan, and he noted there was no evidence of concussion.

**92**  He opined, "she is extremely verbal, articulate, and has excellent recall. She appeared tense and fairly stiff in her movements."

**93**  In her physical examination, he noted that she had full range of motion in her cervical spine. Her spine was vertical and her pelvis level. She had good movement in her lumbosacral spine. She had excellent power. Her shoulder, elbow, wrist and hand examination produced normal results. Her hip, knee, ankle and foot examination were also normal, with brisk reflexes noted.

**94**  He observed: "[m]any of the diagnoses she has been provided with do not have a clear objective basis and in some senses are considered to be controversial diagnoses following motor vehicle accidents."

**95**  He found no classic signs of MS. He organized a repeat MRI for her brain and spine for objective evidence to rule out a demyelinating disorder.

**96**  He concluded with the following note:

As I explained to her originally with her constellation of symptoms and her very established ideas regarding the nature of her complaints, I would ordinarily not attempt to provide ongoing care, as I doubt I would be able to change any of these fixed ideas contributing to her symptoms. On the other hand, there appears to be a good basis to ensure that she does not have at least from an objective perspective a more significant neurological condition. I have explained this to her and she appeared relatively content with this.

**97**  It is interesting to note Ms. Warren's explanation in direct examination that the MRI was sought on the basis of inquiring into possible MS because the hospital would not grant a MRI for mere soft tissue injuries.

**98**  In the second MRI, dated March 7, 2009, 15 lesions were found. The report concluded the white matter lesions were "highly suggestive of multiple sclerosis and demyelination".

**99**  There is no evidence of follow-up with Dr. Weiss.

**100**  Ms. Warren attended the UBC MS Clinic. On July 9, 2009, the clinic cleared her for MS.

***Lay Witnesses***

**101**  Carmen Black provided evidence on Ms. Warren's behalf.

**102**  Ms. Black is a behavioural consultant. She has a long-standing friendship with the plaintiff. They met in kindergarten and they have been friends ever since, even attending first year in their undergraduate studies together.

**103**  Ms. Black testified to Ms. Warren's activities in her early years: she performed piano and ballet; she read a great deal and she was an academic. It seems they drifted apart in university but they reconnected once they both had children.

**104**  Ms. Black testified that Ms. Warren was a good mother. She would entrust her children to the plaintiff's care. The families would go travelling together to their cabins. She recalled Ms. Warren's extraordinary efforts to enrich her children's lives and their education. She noted that Ms. Warren was involved in school committees; she was also the person running the home.

**105**  Ms. Black testified to the plaintiff being highly organized and social. She described her as an easygoing woman and a kind parent. Her mental state she described as "even". She was an intelligent woman and their conversations were reciprocal.

**106**  The plaintiff and Ms. Black would go for long walks together. They would also hike and horseback ride together. They were equally able to engage in these activities.

**107**  Ms. Black was unaware of the MVAs until about a week after they had occurred. She was called one evening by Ms. Warren to come over because she said she needed help. When she attended the plaintiff's home, she found her on the couch. She was not able to carry on a conversation in a coherent manner to explain what had happened.

**108**  A few weeks later, Ms. Black went over to drop off her taxes at the Warrens'. The children answered the door and claimed there was no food in the house. Ms. Black noted it was a busy work time for the husband. The plaintiff had been simply lying down and she did not know what to do.

**109**  Over the first three months after the accident, whenever Ms. Black observed the plaintiff she seemed exhausted and could not follow conversation. The plaintiff seemed overwhelmed. She did make some improvement and then reached a plateau. The plaintiff seemed discouraged.

**110**  In the first year after the accident, her mobility seemed limited. She was unable to pick her children up from school.

**111**  In 2010 - 2011, Ms. Black claimed the plaintiff was able to move around a bit better. They would have to park close to their destinations. She wore a support for her pelvis. She seemed to have difficulty following conversations and she was withdrawn in group situations. She became quickly exhausted and experienced forgetfulness. Sometimes she would tell Ms. Black the same story within the hour and mix up the days.

**112**  In cross-examination, when asked about whether she knew the plaintiff had judged a debating competition in 2008, Ms. Black agreed it was surprising, although she qualified her answer by stating the plaintiff had continued to make efforts to re-engage in the activities that she had formerly enjoyed.

**113**  Ms. Black agreed the plaintiff was articulate in specific situations and at certain times of the day post-accident.

**114**  The plaintiff's son Andrew also testified.

**115**  Andrew was just about to turn 16 years old at the time of the plaintiff's accidents. He was in Grade 11 and preparing for post-secondary education. He currently attends Reed College in the U.S.

**116**  When asked about his mother's role in his life prior to the MVAs, he said his mother was supportive of him and his brothers. He was involved in music and she helped him apply for a number of special education programs in high school. He ultimately decided to attend St. George's. She helped him with his assignments. She judged the debating club that he was involved in. He said she did not participate in the debating club as a judge after the accidents.

**117**  Andrew claimed his mother prepared all of the meals in their home as his father was working all the time. He recalled their family hosting Christmas celebrations on several occasions for their extended family.

**118**  His mother seemed to have a great deal of energy. They did a large hike together one time. His mother was sympathetic and well-grounded. He could not recall ever seeing her depressed before the accidents. She read a lot and would read the same books as he so that they could discuss them together. She would also read over his textbooks to help him with his schoolwork.

**119**  After the first accident, he commented she seemed rattled and had incidental bumps and scratches but was otherwise fine.

**120**  He was contacted two days after the second accident by his father notifying him of the incident. He had been away at the time, touring Vancouver Island with his band. When he first saw his mother, she was resting in bed.

**121**  In the three months following the accident, he observed the plaintiff being limited in her functions. She spent most of her time in bed. He would have to fetch her water for her medication. A year after the accident, his mother could engage in conversation again but her energy seemed limited. She would become exhausted after doing a task for half an hour and would rest for several hours afterward. She would write everything down. She would not understand everything he said and seemed unable to track the conversation.

**122**  Ms. Warren would not listen to his musical pieces any longer. She would occasionally try to go to concerts but she would leave after a few minutes.

**123**  His father took on the task of driving the boys to and from school.

**124**  He noted his mother took a taxi sometimes to get to her appointments.

**125**  He said it took his mother a long time before she would go on walks again. Her first exercise was swimming, but it took years for her to arrive at that point. In the last six months, she has finally been able to walk with him.

**126**  After the accidents, Andrew could not get along with his mother. He found her to be irritable. By 2009, he realized there was nothing he could do to change the circumstances of his home and he decided to stay away as much as possible.

**127**  In 2009, Andrew began to apply for university. His mother did not assist him with his applications. He began attending Reed College in August 2010. She joined him in his moving trip to college in the U.S. They took the train and she seemed upset by everything. It was a few months before he would speak to her again after that trip.

**128**  In cross-examination, he was asked about the two-day span between the MVAs and his father's phone call informing him of the second accident. He explained he did not have a cell phone at the time.

**129**  Andrew clarified that it was a few months before she started driving short distances and a year before his mother started driving to Vancouver.

**130**  He agreed his mother may have taken his brother Stuart to a debate post-accident but he maintained she had not participated in the debates again.

**131**  Ms. Warren's exercise journal kept for her personal trainer Ms. Lawson was put to Andrew. It documented her walking for a half hour on October 29, 2008 and walking for an hour off and on Halloween night. He agreed it sounded plausible. It also documented that she had judged three half hour debates on November 1, 2008. Andrew was surprised by this note. He was further presented with a notation she had made that she had attended his November 8, 2008 concert in Burnaby and had sat for one and a half hours. He only offered that attending concerts was stressful for her.

**132**  Andrew was asked about Dr. William Koch's report, dated March 14, 2008 (Exhibit 14).

**133**  Briefly, this report by Dr. Koch, psychologist, was prepared after he conducted a psychological assessment of Ms. Warren. In his report, he qualified his findings as a preliminary assessment that was based upon incomplete diagnostic testing of Ms. Warren. He had no health record available to him. Ms. Warren had been unable to meet with him at his office in Richmond so he had interviewed her at her home. He interviewed her for a total of four and a half hours and she attempted to complete a Personality Assessment Interview while he was present. He found the interview had been less than productive for several reasons: (i) her emotional distress led to excessively detailed responses; (ii) distractions (a furnace repairman attending the home, phone calls regarding exam schedules for her oldest son, a number of phone calls from friends and her husband and picking up her youngest son from school). She had difficulty completing the assessment, which was atypical. She complained about the test and its contents. It appeared as if she was responding in a defensive manner "so as to disclose few personal faults or life difficulties." He also noted evidence of anxiety and depressed mood. He opined that the multiple traumas in her life that she had described to him were potentially inter-related. He gave the tentative diagnosis of PTSD, Panic Disorder and Major Depressive Episode. He concluded he needed to assess her more fully in a follow-up consult, which never occurred.

**134**  Defence counsel directed Andrew specifically to Dr. Koch's note about Ms. Warren driving Gregory to school, interrupting the interview. Andrew agreed with the defence that this was not a short drive.

**135**  Andrew confirmed he only speaks with his mother now and again on the phone.

**136**  He confirmed he had read some of her medical legal reports.

**137**  I must observe that his evidence seemed rehearsed and many of his observations of his mother's health post-accident were vague.

**138**  Margaret Allan is a friend of the plaintiff. She is a licensed psychologist.

**139**  She first met Ms. Warren in 2001 at the home of their former piano teacher Phyllis. She got to know her well during the time when their piano teacher was ill. They worked together on Phyllis's estate after she passed away and settled all of her matters. They developed a friendship out of this experience. They enjoyed discussing books, music and politics together. She observed that Ms. Warren read voraciously on complex subject matter.

**140**  Ms. Allan recalled the plaintiff being a capable, high-functioning woman who had integrity. She was bright and interested in world events. She was up to date with happenings in Vancouver. Ms. Warren was also a committed mother.

**141**  Ms. Allan did not observe any grief for Phyllis's death interfering with Ms. Warren's ability to function.

**142**  Ms. Allan first saw Ms. Warren a few weeks after the MVAs. She noted a dramatic change. Before, she had been a "bundle of energy". After the accident, she seemed withdrawn, pale and rigid. Ms. Warren had trouble focusing in conversation and was sensitive to light and noise. She seemed frustrated. Since the accident, they no longer attend concerts together.

**143**  In the first year after the MVAs, Ms. Allan observed Ms. Warren having a difficult time following the conversation. The scope of their conversation became limited. Ms. Allan described Ms. Warren as "not the same".

**144**  In cross-examination, Ms. Allan commented that Ms. Warren had expressed an intention to return to work. She was unaware of Ms. Warren's work experience before the accidents.

**145**  Ms. Allan informed the Court that in the past year and a half (since October 2010), she has suffered from shingles so she has not been out of her home in that time.

**146**  Ms. Allan confirmed that Ms. Warren had told her that MVA #2 was a severe impact collision and that she had hit the railing on the bridge. She maintained that Ms. Warren had not told her that she hit her head on the windshield, despite her statement to the contrary in an earlier record taken from her by a defence counsel representative.

**147**  Thelma Avila, Ms. Warren's housekeeper, testified. She was at times difficult to understand.

**148**  She confirmed the plaintiff was always involved in the housework and the gardening. The plaintiff would even help her out.

**149**  She commented generally on the change in Ms. Warren after the accidents. She organized the kitchen to help her with reaching items she needed in the kitchen.

**150**  It is not clear to what extent Ms. Warren participated in the housework after the accidents.

**151**  Before the accident, Ms. Avila worked four hours once a week, arriving at 9:00 a.m. After the accident, she was working three days a week, two hours at a time. She claimed this lasted for three months. After that time, Ms. Avila came two days a week but she did not specify her hours.

**152**  Brent Warren, the plaintiff's husband, also testified. Mr. Warren is a Chartered Accountant. He met Ms. Warren in 1985 and they married four years later. Prior to having children, they skied, golfed, biked and took show horse riding lessons together.

**153**  He testified to Ms. Warren being very involved in the boys' schooling. Her son Andrew in particular needed a great deal of attention. Ms. Warren would go to all school-related and extracurricular activities for the boys. She conducted outdoor supervision for the school. She sat on school committees.

**154**  In the year prior to the MVAs, Mr. Warren described his wife as being in good physical shape. She attended a gym several times a week and took yoga classes. She did snorkelling on the last family trip. She hiked and camped with the family on occasion.

**155**  Ms. Warren had been engaged in Mr. Warren's accounting business prior to the MVAs. He said she coordinated the social event planning aspects of his business. On one occasion she provided marketing advice to a client. Mr. Warren would bill her for her work. In fact, he testified that she was still partaking in this work for him (he spoke to her answering client calls for him at home).

**156**  Ms. Warren had also worked with the widow of one of his clients to aid in the marketing and sale of her past husband's art work.

**157**  Mr. Warren said it was a tough decision for his wife to leave her job at ACNielsen to care for their children.

**158**  Mr. Warren did remember MVA #1 being a traumatic event. He did not recall when he discovered that accident had occurred. He did, however, remember her complaining of pain in her lower back. He thought she had consulted with a chiropractor that day.

**159**  Mr. Warren was at the office when he heard about MVA #2. When he arrived to meet Ms. Warren at the children's school, he observed her sitting down looking scared. She seemed confused and unstable. They attended Dr. McKenzie's office.

**160**  He said Ms. Warren was unable to get out of bed the following day. He made the lunches and breakfasts.

**161**  He observed that her overall condition was poor after the accidents. In the subsequent few weeks, she would not be awake past 4:30 p.m.

**162**  Mr. Warren said her symptoms actually became worse with time. She would glaze over in conversations. The family had to keep the noise level down. Her overall functioning seemed low. Mr. Warren had to step up and take on the tasks of making meals and driving the kids around.

**163**  Mr. Warren had difficulty recalling if his wife's symptoms changed after one month. He recalled that eventually she began helping out with lunch-making in the morning. She would then go back to bed.

**164**  In 2009, he said Ms. Warren attempted to do basic housework. She seemed exhausted and in pain from this work. On the Saturday when he was at home, he would observe her coordinating household work and attempting to participate in it. This involvement would occur in the morning, whereas prior to the accident, she would be engaged in household work throughout the day. If he spoke to her, she would give him blank looks.

**165**  She would be easily distracted and she was forgetful.

**166**  In 2010 and 2011, he said it was hard to say if there was any improvement in his wife's health. Ms. Warren was not engaging in any educational oversight for the boys. Mr. Warren now deals with their schooling. If she tried, she would get frustrated.

**167**  Ms. Warren's injuries have removed joy from their family relationship. They no longer entertain relatives and friends. Her relationship with her children is "off and on" because of changes in her mood.

**The Plaintiff's Medical Evidence**

**168**  A great number of expert witnesses presented evidence to this Court. I note that despite the volumes of expert testimony provided to the Court, there are gaps in the medical evidence presented to the Court.

**169**  Not all of the plaintiff's expert witnesses were helpful to the Court, particularly on the issue of causation.

**170**  I also note the defence's objection to the admission of the evidence of Dr. Blaskovich at trial. The defence noted the facts and assumptions upon which his report was founded were not identified. His qualifications were not set out. The instructions from counsel to the expert were not disclosed. The doctor did not set out the research he was relying upon in forming his opinion. Dr. Blaskovich failed to certify that as an expert he was aware that he is not an advocate. Defence asserted that Dr. Blaskovich gave opinions on matters that were beyond his area of expertise. He also made improper comments in the report that amounted to advocacy.

**171**  I informed counsel for the plaintiff that I would not give any weight to Dr. Blaskovich's report; but he could proceed if he wished. The plaintiff decided not to proceed with entering the report into evidence and examining Dr. Blaskovich.

***A.*** ***Dr. Marshall Wilensky***

**172**  Dr. Wilensky is a clinical psychologist practicing in Vancouver and was qualified as an expert in the diagnosis and treatment of PTSD.

**173**  His first meeting with Ms. Warren was on March 10, 2008. He testified he received a brief history from her of the two MVAs. He then administered the diagnostic criteria (DSM-IV) for PTSD, which produced results that indicated she indeed suffered from PTSD. He noted that her self-reported psychological concerns confirmed this diagnoses. She felt watchful and on guard. Reminders of the MVAs caused her to experience physical reactions. She had trouble sleeping. She also reported difficulty in concentrating. Re-experiencing the accidents, avoidance strategies to suppress feelings and hyper-arousal were all indicative, in his opinion, of PTSD.

**174**  Dr. Wilensky prepared a report, dated September 1, 2011. In this report, Dr. Wilensky concludes Ms. Warren suffers from "Major Depressive Episode and Posttraumatic Stress Disorder - Chronic". He does not offer any opinion on whether her PTSD condition has varied since the initial consultation he had with her in 2008.

**175**  He summarizes his opinion on her condition in the report as follows:

Ms. Warren was injured in the motor vehicle accidents of February 2008. I will leave the descriptions of her physical injuries to her medical practitioners. The physical injuries appear to have had a significant deleterious effect upon life.

Concomitant with the physical injuries has been the complicated and often humiliating and painful process of diagnosing and arranging treatment for those injuries. The ongoing psychological distress from the investigations and iatrogenic aspects of treatment are therefore also caused by the accidents. For example, had it not been for the accidents, Ms. Warren would not have had an MRI of her brain that raised the possibility of multiple sclerosis ... there has been considerable emotional distress associated with further investigations and the possibility of the illness being present.

It would be useful to know the results of the neuropsychological assessment and have a repeat assessment to evaluate any change. More than two years have passed since the initial assessment and a second date point would provide prognostic information. [Emphasis added.]

**176**  Based on his opinion, it seems her psychological distress stemmed from the investigations undertaken into her health post-accidents. He specifically noted that he could not draw any conclusions about whether she had in fact suffered from a brain injury as a result of the MVAs.

**177**  Dr. Wilensky further observed:

These illnesses are probably a result of the combination of accidents in quick succession. Her experience of unusual autonomic system and postural effects documented by Welcome Back, Dr. Mintz and Dr. Hershler has also been terrifying for her and has served to exacerbate the already present [PTSD] and Depression.

**178**  In cross-examination, Dr. Wilensky admitted his September 2011 report was based entirely upon the patient's version of the history of her health.

**179**  He confirmed the main criteria for PTSD is exposure to a traumatic event. It seems that "traumatic event" has broad meaning. He acknowledged that MVA #2 was not necessarily traumatic in and of itself. He explained that the focus of the diagnosis of PTSD is not the event itself but the person's response to the event.

**180**  He confirmed that October 2008 was the last time he administered the itemized diagnostic criteria for PTSD upon Ms. Warren. Significantly, these tests were administered regarding the distressing events of "MVA" (without noting which one) and her "son's birth". His clinical notations revealed their discussions of non-MVA traumatic events.

**181**  The last time Dr. Wilensky consulted with Ms. Warren was in August 2011. This consult was over the telephone; he prepared his report right after. Before that consult, he had met with her in person in February 2011.

**182**  Dr. Wilensky confirmed that as of the date of his report, the plaintiff still fulfilled the diagnostic criteria for PTSD and he disagreed with Dr. Ancill's conclusion that she did not. This is despite the fact that he testified the last time he administered the diagnostic test with respect to the MVAs was in October 2008.

**183**  He confirmed that he had not supplied the criteria for diagnosing a "major depressive disorder" to the Court. He confirmed that he had only diagnosed her with this condition in August 2011.

***B.*** ***Dr. Raymond John Ancill***

**184**  Dr. Ancill has been a psychiatrist since 1980 and he is licensed to practice in British Columbia. He was qualified as an expert in psychiatry and mild traumatic brain injury.

**185**  Dr. Ancill examined Ms. and Mr. Warren on July 13, 2011. Dr. Ancill prepared a report on August 11, 2011 following that consultation for this trial. The documents he relied upon in forming his opinion were also noted. He clarified in cross-examination that he did not read any of these documents before his consultation with Ms. Warren, including her statement dated August 9.

**186**  Her self-report of MVA #2 was summarized as follows:

She stated that she was driving north on the Arthur Laing Bridge and she was in the Granville Street Exit lane around 3:20pm. Suddenly, she was struck violently from behind - she estimated that she was moving at 50kph.

She recalled the collision, seeing the railings at the side of the bridge and being forced towards them.

**187**  He formed the following opinion:

Mrs. Warren was injured in the MVAs of February 2008 and presents 41 months later with the persistence of a wide range of physical, functional, cognitive and emotional symptoms that were not present prior to the accident in question. ...

In my opinion, based on the clinical history I obtained, my examination and my review of the records, Mrs. Warren likely sustained a concussion and suffered a mild traumatic brain injury in the 2nd accident.

...

She reported symptoms of an acute concussion and has gone to develop a persistent post-concussion syndrome.

**188**  He clarified in direct examination that the severe nature of MVA #2 indicated she suffered a concussive injury.

**189**  Dr. Ancill defined a "concussion" as "diffuse damage to nerve cells and fibers ...".

**190**  The basis for his finding that Ms. Warren met the criteria for having sustained a mild traumatic brain injury, as described by the American Centre for Disease Control ("CDC"), was based on the DSM-IV classification criteria, set out in Appendix 4 to his report. He qualifies the reliability of this measurement criteria by stating: "[h]owever, these are not 'objective' evidence of a brain injury and I would recommend neuropsychological testing once the pain and depression have been addressed ... ."

**191**  In response to the question of whether the CDC required positive MRI findings of a mild traumatic brain injury, he said "No".

**192**  He continued:

Although for the purposes of medical nomenclature any brain injury would be classified as mild, it should be noted that the term 'mild brain injury' is a misnomer. Sequelae include problems in cognition, behavior, the constellation of signs and symptoms that make up the post-concussive syndrome, and other psychopathology. These problems cause a surprisingly high rate of disability and have certainly resulted in a significant disability to Mrs. Warren, although it is not clear how much the residual effects of a [mild traumatic brain injury] are contributing to this.

**193**  Based on the DSM-IV criteria, Dr. Ancill diagnosed Ms. Warren with a chronic cognitive disorder, not otherwise specified.

**194**  In examination in chief, Dr. Ancill explained that the DSM-IV classification criteria are used for convenience and commonality within the medical profession - it is "not an absolute diagnostic system."

**195**  Other general comments of note in his report are as follows:

The Post-Concussion Syndrome is nonspecific and will also emerge after other trauma. Depression, anxiety and pain will also contribute to these symptoms and act as symptom 'amplifiers'. In this case, Mrs. Warren's current symptoms are likely being affected by her pain, anxiety and depression. Therefore, while all her complaints result from the accident in question, it is not possible to accurately apportion the contribution of each etiology to each symptom.

... although there is controversy as to causation, it is generally accepted that the post-concussion syndrome occurs and can become chronic and debilitating in a small proportion of patients, especially those who have risk factors.

**196**  Dr. Ancill was of the opinion that Ms. Warren had several indicators of risk: her sex, age, her dizziness symptom that has persisted and her psychiatric symptoms that have continued.

**197**  Dr. Ancill clarified that the post-concussion syndrome from which Ms. Warren suffers is not in itself specific and it does not in itself diagnose a brain injury. He explained that a brain injury will improve over time. The decline of a patient's condition over time will suggest there is another condition at play. He explained that the only way to isolate whether Ms. Warren was suffering from symptoms of a brain injury would be to address the symptoms of depression and pain.

**198**  When asked about the scientific basis for these risk factors, Dr. Ancill explained it was based on generally accepted medical facts and his experience.

**199**  Dr. Ancill also observed that Ms. Warren reported neuropsychiatric complaints that are consistent with a brain injury, confirmed by her husband. In his examination in chief, Dr. Ancill clarified that these psychiatric complaints are consistent with patients who have suffered a concussive injury, but they are not diagnostic or specific. He explained that the most common presenting symptom of a brain injury is fatigue that progresses as the day goes on.

**200**  Dr. Ancill was of the opinion that Ms. Warren suffered from a pain disorder associated with her psychological state. He explained in direct examination that this disorder was psychiatric and arose from a fixation on physical symptoms, which might not be proportional to the actual physical symptoms. He did not make any findings about her physical symptoms.

**201**  Based on the Hamilton Depression Rating Scale, Dr. Ancill diagnosed Ms. Warren with mild major depression.

**202**  Dr. Ancill also opined:

... Mrs. Warren does not suffer from PTSD or a panic disorder at this time and I would defer to Dr. Koch to comment on her mental state as it was closer to the time of the accidents.

**203**  On the issue of causation, he concluded:

However, but for the accidents in question, I can find no other reasonable clinical cause of Mrs. Warren's current symptoms and functional impairments. According to the information available to me, she was functioning well prior to the accident and was both medically and psychiatrically in good health.

I could not establish a clinical history consistent with a diagnosis of multiple sclerosis but I would defer to other experts to comment on this further. The main indicator of such a diagnosis appears to be based solely on the two abnormal MRIs.

**204**  He considered her prognosis for recovery "poor" and he said it was unclear as to whether symptomatic improvement would translate into a sufficient recovery to return to employment.

**205**  He opined:

There seems general agreement among the experts who have examined Mrs. Warren that she suffered from emotional and psychological consequences of the accidents and I am in agreement with this. These problems have persisted and are themselves disabling. I am not able to estimate the residual and current contribution, if any, from a mild brain injury.

**206**  In his examination in chief, he acknowledged that he did not have the benefit of referring to any neuropsychological testing when preparing his report.

**207**  In cross-examination, Dr. Ancill confirmed that if a person's symptoms became progressively worse after a mild traumatic brain injury, there is likely another explanation for the symptoms, including the possibility of a progressive neurological disease.

**208**  He agreed with the principle put to him by defence counsel that "symptoms of [traumatic brain injury] gradually improve" and he explained that he had a practice of telling his patients in the first year of consultation that they have a good chance of recovery. He also agreed with the proposition put to him by defence counsel that if a person has symptoms that are consistent with a concussion, those symptoms will not necessarily prove the person sustained a head injury. In other words, symptoms of concussion are non-specific. He drew defence counsel's attention to a statement he made in his report that post-concussion syndrome is non-specific and not diagnostic of a brain injury.

**209**  He rejected the proposition put to him by counsel that "the severity of [traumatic brain injury] must be defined by the acute injury characteristics and not by the severity of symptoms at random points after the trauma", stating "I define severity as the outcome, not the income."

**210**  Dr. Ancill declined to accept a defined statistic for the number of persons who suffer from a traumatic brain injury with ongoing effects. He said his clinical practice is not about percentages, but rather, individual patients.

**211**  The issue of distinguishing between concussions and mild traumatic brain injuries was also raised in cross-examination. Dr. Ancill explained that a concussion is a subset of mild traumatic brain injury, since there are other mechanisms that can produce mild traumatic brain injury.

**212**  Dr. Ancill affirmed that the majority of major depressions are not associated with a known organic brain problem.

**213**  Dr. Ancill was not told by Ms. Warren about her friend having cancer in 2009, about her father being in a motor vehicle accident in 2009 or of her reaction to the discovery of lesions in her brain in 2008. He was also not told about traumatic experiences in her childhood and youth. He agreed that it would be alarming for a person to discover a hole in their brain. However, he maintained that there was nothing in the materials supplied to him that would suggest Ms. Warren had a psychiatric condition prior to the accident.

**214**  He confirmed he understood the meaning of "iatrogenic" symptoms, defining it as doctor-caused symptoms.

**215**  In regard to the risk factors he identified in Ms. Warren, he qualified that there is a statistically small difference between men and women that is considered to be significant.

**216**  Dr. Ancill agreed he had reviewed Dr. Turnbull's report. When asked about Dr. Turnbull's note that "[o]n examination I found [Ms. Warren] to be bright, alert, and cheerful", Dr. Ancill maintained she was depressed when she saw him. He did not take the report as a detailed mental state examination on the basis of his knowledge of neurosurgeon training.

**217**  Dr. Ancill agreed that when he takes a patient's history, he relies on what he is being told. Later, when defence counsel again raised Dr. Turnbull's report, Dr. Ancill stated he did not rely upon this report at all. He was of the opinion that neurological deficits might not appear in cases of mild traumatic brain injury. In that sense, Dr. Turnbull's findings did not rule out the possibility that Ms. Warren suffered from a mild traumatic brain injury.

**218**  Dr. Ancill agreed there are endless variations to the manifestations of MS, although it will generally be expressed peripherally.

**219**  When asked about his report's notation that her immediate post-accident memory is fragmented and discontinuous, he opined that Ms. Warren had suffered post-traumatic amnesia.

**220**  Dr. Ancill agreed the statement he had accepted from Ms. Warren was reasonably articulate.

**221**  He did not note any other possible sources of trauma based on his interviews with the plaintiff.

***C.*** ***Andre Siquera***

**222**  Mr. Siquera is a physiotherapist. He did not testify as an expert witness. His testimony was limited to his observations of the plaintiff and the physiotherapy treatment upon the plaintiff. Their sessions usually last for about 40 to 45 minutes.

**223**  Mr. Siquera first saw Ms. Warren on April 19, 2011, upon referral from Dr. Hershler. He continued to treat her at the time of trial.

**224**  On the initial consultations, he conducted isometric tests on her neck muscles with some core weakness in her back. He had to stop the test because of the decrease in her ability to swallow.

**225**  She had described to Mr. Siquera a squeezed throat, difficulty breathing, difficulty responding to questions and shaking. It took her time to recover. He also found she could not follow certain commands. He commented that this problem was something that he had never seen before. In cross-examination, it was confirmed that he has treated thousands of patients.

**226**  He decided to treat her as if she was a stroke patient, avoiding exercises that related to the neck.

**227**  He commented that she seemed motivated to get better.

**228**  She would suffer from fatigue and dizziness when she engaged in the exercises. Sometimes he would have to repeat explanations on how to perform an exercise. He would have to explain, demonstrate and then guide her.

**229**  She was able to perform all of the exercises testing for injury in the muscle for the rotator cuff. She did not have any problems with her leg exercises. She did not display any indication of back pain. She was also able to stand up and sit down with her eyes closed. She was able to conduct rowing exercises, engaging her arms, shoulders and back. No episodes of choking arose from those exercises.

**230**  Mr. Siquera had instructed Ms. Warren to repeat her exercises at home. She did show some improvement, indicating to Mr. Siquera that she was doing her homework. He did observe a decline in her ability to perform exercises that required the closing of the eyes but it seems that she simply refused to perform them.

**231**  He confirmed that typically whiplash injuries improve over time and that a physiotherapist can accelerate that recovery.

**232**  When Dr. Turnbull's report was put to Mr. Siquera, he disagreed with the doctor's observation that she had appeared agile.

***D.*** ***Dr. Heather McLeod***

**233**  Dr. McLeod is a chiropractor who prepared a medical report on Ms. Warren dated August 18, 2011. She was qualified as an expert on chiropractic medicine.

**234**  Ms. Warren attended Dr. McLeod's chiropractic clinic before the MVAs. She began visiting the clinic in February 1997 for treatment of her lower back pain caused by her last trimester of pregnancy. She was seen 19 times in 1997, with a gradual decline in the number of consultations per year. She stopped attending the clinic in 2003.

**235**  Ms. Warren next saw Dr. McLeod on February 21 and 22, 2008 after the MVAs. The plaintiff continued attending the clinic until April 22, 2009. It was noted in her report that Ms. Warren experienced gradual improvement. Contrarily, in cross-examination, Dr. McLeod said that as of December 2008, she did not note any improvement in Ms. Warren's condition.

**236**  Ms. Warren next attended Dr. McLeod on August 11, 2011. The report was prepared after this meeting.

**237**  In her report, Dr. McLeod took some notes of the patient's self-reported symptoms post-MVAs, which is referred to in the "History" portion of her report:

The patient stated she felt like she had just given birth. She was unable to sit comfortably. She stated both her arms and legs were intermittently numb and was experiencing moderate facial pain. Mrs. Warren also stated she felt anxious, disoriented, fatigued easily and had difficulty sleeping due to the pelvic pain.

**238**  Her initial examination findings of Ms. Warren are not dated. They make the following observations:

**Examination of Spine:**

Cervical Spine:

Unable to properly assess neck as patient was in too much discomfort. However, global ranges of motion of cervical spine were decreased.

Lower Back:

1. A scoliosis was present.
2. Decreased ranges of motion of both sacral-iliac joints.
3. Right short leg.
4. Acute tenderness with palpation pressure over symphysis pubis.
5. Decreased extension of both legs.
6. Decreased bilateral lateral bending (sideways).
7. Decreased forward flexion caused pain to peritoneum.
8. Decreased rotation of pelvis in both directions.

**239**  The report also documents her examination findings of Ms. Warren in 2011.

**240**  Dr. McLeod observed that Ms. Warren continued to have problems with her neck and back but she noted an improvement in her condition. She noted that Ms. Warren's greatest concern was of extending her neck backwards, which supposedly caused dizziness and blackouts. Ms. Warren had also complained to Dr. McLeod of moderate cognitive problems, sensitivity to noise and tinnitus. Ms. Warren reported to Dr. McLeod that she "would like to return to her career in marketing but she [felt] she [was] not capable or functioning at a high enough level."

**241**  In the physical exam, it was noted:

**Physical Examinations:**

1. A scoliosis was observed.

Cervical Spine:

1. Decreased forward bending of neck.
2. Decreased lateral bending and rotation of neck especially to the right side.
3. Unable to extend neck backward.

Lower Spine

1. Pain and decreased mobility of right hip in figure 4 position.
2. Decreased range of motion in right lateral bending of lumbar spine.
3. Decreased left rotation and left lateral bending of lumbar spine.
4. Decreased ranges of motion of both sacro-iliac joints.
5. Positive bilateral Ely's test (patient on stomach both knees bent to buttocks) caused pain to lumbro-sacral area.

**242**  The report noted that two days following the examination conducted August 11, 2011, Ms. Warren reported an inflammation of pain to Dr. McLeod:

After this examination Mrs. Warren stated she woke up at 4 am with pain up and down her spine, ears ringing more loudly than usual, head and jaw pain. A burning lower back pain was present. Her overall pain level and skull pain at this time was an 8 out of 10. The chest also tightened up and a choking sensation was present. These symptoms lasted for approximately 48 hours.

**243**  She provided the following diagnosis:

Mrs. Warren has sustained a moderate to severe whiplash injury to her upper back and neck, as well as a moderate to severe low back/pelvic strain/sprain complex. These injuries were caused by the motor vehicle accidents of February 5 and 7, 2008 as she was in good health prior to these accidents. An MRI of June 6, 2011 demonstrated a diminished limit in extension. The C5-6 and C6-7 disc protrusions, are causing a slight flattening of the right anterior cord contour. Also mild narrowing of C5-7 foramina was found. This could account for the neuralgia in the forearms and neck pain. At L5 degeneration disc disease was seen. This could account for the neuralgia in the legs and lower back pain.

**244**  She gave the following recommendations:

1. A neuropsychologist assessment to assess cognitive impairments and possible effects emanating from the discal dissections into the spinal cord at levels C5 to C7, also a nerve conduction test is also recommended for the same levels.
2. A digital motion X-ray (DMX) should be done which is a lose (sic) dose fluoroscopic study for the cervical spine. This will evaluate further ligamentous instability as the MRI of June 24, 2011 has found 1-2mm translation at C4-5 on both flexion and extension.
3. The persistent dizziness with the occasional blackouts produced with extension of the head and neck requires further evaluation, possibly a vascular ultrasound.
4. Mrs. Warren must continue to have exercise rehab with an experienced trainer.

**245**  On August 19, 2011, Dr. McLeod addressed a letter to Dr. Elliot Mintz recommending that Ms. Warren undergo a neurological assessment, a digital motion x-ray on the cervical spine and a vascular ultrasound to investigate her experience of persistent dizziness.

**246**  In cross-examination, Dr. McLeod explained that if she suspects malingering, she will incorporate exercises into the examination to determine whether in fact the patient is in fact experiencing pain.

**247**  In cross-examination, when asked about her notation of Ms. Warren shuddering on the examination table and tingling in December 2008, Dr. McLeod said she informed Ms. Warren it was possibly a neurological issue outside the scope of her practice. Nonetheless, the plaintiff did continue to see Dr. McLeod in 2009.

**248**  Dr. McLeod confirmed she did not hear from Ms. Warren at all between April 2009 and August 2011. Dr. McLeod could not say when Ms. Warren's neck began to develop serious pain. She believed Ms. Warren's neck symptoms were beyond her scope of expertise. She had not described passing out with neck extension until 2011. The passing out was a later symptom, but Dr. McLeod had noted dizziness in the earlier sessions of 2008 - 2009. Dr. McLeod never saw her extend her neck.

***E.*** ***Dr. Cecil Hershler***

**249**  Dr. Hershler is a physiatrist and he was qualified as an expert in that realm of practice. He prepared two medical legal opinions and was cross-examined on them.

**250**  The first medical legal opinion was prepared on June 2, 2009 after a single visit with Ms. Warren on May 28, 2009.

**251**  Dr. Hershler at the outset noted that Ms. Warren did not have any noteworthy medical issues to report prior to the MVAs. She was a fully functioning woman.

**252**  In recounting the details of the MVAs, Dr. Hershler noted in regard to MVA #1, "[s]he was ultimately able to drive the Ford away from the accident site, but was aware of pain in the sacral region." He noted Ms. Warren had reported seeing a chiropractor a few hours after the first accident and she had also seen her family doctor.

**253**  After MVA #2, Dr. Hershler noted that Ms. Warren had reported experiencing pain over the posterior region of the head. She had felt shock and the sense of being disconnected as well as dizziness.

**254**  He then noted that "over time" Ms. Warren suffered from a persistent headache, increased pressure through the face, anxiety, irritability, hypersensitivity to light and sound and loss of short term memory. She reported her voice being weaker and her vision being affected. She experienced pain in the right side of her neck, shoulder, upper and lower back as well as the sacrum and the coccyx. She also experienced tingling in the arms and legs and ringing in the ears.

**255**  He noted:

X-rays of the cervical and lumbar spines, sacrum and coccyx (February 20, 2008) were normal, with only mild degenerative changes noted at C5/6 and C6/7. An MRI of the head (March 2008) showed no evidence of trauma.

**256**  He continued by recording her observations of improvements:

Over the past 15 months, all of her symptoms have persisted to some degree. The only exception being a major improvement in terms of cognitive abilities. Her memory, comprehension and ability to read have improved. Sensitivity to light and sound has resolved. The ringing in the ears has lessened. The numbness and tingling in the body has lessened. She initially had extreme bladder urgency and frequency post-accidents, but this has normalized. Anxiety has also improved.

**257**  He confirmed that the plaintiff had informed him of these improvements and he affirmed that her report was consistent with the normal course of recovery.

**258**  Ms. Warren had reported to him that she was only 50 to 60% recovered. She said her left leg gave way; she was only able to tolerate walking for half an hour. She had resumed her domestic tasks with adjustments to accommodate her pain. Her sleep had improved and she was on no medication at the time.

**259**  She had persistent pain in her neck and lower back, generally on the right side.

**260**  On the point of causation, Dr. Hershler noted: "[t]hese symptoms date from the first motor vehicle accident on February 5, 2008 and were subsequently aggravated by a second accident on February 7, 2008."

**261**  In the physical examination conducted on Ms. Warren, Dr. Hershler noted that "[m]ovements of the lumbar spine were fluid, but she complained of pain in the sacrum, right coccyx and right sacroiliac joint during extension." Palpations of the cervical spine produced similar results. There was evidence of soft tissue swelling over the sacrum and the sacrum being more prominent than normal. Ms. Warren had a restricted rotation of the neck of 20%.

**262**  Dr. Hershler concluded the physical findings and clinical history were consistent with post-concussion syndrome, post-traumatic stress syndrome, severe soft tissue injury to the cervical spine, severe soft tissue injury to the lumbar spine and severe injury to the sacrum, right sacroiliac joint and pelvic floor ligaments. He also found there did not appear to be evidence of any neurological injury. He recommended reassessment.

**263**  In his second medical legal opinion, dated October 18, 2011, Dr. Hershler reported on three follow-up sessions he had with Ms. Warren in September 2010, March 2011 and August 2011. I note that the first report was also cut and pasted into the second report, and his subsequent findings were simply added. He provides the same diagnosis despite his notations of changes in her condition.

**264**  Dr. Hershler noted that the MRI he had recommended for her lumbar spine, sacrum and coccyx in the May 2009 meeting had been undertaken on October 8, 2009. This MRI had revealed mild bilateral facet joint hypertrophy at L4/5 with no other finding. She had a posterior central disc bulge with a right annular tear, displacing the S1 nerve root. In other words, her results were essentially normal.

**265**  He noted that Ms. Warren had experienced significant improvements in the pain intensity in her neck and upper body since their last consultation after one year of pulsed electromagnetic field therapy. Dr. Hershler noted that prior to the administration of this therapy, Ms. Warren was unable to walk at all. He observed that she is now able to walk a 15-minute loop with increased stride. Dr. Hershler was of the view that there was no need for a repeat MRI in light of these improvements.

**266**  He explained in cross-examination that in his testimony his reference to her being "unable to walk" was not meant to suggest that she could not walk at all.

**267**  Dr. Hershler noted that upon physical examination, Ms. Warren had major improvement generally in all the areas where she had previously complained of pain. She had complete range of rotation with limitations in extension at 50%. Notably, she could "now stand on the left leg and support her body weight."

**268**  In the follow-up conducted on March 21, 2011, the most significant finding noted by Dr. Hershler was that Ms. Warren did not like to be touched in the soft tissue area of the neck "as it cause[d] constriction in the throat" and she had "difficulty with any type of backward movement or extension of the head." This neck pain was persistent in the follow-up session conducted on August 25, 2011. In the physical examination, Dr. Hershler observed: "[a]s the neck was titled backwards, she became more anxious and ultimately experienced a choking feeling, and had difficulty with breathing." She also complained of dizziness. His prognosis for improvement was poor in regard to the neck.

**269**  He conceded that one would expect to find hemosiderin if there was a traumatic brain injury. He limited his opinion with regard to the MRI results examining the brain by stating it was beyond his expertise. He did say these lesions could be asymptomatic, but he would defer to a radiologist.

***F.*** ***Alice Rose***

**270**  Ms. Rose is an occupational therapist, working for GF Strong Rehabilitation Centre. She met with Ms. Warren on April 11, 2008. It was a one-time meeting, about three hours in length, estimated on the basis of her usual practice. She prepared an early response brain injury service report as well as a letter to Ms. Warren's lawyer on that same date.

**271**  Ms. Rose did not testify as an expert witness. She was examined upon her report and her letter to counsel. She confirmed in her examination in chief she had no recollection of the meeting.

**272**  In her report, Ms. Rose made notations in relation to the MVA #2; she does not refer anywhere to MVA #1. It was noted that on March 31, 2008, Ms. Warren attended the Vancouver General Hospital due to persisting symptoms.

**273**  Ms. Rose noted:

**Impairments**

1. No loss of memory for events immediately before or after the accident
2. Dazed, disoriented and confused at the scene; she felt panicky and did not know what to do; when offered a glass of water at the school she poured it on her blouse as she tried to drink it; she had difficulty formulating her thoughts
3. MRI Scan at Canadian Diagnostics in March did not show any evidence of acute intracranial pathology
4. Multi-trauma (soft tissue injuries in cervical, thoracic and pelvic areas)
5. Acute post-traumatic stress reaction [Underline emphasis added.]

**274**  She further noted:

**Disabilities/Client Concerns**

Initially Camilla experienced significant sleep disruption and light sensitivity but this has recently improved

1. Camilla is continuing to experience the following symptoms:
2. Often gets a mild headache over her right temple as well as some TMJ discomfort
3. Cognitive and physical fatigue, tiring more easily
4. Hypersensitive to noise
5. Feeling sad, tearful, anxious and worried about her symptoms and her recovery
6. Forgetfulness, poor memory
7. Difficulties with selective, focused and divided attention
8. Slowed processing, taking longer to think
9. Becomes overwhelmed and disoriented with multiple stimuli especially in new situations
10. Difficulty reading

...

**275**  She commented:

**Factors that may contribute to Symptom Prolongation or Delay Return to Work**

Typically symptoms of mild brain injury show significant improvement in the first three months following injury, with most people recovering within six months. Factors that could prolong the duration of Camilla's symptoms include

1. Multi trauma
2. Anxiety
3. Litigation
4. Demanding responsibilities

**276**  In Ms. Rose's letter to plaintiff's counsel, she noted that Ms. Warren was referred to the Early Response Brain Injury Service at GF Strong by the Emergency Department at the Vancouver General Hospital. She also noted that Ms. Warren had sustained multi-trauma, a concussion and emotional trauma as a result of a motor vehicle accident on February 7, 2008.

**277**  She opined:

Camilla is experiencing physiological (fatigue, hypersensitivity to noise, headaches), cognitive (difficulties with attention, concentration, multi-tasking, reading, memory and processing) and emotional (anxiety) symptoms. It appears that her symptoms are escalated by both a) situational demands that exceed her cognitive or physical capacity and b) psychological factors including stress.

**278**  She recommended private occupational therapy services to develop strategies for improving cognitive-executive functions, planning a structured routine and an ergonomic assessment.

**279**  In her examination in chief, Ms. Rose explained that she is not able to diagnose a brain injury. The purpose of the impairments heading is to record self-reported impairments.

**280**  In cross-examination, Ms. Rose explained that under the headings "Disabilities/Clients Concerns", her observations were also based on self-reporting, which she accepts on face value. She clarified that the section addressing "Factors that may contribute to Symptom Prolongation or Delay Return to Work" summarized her conclusions drawn from scientific literature.

**281**  When asked if persons have headaches and cognitive problems three months after a mild brain injury, it was her understanding that there might be other complicating health variables.

**282**  She agreed that symptoms are aggravated by stress.

***G.*** ***Dr. Kevin Loopeker***

**283**  Dr. Loopeker is an optometrist. The admissibility of his evidence was challenged by the defence with respect to his opinions in his report diagnosing brain injury and "post-traumatic vision syndrome". He was qualified as an expert in the treatment of visual disturbances. I did not accept that he has the training to diagnosis a closed head brain injury or a condition of that nature. His evidence was limited in this regard.

**284**  Dr. Loopeker prepared a report dated August 30, 2011.

**285**  Dr. Loopeker first examined Ms. Warren on April 2, 2007. Since that time, he has met with her on six occasions (twice in 2008, once in 2009 and three times in 2010). He also conducted five vision therapy sessions with Ms. Warren in 2011. '

**286**  In his report, Dr. Loopeker diagnosed Ms. Warren with post-trauma vision syndrome.

**287**  He listed the following visual symptoms she experienced:

1. visual-spatial awareness problems (difficulty navigating through large, unfamiliar spaces, causing anxiety and distress);
2. hypersensitivity to peripheral motion (including a notation he made in meeting with her on April 5, 2008 that she cannot stand the sight of moving water);
3. visual memory impairment;
4. increased sensitivity to sunlight;
5. difficulty reading (she had to use a typoscope after the MVAs to read);
6. increasing sensitivity and awareness to heavy, bulky spectacle frames.

**288**  Dr. Loopeker examined Ms. Warren on April 5, 2008. She had reported to him that she was having difficulty navigating through large spaces. She could not look at moving water.

**289**  She returned to his office on June 4, 2008 for a new pair of glasses. She did not express any specific concerns about her visual clarity, eyestrain, blurring or diplopia while reading. She even reported "feeling physically, emotionally and cognitively improved; her energy, memory and executive functioning were returning." (I note this is the day before she met with Dr. Turnbull).

**290**  He examined her again on April 6, 2009. She complained of being bothered by her prescription for her left eye. He modified the prescription slightly to reduce motion effect created by the prescription. She did not return to see him for another 11 months.

**291**  In a 2010 visit, Ms. Warren had normal results.

**292**  Dr. Loopeker in 2011 commenced vision therapy with Ms. Warren in 2011. While he had not made any previous notations of significant visual field defects, after administering vision therapy on Ms. Warren, he found a number of defects (undated) leading to his diagnosis of post traumatic vision syndrome, midline shift syndrome and visual perception dysfunction. He found her prognosis for recovery was unclear, although it was evident that she was unable to return to her former capacity as a homemaker. He recommended a number of vision treatments, including visual therapy.

**293**  He agreed that her visual-spatial complaints were consistent with complaints of anxiety as well as memory problems.

***H.*** ***Dr. Chuck Jung***

**294**  Dr. Jung is a registered clinical psychologist. He prepared a medical report on September 1, 2011 based on his interviews with the plaintiff on July 15, 27 and August 16 and 24, 2011. He also interviewed her husband and reviewed the medical reports supplied to him before preparing his report. In the course of these interviews, he administered questionnaires to aid his assessment.

**295**  Revisions to the draft were not available as they had been destroyed.

**296**  He has been treating her since the second week of October 2011.

**297**  Ms. Warren was referred to him by Dr. Anderson for cognitive behaviour therapy in 2009 but it was not until 2011 that she met with him.

**298**  Dr. Jung was qualified as an expert witness and cross-examined on his medical report.

**299**  In the "Opinion" portion of his report, Dr. Jung found:

Subsequent to [the second] accident, the recovery has been a protracted one for Ms. Warren. Initial stages were fairly complicated. Her physical, emotional, and cognitive difficulties rendered her highly disabled. Due to the multiple-trauma nature of her injuries, there was also various alternative diagnoses regarding her condition. It should be noted that she received a diagnosis of MS which was quite alarming to her and this was not ruled out until a year and a half later. I would defer to the respective medical specialists to comment more on her physical injuries and diagnoses.

**300**  He continued:

... I am of the opinion that Ms. Warren continues to experience psychological problems from her accident of February 7, 2011 (sic). I am of the opinion that she continues to meet the diagnosis of Post Traumatic Stress disorder (partial remission), Major Depressive Disorder (partial remission); Panic Disorder (in partial remission), and a provisional a (sic) diagnosis of a chronic Pain Disorder associated with general medical condition (deferred) and psychological factors.

**301**  With respect to the effect of traumatic events that pre-dated the MVAs, Dr. Jung observed:

With respect to her history, she has had some traumatic experiences in her past; however, none of them have resulted in her requiring counseling nor resulting in a diagnosis of a clinical disorder.

**302**  Dr. Jung opined the second accident was sufficiently traumatic to bring on symptoms of PTSD:

... in the accident on February 7, 2008, Ms. Warren was hit at a very high speed while she was traveling by herself on a bridge. Following the impact, her memories are somewhat scattered, however, she does recall heading towards a guardrail, experiencing a feeling of dread and being in peril. There was an experience of de-realization. Although she did not hit the rail, in her mind she did have a vision of herself hitting the rail and just hanging over. The nature of this accident in itself would be sufficient to precipitate the development of [PTSD].

**303**  Dr. Jung noted that Dr. Koch, who saw the plaintiff within a month of the accident, diagnosed her with PTSD and Major Depression.

**304**  Dr. Jung noted issues in Ms. Warren's rehabilitation:

She saw multiple doctors and received various diagnoses, some competing. It should also be noted that during this period she also was not only highly debilitated by her physical functioning and pain, however, she was also diagnosed as having MS, which certainly heightened her sense of helplessness, dread and horror. It is also well known that the co-occurrence of pain with Post Traumatic Stress symptoms results in a vicious cycle, where the experience of pain exacerbate[s] the Post Traumatic Stress symptoms and vice versa. I do believe that this was the case for Ms. Warren earlier in recovery. On a positive note, there has been some gradual recovery; however, there remain many problems. ... Reviving memories of her accident of February 7, 20[08], continues to bring distress. She continues to have cognitive difficulties when anxious.

**305**  On the issue of causation, he opined:

... if not for her accidents of February 7, 2011 (sic), Ms. Warren would not be experiencing her Posttraumatic Stress Disorder (Partial Remission), Major Depresive (sic) Disorder (Partial Remission), Panic Disorder (Partial Remission), and Pain Disorder.

**306**  In cross-examination, Dr. Jung confirmed that when administering the questionnaire on Ms. Warren, she had asked for the precise meaning of the questions. She had also complained about the questionnaire because she was worried about the interpretation of her answers and her ability to fill it out in the way that she was supposed to fill it out. It took her three hours to complete the questionnaire. Dr. Jung also confirmed that she changed her answers a number of times (defence counsel counted 23 times). He did not agree that this behaviour necessarily reflected defensiveness. He observed that she liked to feel strong; she was an analytical person.

**307**  In any event, Dr. Jung did not base his opinion upon her responses to the questionnaire.

**308**  He admitted that his findings were reliant on the plaintiff.

**309**  Under the "Facts and Assumptions" section of Appendix A to Dr. Jung's report, he noted:

1. Ms. Warren was involved in two motor vehicle accidents, on February 5 and February 7, 2011 (sic). In the first accident, Ms. Warren was driving her vehicle with three children from the pool and she was at a stop sign when she was hit from behind. She described the impact as a kick in the backside. Ms. Warren was initially upset when the lady said there was no damage.

**310**  Dr. Jung was under the impression that she had been hit hard.

**311**  She indicated to Dr. Jung that she could not sleep the night after MVA #1.

**312**  With regard to MVA #2, Dr. Jung said he had the impression that Ms. Warren thought she was heading into the railings. He recounted her description of MVA #2: "[s]he remembered her body going forward and back such that when her head went forward she could see the floor, and when she went back, her head went above the headrest and she could see the ceiling." Dr. Jung never saw damage to the vehicle. He did not know if she had been wearing a seatbelt. She had felt dazed and in peril after MVA #2. She had the experience "of being draped over the railing but she knows this did not happen."

**313**  Defence counsel drew attention to Dr. Jung's notation, "[s]he felt like her head was going to explode. She worried if she could make it through the night", and explained to him that she had not yet sought medical attention. Dr. Jung commented that these feelings are typical in persons with PTSD - they experience fear that something bad will happen.

**314**  Dr. Jung affirmed that Ms. Warren had related in a general manner to him that her memory was patchy of the evening following MVA #2. When asked about Dr. Koch's notation that Ms. Warren had no problem recalling the event, Dr. Jung surmised that this might indicate that she has since suppressed her memory.

**315**  Dr. Jung opined that Ms. Warren was very articulate and spoke quickly, often in excessive detail and on tangential points. She had high standards for herself. She was taking care of many activities and the household prior to the accident. However, her abilities to make judgment and prioritize were not as strong. Dr. Jung deferred to Dr. Lanius on measurements of her IQ.

**316**  She had reported to Dr. Jung that her headaches were initially intense, although it was not specified when her headaches had begun occurring. She told him that she was bedridden after MVA #2. He had assumed she had been bedridden initially after the accidents. He was not aware that none of the other medical reports had reported her being bedridden. Dr. Jung surmised that she was certainly unable to function in the home.

**317**  When Dr. Jung was asked about Dr. Koch's notation that Ms. Warren had experienced more intrusive recollections of the birth of her son and less intrusive recollections of her MVAs, he observed that she had not made the same representations to him.

**318**  When asked about whether Ms. Warren had informed him that her panic attacks began a week after her MVAs, alongside her pelvic pain, he said "No".

**319**  Dr. Jung affirmed that the discovery of 10 lesions in her brain in March 2008 caused stress for Ms. Warren. He could not recall a second scan of her brain.

**320**  He agreed she seemed to have psychical limitations and that they were fairly severe and that it was his impression that she had these problems ever since the accidents, with some improvements.

**321**  Dr. Jung agreed it was his experience that 90% of people with a concussion resolved within three months. 5 - 10% do not recover. He was not familiar with the literature put to him by the defence counsel, but he maintained that he had "other reference literature" in his possession.

**322**  He said that headaches and memory problems were symptoms indicative of a concussion. He agreed these symptoms were also consistent with mental health illness. He accepted that MS could not be ruled out. Nor could he rule out traumatic brain injury because he knew she was getting a neuropsychological assessment. He focused solely on reducing her emotional problems.

**323**  He agreed that she was not emotionally upset by the fact that MS could not be ruled out. Dr. Jung specified that she felt frustrated by the challenge of determining what was causing her cognitive disability.

**324**  Dr. Jung agreed that it is ideal to have a treating psychiatrist administering medication and a professional administering cognitive behavioural therapy in the context of mental health. Dr. Jung was not sure if it would be helpful in her case because she does not have a treating psychiatrist.

**325**  He was posed with a hypothetical question: assuming the MVAs never happened and Ms. Warren had episodic MS that led to the discovery of holes in her brain, was it possible, if not probable, that she would develop depression, anxiety or somatoform disorder? Dr. Jung simply commented that anyone could develop those disorders.

***I.*** ***Dr. Pamela Michele Williams***

**326**  Dr. Williams is a dentist and a certified specialist in oral medicine. She prepared a medical legal report dated August 25, 2011.

**327**  Dr. Williams first met with Ms. Warren on January 9, 2009. She conducted a series of re-evaluation appointments. She based her report on these evaluations and the medical reports she was provided.

**328**  Ms. Warren informed Dr. Williams that she began to experience facial pain soon after the MVAs. She reported her wide mouth opening being restricted. She had facial pain that was aggravated by normal jaw function. Ms. Warren had been referred for physiotherapy when she reported these symptoms, which had escalated her pain. She was then referred to Dr. Williams for additional review.

**329**  At the initial assessment, Dr. Williams noted that Ms. Warren's pain was constant, at a moderate to severe level. It was located in the anterior and posterior neck, the occipital, parietal and frontal aspects of her head. She made the following observations:

... there was no facial swelling. Ms. Warren's cranial nerve examination seemed intact bilaterally. She was able to open her mouth 42 mm. With gentle pressure as applied by the examiner a maximum mouth opening of 48 mm was achieved. There was no significant alteration in the path of opening. Lateral and protusive jaw motions were normal. Translation of the mandibular condyles was synchronous. No distinctive TM joint clicking or crepitus was audible. There was moderate tenderness overlying both TM joints. She also had moderate generalized neck and masticatory muscle tenderness. A brief clenching exercise resulted in an increased complaint of jaw-related pain. Ms. Warren had a stable occlusal relationship.

**330**  Her radiographic results, obtained on January 9, 2009, did not disclose any jaw-related pathology. A temporomandibular ("TM") disorder was diagnosed.

**331**  In her assessment, she offered that parafunction was suspected and considered significant as a possible perpetuating variable. Parafunction in this case was clenching or grinding. She agreed that this symptom can arise in a person that is not involved in a car accident. However, she assumed it was related to the accident because of the time proximity between the accident and the reported symptoms. She agreed the complaints of jaw pain would be perpetuated by activities causing her muscles to clench, which would explain why Ms. Warren has experienced a slow recovery.

**332**  She noted that Ms. Warren still has some residual jaw-related issues, but she has demonstrated improvement.

**333**  She was of the opinion that the MVAs were the precipitating events for the TM disorder. She did not consider it disabling. It would not impair her choice of work-related or leisure activity. Her prognosis for improvement was good although she could not determine whether her jaw pain would ever be completely resolved.

***J.*** ***John Oldham***

**334**  Mr. Oldham is a physiotherapist.

**335**  At trial, I found his report inadmissible. I accepted the defence's submissions that no facts or assumptions were set out in the report. Mr. Oldham failed to disclose counsel's instructions that were provided to him. He failed to describe research he conducted and the documents he relied upon in formulating his opinion. The report did not disclose the reasons for his opinion. Portions of his report fell beyond his area of expertise. Finally, he failed to certify that as an expert, he understood it was his obligation to not act as an advocate.

**336**  He was allowed to testify as a treating physiotherapist on his observations of Ms. Warren.

**337**  In direct examination, Mr. Oldham described some of the initial observations he made of Ms. Warren. He noted a problem of posture. He noted balance problems. She said she was experiencing pain when he lay her down and asked her to raise her legs. He noted that she was unable to raise her tongue. The muscles that elevated her tongue were weak. He put her into resting positions to alleviate stress in her neck and lower back. She was unable to respire easily in these positions and was unable to remain in them. No dates were provided to contextualize these observations.

**338**  In cross-examination, Mr. Oldham confirmed that he first saw Ms. Warren on September 15, 2009. He confirmed that he had made clinical notes that her neck worsened six months after the accident. He further confirmed that two weeks later, his clinical notes report that Ms. Warren's neck movement had improved, as per the plaintiff.

**339**  His last treatment of Ms. Warren was on February 3, 2011.

***K.*** ***Dr. Ulrich Lanius***

**340**  Dr. Lanius is a neuropsychologist registered to practice in British Columbia. He met with Ms. Warren on March 24 and April 2, 2009 for eight and a half hours to conduct an assessment of her psychological functioning. He prepared a medical legal report for plaintiff's counsel on September 2, 2011 documenting her symptoms, diagnosis and treatment. He prepared a second medical legal report for the purpose of reassessing Ms. Warren's psychological functioning on February 3, 2012. He had met with her on January 27, 2012 for five hours.

**341**  During their consultations, Dr. Lanius administered a number of neuropsychological tests to measure her brain functioning. He explained in his direct examination that these tests are primarily concerned with short term memory. In preparation of his report he also reviewed the clinical records of other medical experts.

**342**  He described MVA #2 as follows:

... on February 7, 2008, Ms. Warren, while traveling on the Alex Fraser Bridge in her Ford Windstar van and on the way to pick up her sons from school, was rear-ended again. On this occasion, the impact occurred at a higher speed. Apparently, Ms. Warren "was thrust violently up and down, and recalls her lower back being thrust forward, her body upward and then striking the base of her skull against the top of the car seat (integrated head restraint)."

**343**  In the "Summary & Recommendations" portion of his report, he made the following findings, which I excerpt here:

1. Ms. Warren's current level of intellectual functioning falls in the Superior range. VIQ [or, "verbal IQ"] falls in the High Average range and PIQ falls in the Very Superior range. More likely than not, this performance suggests a deterioration from estimated levels of premorbid functioning in the Very Superior range throughout.
2. The neuropsychological profile reflects multiple remaining strengths, but also a number of deficits that include multiple aspects of memory - most notably verbal memory. Nonverbal memory, working memory, as well as aspects of attentional functioning are also significantly impaired.
3. ... the onset of cognitive impairment is consistent with Mild Traumatic Brain Injury (MTBI). Behavioural symptoms of affective dysregulation, impaired memory and attentional functioning did not appear until after that MVA. Thus, given, (sic) onset of impaired cognitive functioning subsequent to the MVA, it is more likely than not that Ms. Warren suffered a concussion and MTBI as a result of the February 7, 2008 MVA due to accelerative injury.

**344**  On the issue of causation in relation to the white matter lesions on Ms. Warren's brain, Dr. Lanius could only comment "[u]ltimately, I defer to a neuroradiologist with regard to the causation with regard to lesions evident on neuroimaging." He then opined: "if such lesions were indeed pre-existing prior to the 2008 MVA's (sic), this would have made Ms. Warren much more prone to developing significant neurocognitive symptoms secondary to MTBI."

**345**  He provided a qualified response on whether Ms. Warren's emotional condition may have impacted her testing results:

1. ... I am unable to rule out that Ms. Warren's emotional sequelae, as well as some ongoing pain activity may have some impact on her neuropsychological test performance. However, both the pattern of neuropsychological results, as well as the magnitude of deficits, support the notion that the observed deficits are primarily attributable to MTBI, rather than pain and/or emotional factors. Nevertheless, there is likely a synergistic effect of both cognitive and emotional factors on day-to-day functioning, including profoundly (sic) effects on social and recreational functioning.

**346**  He found Ms. Warren developed PTSD from MVA #2:

1. ... Ms. Warren developed a [PTSD] secondary to the February 7, 2008 MVA. ... There is evidence of a significant trauma history prior to the February 2008 MVA's that likely predisposed Ms. Warren to develop PTSD in the face of a renewed traumatic event.

**347**  He also found she met diagnostic criteria for Major Depressive Disorder - moderate. He opined that it was more likely than not her depressive symptoms were partially in response to the loss of her cognitive functions. She further met diagnostic criteria for Chronic Pain Disorder.

**348**  He was of the opinion that Ms. Warren's ability to work and her earning capacity may have been profoundly impaired by the 2008 MVAs. However, he concluded his report with the following recommendation:

1. Generally, after three years post-injury the likelihood of additional improvements is limited. Thus, at this time I am unable to comment on long-term outcome and prognosis as well as on future earning capacity with regard to the effects of Ms. Warren's injuries. ...

**349**  For the second medical legal report, Dr. Lanius performed some, but not all, of the previous brain functioning tests. He also reviewed the updated clinical records on Ms. Warren, which are set out in his report.

**350**  In the "Summary & Recommendations" portion of his report, he provided the following opinions.

1. Ms. Warren's neuropsychological functioning is largely unchanged from the previous assessment conducted in 2009. There are some are some (sic) areas of significant improvement with regard to contextual verbal memory (e.g. Logical Memory). This likely comes at a cost of slightly decreased visuo-perceptual performance (e.g., Block Design, RCFT).

**351**  He explained in cross-examination that the normal course for a large portion of persons with a disruption to their brain functioning is improvement. However, for some, the effects of "neuroplasticity" can result in ongoing deterioration of some parts of the brain, prompting other areas of the brain to compensate. He said that often what happens is a deficit in verbal memory will eventually improve with a decline in visual memory, which is a less important part of the brain for most people.

**352**  With regard to the prospect of employment, Dr. Lanius opined:

1. Overall, while the neuropsychological profile reflects multiple remaining strengths, the profoundly impaired performance on Trails B likely reflects the limiting factor with regard to overall functioning. Generally, it has been my experience that individuals with similarly impaired Trails B scores are unable to be remuneratively employed and they tend to have profound impairments with regard to day-to day (sic) functioning.

**353**  He provided the following explanation for why Ms. Warren demonstrated significant improvement in some areas with other areas remaining consistent:

1. [This] pattern ... is very much consistent with MTBI rather than a deteriorating condition, such as Multiple Sclerosis. It very much supports the notion that Ms. Warren's deterioration in cognitive functioning after the February 7, 2008 MVA was indeed primarily attributable to MTBI.
2. While I am unable to rule out that PTSD, depression and pain have some impact on neuropsychological performance, it is my opinion that such impact is relatively minimal. ...

**354**  He maintained that Ms. Warren suffered from ongoing PTSD symptoms. He disagreed with Dr. Ancill's opinion that her PTSD was in full remission. He confirmed that Ms. Warren continued to meet the diagnostic criteria for Major Depressive disorder at a moderate level.

**355**  He concluded that given four years had passed since the MVAs, her neuropsychological impairments were likely permanent in nature.

**356**  In cross-examination, I note Dr. Lanius was quite unwilling to aid the Court on many complex issues. He was disagreeable and provided many equivocal responses. I highlight here portions of his testimony that were actually helpful (even though he might not have so intended).

**357**  Dr. Lanius explained that mild traumatic brain injury encompasses a great range of impairment and deficit. He agreed that most persons that sustain a mild traumatic brain injury return to their normal lives within three months, with some never recovering.

**358**  When asked about whether there was any sign of bleeding inside her brain within a month of the accident, he only commented that the MRI revealed lesions. When pressed further on this point he noted:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 38. |  | A | I can't comment on that. But certainly if you |  |
| 39. |  |  | have lesions, if you have a low resolution |  |
| 40. |  |  | scanner, you often cannot determine whether |  |
|  |  |  | there |  |
| 41. |  |  | actually is a bleed or not. And to my knowledge |  |
| 42. |  |  | there actually hasn't been any really high |  |
| 43. |  |  | resolution or imaging done to rule that |  |
| 44. |  |  | possibility out. |  |

**359**  Dr. Lanius agreed with defence counsel that there has been no medical opinion from a neurologist or any other qualified medical professional that would suggest that any of the lesions on Ms. Warren's brain were caused by the accident. Defence counsel then noted that Dr. Lanius had not supplied any authority for the proposition he made in his report that white matter lesions are common secondary to traumatic brain injury. Dr. Lanius replied that it was "common knowledge" in neuropsychology that someone with comprised cerebral functioning will be vulnerable to brain injury.

**360**  Dr. Lanius agreed with defence counsel that his findings operated on the assumption that there was sufficient force in the accidents to cause some form of neurological disruption, to which he added: "certainly my neuropsychological assessment results would be consistent with that."

**361**  Dr. Lanius explained that traumatic brain injuries are typically accompanied by a cascade of other conditions, including PTSD, depression and pain disorder. He disagreed with the premise put forward by defence counsel that it was impossible to determine the cause of neurological symptoms, even with testing. He maintained that psychological disorders exhibit patterns that can be distinguished from mild traumatic brain injury symptoms. At the same time, later on in cross-examination, he noted that "neurophysiological cascade that we're talking about is in some ways kept alive by other psychological processes. So certainly there's evidence for PTSD affecting the neuroimmune functioning."

**362**  He agreed with the proposition put to him that mild traumatic brain injury has small overall effects. He agreed that attention span is the most likely to be affected by a brain injury. He also "largely" agreed with the proposition "[p]atients with persistent post-concussive symptoms generally have non-injury related factors which complicate their clinical course. Post-concussive syndrome is a relatively rare sequelae of MTBI seen in 1 to 5 percent of all MTBI patients."

**363**  He refused to say whether he agreed with the proposition that where symptoms persist, compensation/litigation is a predictive factor, with little else as a consistent predictor.

**364**  Dr. Lanius confirmed in cross-examination that he did not observe any symptoms of pain in the plaintiff in their consultations.

**365**  He agreed he had not set out the margin for error in his tests in his report.

**366**  He agreed that white matter lesions can be found in persons that do not report having a concussion. He said that it was his experience that there was a higher likelihood of white matter lesions in patients with a history of mild traumatic brain injury.

***L.*** ***Dr. Elliot Mintz***

**367**  Dr. Mintz was qualified as an expert family physician. He prepared a medical legal report on August 9, 2011. Dr. Mintz met with Ms. Warren on January 5, 2009, February 10, 2010, April 20, 2010 and August 3, 2011.

**368**  Dr. Mintz's report begins with a summary of the two MVAs. Interestingly, his summary notes:

[After MVA #2, Ms. Warren] did go to Richmond General Hospital. There, they diagnosed a concussion. On April 10th, 2008 she attended GF Strong and VGH where they diagnosed her as having mild traumatic brain injury.

**369**  She was never diagnosed with a mild traumatic brain injury at GF Strong.

**370**  Dr. Mintz made the following notations of Ms. Warren's medical history after first meeting with her on January 5, 2009:

She started (sic) that she had a reaction to Gaba pentine and had to go to the emergency department for intravenous therapy. One week later her blood pressure was high leading to vertigo. She saw her Doctor, Dr. McKenzie who did blood work for connective tissue disorder. The next morning she attended Richmond General Hospital for rehydration. On December 18th she again returned to Richmond General Hospital. They felt that she had post concussion syndrome. She had muscle pain all over her body. This pain was delayed [for] more than four hours later after physical activity. She attended pool exercises but later had a decrease in her energy. She felt ok between her shoulder blades and waist. Her sacrum right side had pain in the emphasis pubis. She attended Dr. Christina Williams OB Gynae specialist who referred her to a physical medicine doctor, Dr. Elliot Weiss. She also referred her to a pain specialist Dr. Karen Hossack on January 13th, 2009. She had not yet seen a physiatrist.

[Emphasis added.]

**371**  Dr. Mintz further noted she was experiencing a "lot of down ward spiraling events" at home. He recorded that she was seeing Dr. Wilensky, who was attempting to reprocess her birth episode as well as her eye injury and scarlet fever she suffered at the age of four.

**372**  Dr. Mintz noted he received a letter from Dr. Hershler about a consultation he had with Ms. Warren on September 13, 2010. Dr. Hershler had reported that Ms. Warren's physical exam showed major improvements in all of the areas where she had previously complained of pain. Dr. Hershler had informed Dr. Mintz that "[h]e felt that the range of motion of her head and neck was almost completely resolved." He also noted he received a letter from Dr. Loopeker on February 11, 2011, who had reported that Ms. Warren was overall making progress and had been feeling physically, energetically and cognitively improved.

**373**  In his consultation with Ms. Warren on February 10, 2010 (although his report indicates February 10, 2011). He spoke with her about avoiding aggressive massage and chiropractic work because of a powerful release of endorphins that she had been experiencing with Dr. Hershler's treatment.

**374**  Dr. Mintz saw Ms. Warren next on April 20, 2010. She had described her condition as "moving up the ladder".

**375**  He received another note from Dr. Hershler after his consultation with Ms. Warren on March 21, 2011. Dr. Hershler had informed Dr. Mintz that he was going to commence a training program with Ms. Warren to wean her off her dependence on therapists.

**376**  He last saw Ms. Warren on August 3, 2011. They discussed her attending an appointment at the MS clinic to rule out MS. That appointment was scheduled for September 1, 2011.

**377**  Dr. Mintz concluded that as a result of the MVAs, Ms. Warren sustained post-concussion syndrome, PTSD, severe soft tissue injury to her cervical spine, severe soft tissue injury to her lumbar spine and severe injury to her sacrum. His prognosis for her recovery was guarded.

**378**  The bases for these diagnoses are not clearly laid out since Dr. Mintz does not detail his own observations. He only summarizes the observations of others.

**379**  In cross-examination, he agreed he relied upon the accuracy of the patient's relayed medical history in forming his diagnosis and treatment plan.

**380**  Ms. Warren saw Dr. Mintz on 15 to 20 occasions. She last saw him on October 19, 2011.

**381**  Dr. Mintz maintained that x-rays of her neck showed evidence of previous injury as well as wear over time. However, the x-rays did not reveal any problem that would be symptomatic. He noted she had herniated discs displayed in her x-rays in the L5-S1 area, the most common area, without any evidence of nerve impingement.

**382**  He said the usual course of recovery for soft tissue injury is for the person to experience the greatest change in symptoms within the first few months. This recovery will eventually reach a plateau. A minor injury will have symptoms lasting six months; a serious injury will last over two years. He agreed a good predictor of speed of recovery was the degree of strain upon the muscles. A person with a minor injury is likely to fully recover. He said the fact that she was still suffering four years on indicated she had suffered a severe injury. He did agree that pain was a subjective symptom.

**383**  Dr. Mintz also agreed that his description of the MVAs and her subsequent diagnoses were based on the history that she had provided to him at her initial consultation, on January 5, 2009. He said he never revised those descriptions in his report. He confirmed he never received reports from GF Strong but he explained he did receive reports detailing MTBI in emergency reports from VGH. When he was informed by defence counsel that Ms. Rose from GF Strong could not diagnose MTBI, he had no knowledge of that fact.

**384**  The clinical records from Ms. Warren's visit to the VGH emergency on March 31, 2008 were put to Dr. Mintz. He was presented with the Emergency Nursing Assessment, which made notes that included "nerve pain to the legs", "short of breath", "alert", "steady gait". In the Emergency Department Record, made on that same date, "constellation of neurologic symptoms" was noted. Final diagnosis was "anxiety". It noted "neuro appointment". Dr. Mintz was never provided with these records. His attention was also drawn to hospital records from the Richmond General Hospital, dated February 9, 2008. These records show that she reported no neck pain. He said some injuries will not necessarily manifest right away.

**385**  Dr. Mintz maintained that MVA #2 was a high impact accident. When posed with the hypothetical question of it being a low impact accident, he said he would expect minimal symptoms present.

**386**  Dr. Mintz was presented with Dr. Turnbull's report prepared in June 2008. His attention was drawn to Dr. Turnbull's observation that Ms. Warren had full range of movement in her neck and back. Dr. Mintz was not aware of this report. Ms. Warren had not volunteered this information to Dr. Mintz.

**The Plaintiff's Vocational and Earnings Evidence**

***A.*** ***Derek Nordin***

**387**  Mr. Nordin is a vocational rehabilitation consultant and he was so qualified as an expert.

**388**  He prepared a report on August 31, 2011 after meeting with Ms. Warren on August 2, 2011. He relied on this interview, the vocational battery test she completed and the documents sent to him by her counsel.

**389**  Ms. Warren reported to Mr. Nordin that at the time of the MVAs, it was her plan with her husband that she would re-enter the workforce once her youngest son entered high school. Mr. Nordin estimated that her youngest son would be 11 at the time of the accident and that Ms. Warren would have re-entered the work force in two years time. At the time of the MVAs, she described herself as working part-time for her husband in his accounting practice.

**390**  Ms. Warren had also indicated to Mr. Nordin that she had planned to initially work part time and eventually move into full time work. She did not have any specific employment in mind.

**391**  Ms. Warren described to Mr. Nordin the second accident as being a "high speed rear-end" collision. She reported an injury to her cervical spine, a concussion, injury to her pelvis and her lower back.

**392**  Based on Ms. Warren's self-reporting, Mr. Nordin notes that her overall condition has remained the same.

**393**  Mr. Nordin relied upon the diagnoses of Dr. Anderson and Dr. Ancill in formulating his opinion.

**394**  The vocational test battery administered on Ms. Warren produced the following results:

1. academic achievement - 81st percentile;
2. reading ability - vocabulary score in the 97th percentile; reading comprehension 2nd percentile (resulting in her inability to complete the questions in the time allotted). He noted that in his experience, "quite often difficulties with memory and/or concentration can impair an individual's ability to do well on the reading comprehension subtest;
3. vocational interests - strongest score in the investigative theme (strong scientific orientation). Her areas of least interest were office management, programming and information systems and entrepreneurship;
4. personality factor - normal range results (with the exception of "reasoning", which produced a high score and emotional stability which produced a low score). Mr. Nordin noted: "[h]er results also suggests, however, at the present time Mrs. Warren presents herself as somewhat more anxious than most people".

**395**  In the discussion portion of his report, Mr. Nordin noted he did not have the opportunity to review any income tax information from Ms. Warren from 1997 - 2008. He summarized her work history as primarily involved in a market research company, ACNielsen, from 1987 to 1995. Her last position with that company was as a business manager. Her reported salary was $94,000.00. She also reported teaching as a sessional instructor at Kwantlen College. She did not provide Mr. Nordin with earnings information on that position.

**396**  He opined:

From a vocational rehabilitation perspective, I am not aware of any limitations in the physical, cognitive, or emotional domains which would have precluded Mrs. Warren from returning to the workforce as she had intended.

However, at the same time, I have no way of knowing the likelihood of her following through on her expressed plans. All that I can say is that she had the potential to do so.

As noted earlier, as her return to work plan was based on her returning to work two years after the subject accidents she did not, at that time, have any specific employment opportunities available to her. [Emphasis in original.]

**397**  He noted census data showing that females who worked full year/full time as sales, marketing and advertising managers earned on average $68,780.00 per year in 2010. He also observed that new hires at Kwantlen University earn an annual salary of $52,833.00.

**398**  Her ongoing symptoms in her physical, cognitive and emotional domains, her difficulties with memory, concentration, word finding and emotionality led to his conclusion that Ms. Warren was not competitively employable at this time. He predicted that she would remain out of the workforce unless she experienced an improvement in her symptoms.

**399**  He confirmed in cross-examination that the plaintiff had not advised him that she had not worked full time after 1991.

**400**  He agreed that the plaintiff's issues were emotional or psychological, and that resolution of those issues would make her employable.

***B.*** ***Darren Benning***

**401**  Mr. Benning, President of PETA Consultants Ltd., prepared a report estimating past and future income loss for Ms. Warren. He was qualified as an expert in the valuation of all aspects of economic loss in civil actions.

**402**  The report was completed on the assumption that but for the accidents, Ms. Warren would have returned to the labour force by January 2010 and that she would have earned an income comparable to a British Columbia female working as a sales/marketing manager, a college instructor or a marketing researcher through to retirement at 65 years of age.

**403**  It was also assumed that Ms. Warren may have suffered income loss in the past as a result of the accidents and that in the future, Ms. Warren may have no residual earnings capacity.

**404**  As she had been out of the work force for approximately 14 to 15 years, her earnings were lagged by that amount of time. Allowance was made for non-statutory, non-wage benefits for future years; no allowance was made for Canada Pension Plan premiums given her age.

**405**  He reported the calculations as follows for "Without-Accident Past and Future Income":

Under these assumptions, total past without-accident income is either (sic) $123,372, $92,505, or $109,498, prior to court-ordered interest. Similarly, the lump sum present value of Ms. Warren's future without accident income is either $649,411, $503,149, or $466,681.

**406**  For "Past Income Loss", he reported:

... we estimate a past income loss of either $99,970, $78,200, or $90,216, prior to court-ordered interest.

**407**  Her earnings from her husband were excluded from this calculation because it was suspected that her declared income from her husband was for the purpose of income splitting.

**408**  He calculated "Future Income Loss" as the same as her "Without-Accident Future Expected Income".

**The Defendant**

***Mauro Berretta***

**409**  Mr. Berretta gave evidence on MVA #2. He was 70 years of age at the time of trial. Before his retirement he was a mining engineer, geophysicist and geologist. He was the driver of the Mercedes SUV that impacted Ms. Warren's van.

**410**  He remembered he was coming from the airport on that day. The accident occurred on the Arthur Laing Bridge. He was in the right hand lane on the bridge between 3:00 and 4:00 p.m. The traffic was heavy and it was moving at a stop and go pace. He was driving at a speed of 15 kph. The vehicle in front of him was a van.

**411**  In the process of stopping and going he looked in his rear view mirror. He noticed the vehicle behind him was close. He then looked forward and saw the van had stopped and he slammed on the brakes. He was going 5 kph upon contact with the van. He did not remember the van moving forward upon impact. He did not recall the van's lights being on at the time. He braced himself on his wheel. He was not wearing a seat belt and he did not move substantially. The airbags did not deploy.

**412**  Mr. Berretta and his wife got out of the vehicle. The driver of the van got out of the vehicle. They spoke briefly and then moved the cars out of the lane. They then proceeded to exchange information.

**413**  Mr. Berretta's front bumper was pushed in.

**414**  He estimated that almost immediately after impact, the driver exited her van. She seemed upset and tearful. She mentioned to Mr. Berretta and his wife that she had been rear ended a few days earlier. She seemed normal. She spoke clearly.

**415**  Mr. Berretta did not have any injuries from the accident.

**416**  In cross-examination, Mr. Berretta agreed that in his examination for discovery he had said that Ms. Warren's vehicle was pushed forward some distance.

**417**  Mr. Berretta admitted his Mercedes SUV was a heavy vehicle, although he maintained it was not a large vehicle.

**418**  He confirmed that the total amount for repairs on his vehicle was approximately $6,000.00.

**419**  He confirmed that he was not looking at his speedometer at the time of the accident. His measurement of speed was his own estimation.

***Shannon Grant***

**420**  Ms. Grant was 62 years of age at the time of trial. She is the wife of Mr. Berretta. Before retirement she was a geologist. She is now a homemaker and artist. She was the passenger in the Mercedes SUV that collided with Ms. Warren's vehicle.

**421**  She confirms Mr. Berretta's testimony that they were driving on the Arthur Laing Bridge in the far right lane. The traffic was stop and go.

**422**  She was reading at the time of the accident. She first looked up when her husband hit the brakes. She said they were travelling "not very fast".

**423**  She did not recall the van moving forward. She was wearing her glasses at the time. Nothing occurred to her upon impact. She had her hand forward to brace herself.

**424**  After the accident, they got out of the vehicle to exchange information. They tried to pull over to move out of the way of traffic. After that point they exchanged information. The woman driver of the van wrote down their information. She was clearly upset but acted normally. She informed Ms. Grant that she had been rear ended recently. Ms. Grant had no injuries resulting from the accident.

**425**  She confirmed she did not make a statement after the accident - she had not thought anything would come of it.

**The Defendant's Medical Evidence**

***A.*** ***Dr. Ian Turnbull***

**426**  Dr. Turnbull is a neurosurgeon and was so qualified to testify as an expert.

**427**  Dr. Turnbull prepared a medical legal report on June 23, 2008 for the former counsel of Ms. Warren. He met with Ms. Warren on June 5, 2008.

**428**  In his medical legal report, Dr. Turnbull summarized Ms. Warren's MVAs and her subsequent medical history and treatment.

**429**  Dr. Turnbull noted that she reported she was gradually resuming her normal pattern of life. On weekdays she would rise at 6:15 a.m. and make breakfasts and pack lunches for the boys. She would send the two younger sons off to school. Her housekeeper, who formerly came once a week, now came three times a week.

**430**  Dr. Turnbull noted that on March 26, 2008, Ms. Warren had an MRI scan of her head. The radiologist, Dr. Andrews had reported finding approximately 10 high-signal lesions measuring up to 8 mm in size in the cerebral white matter bilaterally. He noted "[t]hese lesions did not have the characteristics of axonal injury and suggest the possibility of multiple sclerosis." It was also noted that these lesions were non-specific.

**431**  Dr. Turnbull determined that any of her ongoing problems were attributable to MVA #2. She had complained of problems in her back from "top to bottom". She experienced muscle spasms in her low thoracic region. She suffered from aching tightness in her shoulders. She had a pulling feeling in the muscles around her pelvis. She would suffer from a burning sensation in her upper lumbar region with activity. She felt unsteady. She felt pressure in the back of her neck from gardening that would cause her to lie down. She also had the sensation of a tight line extending from the back of her skull over the top of her head to her teeth. She no longer had a ringing sensation in her ears.

**432**  Upon examination, he observed:

... I found her to be bright, alert and cheerful. Although concerned about her ongoing symptoms, she made no effort to exaggerate her reaction to them. She moves about with agility and displays good dexterity.

She has a full range of movement of her neck and back, with no symptoms being caused. She has slight tenderness in the upper trapezius muscles on both sides of her neck and the paraspinal muscles in the low thoracic region and upper lumbar region are tender to palpation.

She has full strength in the muscles of her arms and legs. She feels that her grip is not as strong as it used to be, but I could not detect any weakness. The deep tendon reflexes are brisk and symmetrical in her arms and legs. I could find no sensory abnormalities in her arms and legs.

**433**  He confirmed this observation in his testimony.

**434**  Significantly, he made the following observation:

I could not find any evidence on physical examination to indicate dysfunction of the brain, spinal cord, or peripheral nerves; consequently, I could not find anything to correlate with the areas noted on the MRI scan as being possibly abnormal. To my eye, the scan is not of high quality. If there is any reason to postulate that she may have brain dysfunction on a structural basis, I recommend that the scan be re-read by a neuroradiologist, who may want to do some repeat studies. The history does not suggest multiple sclerosis or a physical brain injury as possibilities.

**435**  He concluded that she sustained soft tissue injuries in the second MVA. He did not believe that she would benefit much from ongoing treatment. He only suggested that she resume her normal activities gradually.

**436**  I asked him about that last comment. He responded by clarifying that it was his impression that she was doing quite well. He was not commenting on psychiatric help. When I asked about the type of treatment that would be recommended for a person who was suffering from symptoms resulting from a concussion injury, he said it would depend on the nature of the difficulty being experienced by the individual.

***B.*** ***Dr. Marc Boyle***

**437**  Dr. Boyle is an orthopaedic surgeon and he was so qualified as an expert.

**438**  Dr. Boyle prepared an independent medical report on August 17, 2011. He interviewed and examined Ms. Warren on that same date.

**439**  His report notes that her worst complaint is her neck. She also complained of a burning sensation posteriorly, more on the left side. She experienced stiffness and grinding. She had headaches that are occipital with bifrontal radiation. With neck extension she reported suffering from dizziness or near fainting.

**440**  She complained of low-grade tinnitus and dizziness. This dizziness had interfered with her physiotherapy sessions.

**441**  She experienced numbness is the right fifth finger. She complained of radiation in the midline through the sacrum, which was not constant. She had mid-back pain brought on by activity. She stated that she had problems with the pelvic floor. She had tenderness over the pubic symphysis.

**442**  His examination of Ms. Warren's stance revealed normal alignment. Her shoulders and pelvis were level and her cervical and lumbar lordoses were normal.

**443**  He also made observations of her range of motion. She could rotate to 90 degrees bilaterally and laterally flex to 30 degrees bilaterally. She would not extend from the neutral position of 90 degrees mentum-cervical angle. She would not allow axial compression. He explained that this test is to elicit the status of the cervical spine. She would not allow palpation. There was no wasting, which would suggest atrophy. He noted: "[r]egarding extension, the patient refused to do so on request for fear of 'losing connection in physical space' and possibly fainting." She had simply been asked to look at the ceiling.

**444**  On flexion of her lumbosacral spine, she extended 120 to 130 degrees with no complaint. In doing so, he noted she extended her neck without any symptoms.

**445**  He observed:

It should be noted that the patient displayed extension of her cervical spine without complaints to at least 135 degrees when she forward-flexed her lumbar spine with knees in extension. She was adamant, however, that she could not extend from an axifemoral angle of 90 degrees without suffering dizziness and possibly fainting. This did not occur during the aforementioned examination. [Emphasis added.]

**446**  Her thoracic spine had normal expansion upon inhalation. He observed the "[c]ompression of the thorax was not associated with any complaints."

**447**  Upon examination of her lumbar spine, he made the following observations:

**Range of Motion**

Flexion allowed her hands to reach to 6 cm from the floor with a 10-cm lumbosacral excursion. She states that, prior to the MVA, she could touch her hands flat to the floor with knees in extension. Extension resulted in normal curve reversal and was possible to an axi-femoral angle of 30 degrees. Lateral flexion allowed her hands to possible to (sic) an axi-femoral angle or 30 degrees. Lateral flexion allowed her hands to reach her knee joint lines. There was no tenderness. The muscle tone was normal.

**448**  His other observations were noted as normal.

**449**  His impression of the plaintiff was that she had suffered a myofascial strain to the cervical spine after MVA #2. He did not find any evidence of injury to her vertebrae, disc pathology or neurological compromise. Her MRI revealed mild disc protrusions in her spine that would be considered the norm at her age. He opined these changes in her spine were not resulting from the MVAs.

**450**  He opined that Ms. Warren did not require surgery and that her medical management should involve stretching and strengthening.

**451**  He found there was no medical basis for her complaints of an inability to breathe because of lack of expansion of her thorax. He did not find any abnormalities in her bone scan with regard to her thoracic cage.

**452**  No other findings revealed anything noteworthy in her condition.

**453**  He concluded as follows:

Absent any objective evidence of musculoskeletal trauma other than the working diagnoses of mild myofascial strains, the overwhelming likelihood is for resolution of her complaints over time.

Again, from an organic point of view, absent any objective evidence of pathology in the musculoskeletal system, the overwhelming likelihood was for resolution of her symptoms.

It is the writer's opinion that such complaints would be mild and would be intrusive for a very limited period of time.

**454**  Dr. Boyle echoed the diagnosis of Dr. Anderson that at most she suffered a mild traumatic brain injury, with the overwhelming likelihood being full resolution over time. He noted her MRI did not reveal any traumatic changes to her brain. She had a normal neurological examination under the care of Dr. Stewart and a normal neuro-opthalmic examination by Dr. Lindley in 2009.

**455**  He agreed with Dr. John Stewart that there was little, if any, likelihood of a causal relationship between Ms. Warren's hip complaints with MVAs.

**456**  Dr. Boyle opined that she would have been able to resume consulting work within four to six weeks of the MVAs with a similar time line for her leisure injuries and household duties.

**Errata**

**457**  In the course of closing submissions, the defendants raised an objection to the plaintiff's closing submission. They alleged it was replete with factual errors. As the defendants were unable to specify all of the alleged errors at that time, due to time constraints I allowed the defendants to submit a summary of the errors after the trial was completed. The defendants' summary of errata in the plaintiff's closing argument was filed on May 23, 2012.

**458**  The plaintiff's counsel responded to the defendants' summary of errata in a letter dated May 28, 2012, alleging that the summary contained argument. He believed that "significant submissions" were required to respond. However, he was unable to make those submissions because of ongoing health issues.

**459**  In this letter, plaintiff's counsel also informed the Court that his health may have impacted his ability to properly represent his client at trial. He indicated that he was seeking legal advice on this issue and that he might bring further applications based on that advice.

**460**  The defendants opposed this right to reply in a letter dated May 28, 2012. They submitted that to the extent the errata summary contained argument, it was necessitated by the "volume of discrepancies" that needed to be addressed, which could not be accommodated in closing argument. The defendants would only agree to further submissions on costs.

**461**  Finally, the defendants stated that if accommodations were to be made for the plaintiff's counsel's health, they required medical documentation of those health issues.

**462**  Plaintiff's counsel retained counsel. On June 18, 2012, his counsel wrote to the Court advising that he had concluded his client's health issues had impacted his ability to properly prosecute the claim. He was prepared to submit medical evidence on this issue. He sought leave to file a new/amended closing submission after he had time to review the entire trial. He also advised the Court that after reviewing the trial record, he might seek to re-open the case.

**463**  I granted the plaintiff a right to reply to the defendants' summary of errata, although this reply was limited to new arguments raised in the defendants' submissions. I declined to re-open the case.

**464**  To ask a trial judge to be responsible for determining the competence of counsel's decisions in the course of a trial would impose an impossible and inappropriate burden on the Court.

**465**  A sur-reply was submitted to the Court dated September 4, 2012. It essentially argued that the summary of errata was simply criticizing the plaintiff's interpretation of the evidence.

**466**  I have reviewed these further submissions by the parties. I agree with defence counsel that the plaintiff's closing argument contained extensive errors, including reference to evidence that was not before the Court. This is particularly unhelpful given the extent of the evidence that was proffered to the Court in this trial.

**467**  It is trite to say that I have relied upon the evidence admitted at trial in forming my factual and legal conclusions.

**Analysis**

**Factual Findings for MVA #2**

**468**  I find that MVA #2 was a minor accident. I draw this conclusion for several reasons.

**469**  I note the damage to Mr. Berretta's vehicle was not significant. There was no damage whatsoever to Ms. Warren's vehicle.

**470**  Ms. Warren claims that when she was hit by Mr. Berretta, she was driving 50 kph. Yet, Mr. Berretta said he slammed on his brakes to avoid hitting Ms. Warren's van because her vehicle had come to a stop.

**471**  Her speed estimate also contradicts her own admission that the traffic was at a shuffle pace as it merged off the Arthur Laing Bridge.

**472**  I infer that the traffic was heavier at the time of the accident as it coincided with the beginning of rush hour. I prefer Mr. Berretta's evidence, supported by his wife's testimony, that the traffic was stop and go. He estimated his speed at the time of the accident was 5 kph. I find this estimate to be a more reasonable approximation of the speed he was travelling at when he collided with Ms. Warren.

**473**  I find that both Mr. Berretta and Ms. Grant were honest, credible and reliable witnesses. They did not depart from their version of events and they were forthcoming about the limitations of their observations.

**474**  It is unclear whether Ms. Warren's van was pushed forward by Mr. Berretta's vehicle. Mr. Berretta in his examination for discovery said that her car was pushed forward some distance. It was Ms. Warren's own admission in cross-examination that she did not recall her car being pushed forward upon impact; she claimed her memory of MVA #2 was limited. Yet, her statement taken at the Richmond Claims Centre four days after the accident shows that she had excellent recollection of the accident at the time, suggesting that her inability to recall the accident now can be attributed to the passage of time (or perhaps the "suppression" of her memory, as Dr. Jung proposed). This statement does not mention her vehicle being pushed forward.

**475**  I reject the plaintiff's submission that the weight of Mr. Berretta's vehicle made the impact more severe. I have no evidence to support that submission beyond inference.

**476**  These findings do not determine the issue of causation. The law is well-established that causation and the extent of an injury will be decided on the whole of the evidence: *Hoy v. Harvey*, [*2012 BCSC 1076*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24W1-00000-00&context=) at paras. 44 - 45; *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. 56 - 57. Even if the accident was minor, Ms. Warren may have suffered serious physical and psychological injury.

**477**  At the same time, Ms. Warren has put forward an untruthful version of the accident to her treating health care professionals, as evident in their description of the incident. For instance, Dr. Boyle's report notes that she crashed into the car ahead of her as a result of Mr. Berretta's vehicle hitting her from behind. This misstatement cannot be explained by the passage of time; it is a misrepresentation that affects the reliability of the medical evidence admitted in this case for the purpose of determining causation and damages.

**The Plaintiff's Credibility**

**478**  A fundamental issue in this case is the plaintiff's credibility.

**479**  The plaintiff suggests there is ample evidence to support her claim that MVA #2 caused her to suffer from physical injury, chronic pain, cognitive dysfunction and psychological disorder.

**480**  The defendant argues the plaintiff has been untruthful about the nature and extent of her symptoms. The defendant impugns her evidence by pointing to substantial inconsistencies between her evidence and the findings of some medical experts.

**481**  This accusation of malingering is particularly concerning since the plaintiff has not proved there is an organic basis for her symptoms. If she has fabricated her symptoms, the reliability of the expert opinions that were formed on the basis of her complaints is diminished.

**482**  The Court of Appeal ruled on the correct approach to assessing the truth of a witness' story in *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.) at 357. It held:

In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

**483**  Madam Justice Dillon 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=) (affirmed in [*2012 BCCA 296*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24KX-00000-00&context=)) expanded upon the method of assessing credibility:

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* [*(1919), 59 S.C.R. 452*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-F7ND-G14C-00000-00&context=), [*50 D.L.R. 560*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YGW1-DYFH-X025-00000-00&context=) (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis* [*(1926) 31 O.W.N. 202*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SC71-JK4W-M2MK-00000-00&context=) (Ont.H.C.); *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).

**484**  To assess Ms. Warren's credibility, it is helpful to begin with some comments on her presentation as a witness.

**485**  Ms. Warren spoke clearly and carefully.

**486**  She had good memory for the most part, with the exception of timeline, which happens to be a crucial issue for causation. Her memory was particularly detailed with regard to the nature of the treatments she obtained from the various health professionals she met with from 2008 to 2012. However, she was vague about the nature and progression of her symptoms, particularly after December 2008. Her recollection of the order in which she met with these professionals was replete with errors. This might not simply be an indication of cognitive dysfunction; the evidence establishes that Ms. Warren has met with a large number of health care professionals since MVA #2 and it may very well be difficult for her to recollect the order in which she met with them four years on.

**487**  Ms. Warren expressed confusion over some of the longer questions posed by counsel, but not all. Sometimes she completed questions for her counsel.

**488**  Ms. Warren provided lengthy, tangential answers to counsels' questions. She also attempted to explain away issues. For instance, she said the second MRI requested by Dr. Weiss was for the purpose of examining her soft tissue injuries. Given the limited resources of the hospital, Dr. Weiss requested the MRI be conducted to investigate the possibility of MS.

**489**  Defence counsel brought forward evidence of Ms. Warren attempting to control the sharing of information between experts. She wrote an email to Dr. Lanius on July 22, 2009 (at 8:41 p.m.) asking:

If possible I would like Art [Vertlieb (her former counsel)] to forward a copy of your report to me. I would like to read it before it is distributed to other parties. I am wondering if your findings could be shared with Dr. Marshall Wilensky as he continues to provide treatment to me.

**490**  A final noteworthy point is that on several occasions, Ms. Warren expressed the sentiment that she was not understood. In this way, I had the impression that she was guarding against the perception that her ability to communicate in an articulate manner was suspicious.

**491**  Ms. Warren's symptoms were confirmed in a general way by the lay witnesses that testified on her behalf. However, observations on her slow recovery seemed exaggerated. Her son Andrew, for instance, testified to her being bedridden and being unable to walk for years. He failed to provide a particularized timeline of the progression of her symptoms. The evidence from her husband and son in any event was unhelpful because both witnesses admitted to being away from home frequently. In Andrew's case, he has been attending college in the U.S. since August 2010. Ms. Allan and Ms. Black were similarly vague in their observations of the plaintiff. Ms. Avila's evidence was difficult to understand and she also resorted to generalizations.

**492**  The plaintiff's evidence is consistent with some of the independent evidence, but not all of it. These inconsistencies are further explored in the causation analysis; I merely take this opportunity to note that there are indeed important inconsistencies between her evidence and the medical evidence presented.

**493**  There are also significant gaps in her medical evidence. This limits the Court's ability to independently confirm her evidence.

**494**  It would have been helpful to hear from her former GP Dr. McKenzie as a witness, who could have spoken to her medical history and her symptoms immediately after the accident.

**495**  It is difficult to track the progression of her physical symptoms in the first year. As of 2009, she had not yet seen a physiatrist, as noted in Dr. Mintz's 2009 report.

**496**  I do not have any evidence that indicates Ms. Warren met with a neuroradiologist, even though two experts expressly said they would defer to a neuroradiologist's opinion (Dr. Turnbull and Dr. Lanius). A neurologist who had examined Ms. Warren in 2008 was not called as a witness, even though she was on the witness list.

**497**  Finally, I note that Ms. Warren did not seek treatment from a psychiatrist until October 2011.

**498**  The Court's ability to independently corroborate Ms. Warren's evidence is hindered in another way. Only several of the expert witnesses have monitored the development of Ms. Warren's symptoms over the full time period extending from MVA #2. Those professionals are an optometrist (Dr. Loopeker), a psychologist (Dr. Wilensky) and a chiropractor (Dr. McLeod); these medical professionals do not have the expertise to diagnose neurological problems. Nor do they have the ability to diagnose her physical injuries.

**499**  The plaintiff's evidence also seems unreasonable and unlikely. At first she experienced improvement. Then her health declined. She reached a plateau in some aspects, improved in others and experienced dramatic decline in specific areas. This evidence is somewhat confusing because there are a number of medical opinions addressing different symptoms presented by Ms. Warren, making her recovery difficult to track.

**500**  If the Court were to accept her evidence on a stand-alone basis, I would find that she suffered severe physical injuries, pain and major cognitive deficit as a result of MVA #2. I would accept that the development of her symptoms would have improved and then declined. I would have to infer that Ms. Warren's brain injury was unusual as it did not follow the normal course of improvement, with the large majority of persons suffering from a mild concussion recovering in three months to six months with no resulting post-concussion syndrome.

**501**  At the same time, Ms. Warren's case is unusual: she has brain lesions. The effect of these lesions could strengthen the inference that her case falls into the minority that do not recover from their concussions. However, she has not supplied sufficient evidence to support that inference. That evidence could only come from a neurologist or a neuroradiologist. Instead, she relies upon the opinions of a psychiatrist (Dr. Ancill) and a neuropsychologist (Dr. Lanius), who are unqualified to give that evidence. I rely upon Mr. Justice Johnston's comments in *Meghji v. Lee,* [*2009 BCSC 1542*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B2B9-00000-00&context=):

[28] At the risk of appearing to be overly semantic about this analysis, I take it that what counsel want Dr. Malcolm to be able to do is to testify by way of opinion about whether or not there has been some form of harm or damage to the tissues of the brain of Ms. Meghji as opposed to some form of harm or damage to the mind or emotions or personality of Ms. Meghji. Whether there is a distinction between the brain as an organ of the body, on the one hand, and the mind and personality of the person in whose body the brain is found, on the other, is a metaphysical question that I hope I never have to answer in a court of law. I am going to confine myself to what I think is in issue, and that is Dr. Malcolm's qualifications as a neuropsychological (sic) and whether they permit him to provide the ready-made inference through opinion on whether there has been physical harm or damage to the brain as an organ of the body, and in my view, they do not.

[29] The statutory regime does not, in my view, go any further than to allow testing, assessment, diagnosis of, and therefore opinions on the abilities, aptitudes, interests, et cetera, or the behaviour, emotional, or mental disorders, that is, disorders of the mind. These conditions may arise with or without damage to the structure or tissues of the brain. They may be associated with or flow from injury or damage to the brain itself. They may arise from or flow from other causes. It does not necessarily follow that because Dr. Malcolm is permitted by statute to test, assess, or diagnose behavioural, emotional, or mental disorder that he must therefore be permitted to give in evidence his opinion that the cause of any of these conditions stems from an injury to the tissues or structures of the brain.

[30] In my view, Dr. Malcolm's qualifications do not go so far as to permit that opinion.

[31] That does not say that Dr. Malcolm cannot give, in evidence, his opinion based upon the results of his testing, nor does it prevent Dr. Malcolm from giving an opinion on whether the test results as evaluated by him are of a nature, kind, or quality seen in people who have been diagnosed as having had organic brain injuries.

[32] In my view, the distinction drawn by Mr. Justice Clancy in *Knight* remains appropriate, and that is, Dr. Malcolm is qualified to give his opinion on the cognitive and behavioural sequelae of brain injuries and to indicate the relative likelihood of any cognitive and behavioural abnormalities being the consequence of a traumatic brain injury, but to paraphrase Mr. Justice Clancy, it does not permit him, that is, Dr. Malcolm, to diagnose physical injury and the manner in which it was incurred.

**502**  I accord Ms. Warren's evidence little weight. I will exercise caution in considering her reported symptoms and expert opinion that rely heavily on her complaints in developing their assessment.

**Adverse Inference for Failing to Call Dr. Devonshire**

**503**  The plaintiff opted to not call Dr. Devonshire as a witness, even though she was named on her witness list. Dr. Devonshire is a neurologist who met with Ms. Warren in 2008 on two occasions with regard to her MRI results that revealed brain lesions.

**504**  The defendant seeks an adverse inference drawn against the plaintiff for failing to call Dr. Devonshire.

**505**  An adverse inference may be drawn by the court when, in the absence of an explanation, a party fails to call a witness who could have knowledge of the fact and would be assumed to be willing to assist that party: *Kokanee Mortgage MIC Ltd. v. Concord Appraisals Ltd*., [*2000 BCSC 1197*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-22P7-00000-00&context=) at para. 68.

**506**  Plaintiff's counsel explained that Dr. Devonshire was unavailable to testify for the increased length of time required by the defence. Defence counsel had informed plaintiff's counsel one month before trial commenced that he would need an additional two hours for cross-examination of the witness.

**507**  I find that scheduling alone is an insufficient reason for not calling a witness.

**508**  Furthermore, the proposed witness could possibly have shed light on the plaintiff's neurological condition after the accident. Her evidence was particularly important for this case on the issue of causation.

**509**  There are sufficient grounds to draw an adverse inference here, but I do not need to rely upon such an inference to determine the issue of causation.

**Causation**

**510**  The central issue in this case is whether the plaintiff has established the defendant has caused the extent of the injuries alleged by the plaintiff.

**511**  The plaintiff argues that MVA #2 caused her to sustain physical injuries, chronic pain, cognitive dysfunction and psychiatric disorder.

**512**  Ms. Warren denies that her brain lesions discovered in her brain after MVA #2 have caused her symptoms. She submits that her brain lesions were asymptomatic before the accident and were either rendered symptomatic by MVA #2 or made her brain "vulnerable to injury".

**513**  The defendant takes the position that MVA #2 did not cause a compensable injury. In the alternative, if there was a compensable injury, it was minor and transient; it was fully resolved by June 5, 2008 when Ms. Warren met with Dr. Turnbull.

***Law***

**514**  The plaintiff must satisfy the Court, on a balance of probabilities, that but for the defendant's negligent act, she would not have sustained her injury. The "but-for" test is the general test for factual causation. The negligent conduct must be substantially connected to the injury. This test was most recently 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=):

[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=).

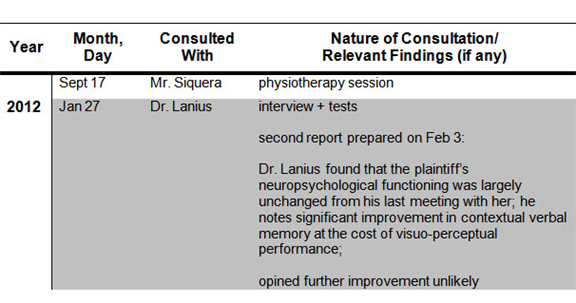
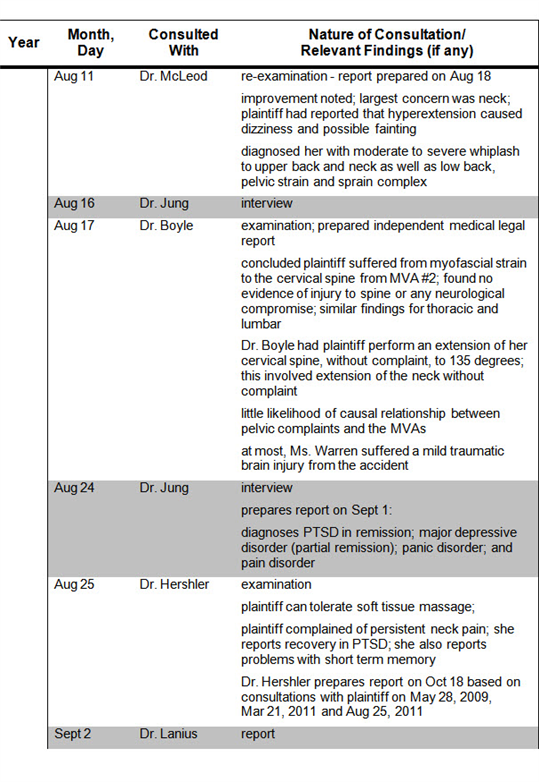
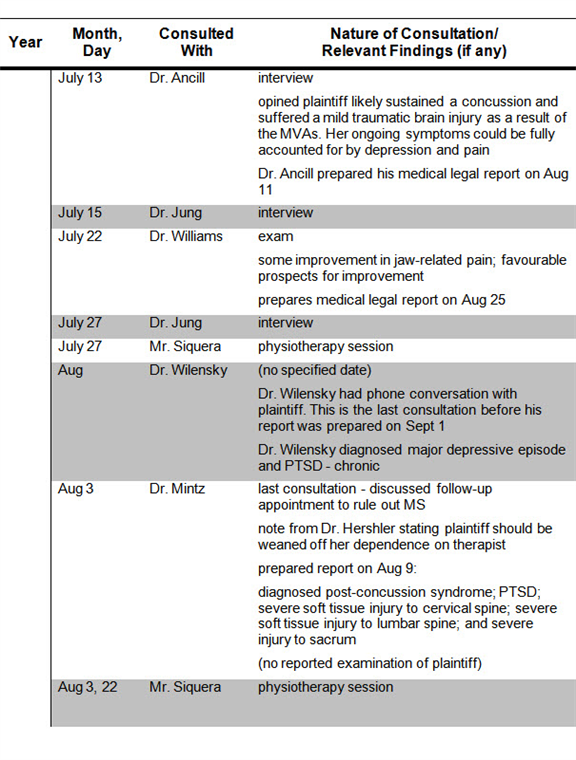
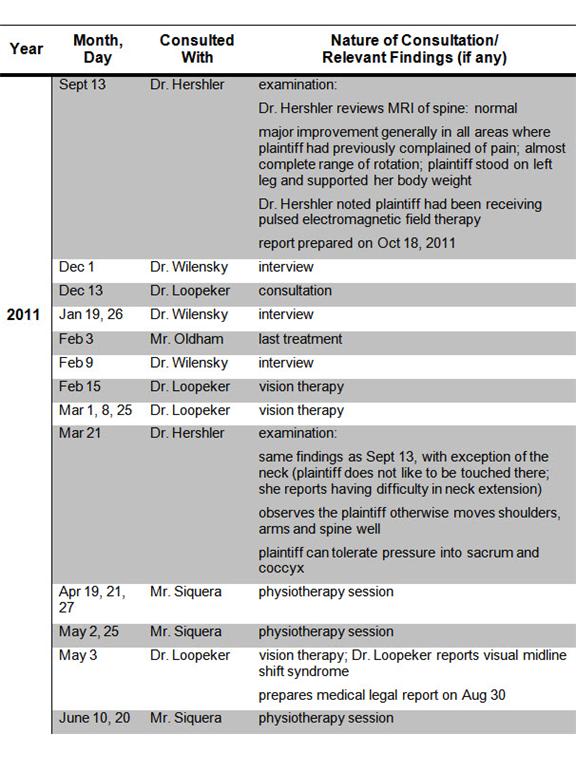
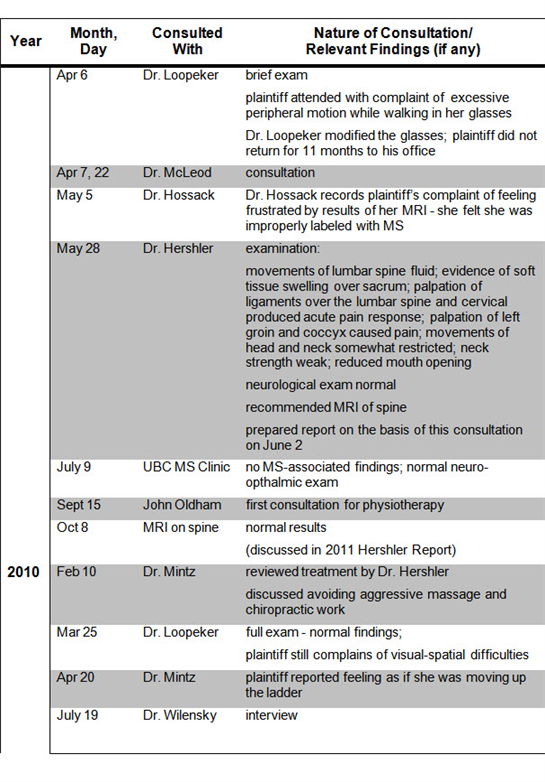
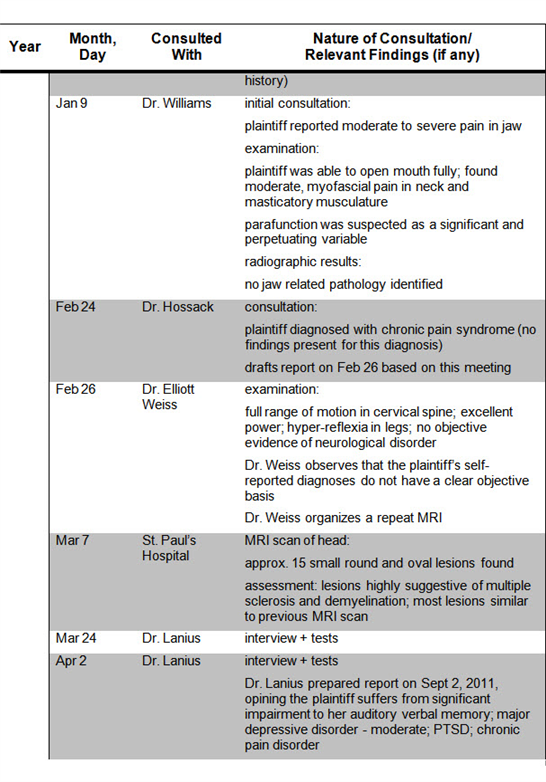
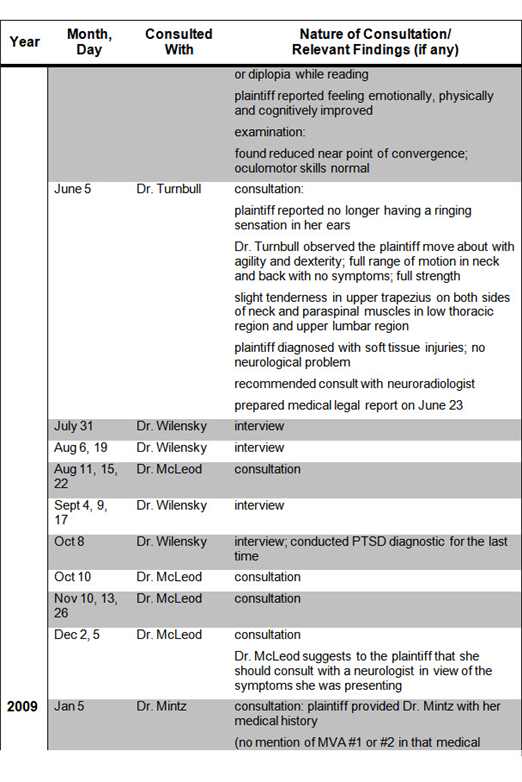
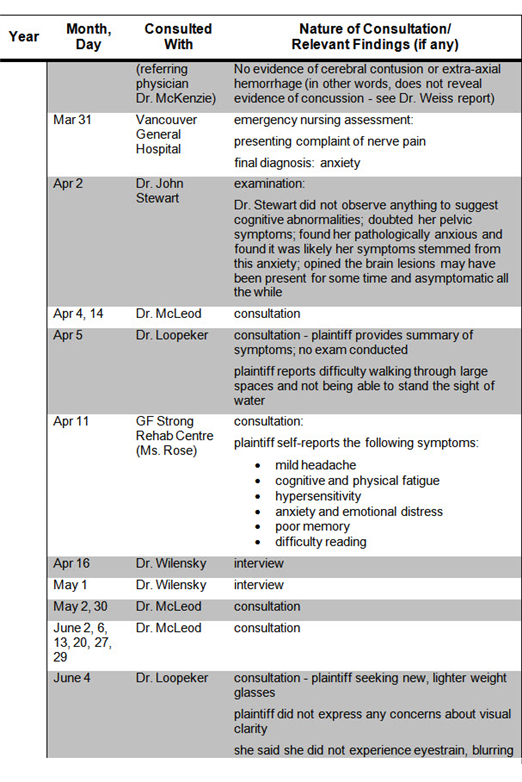
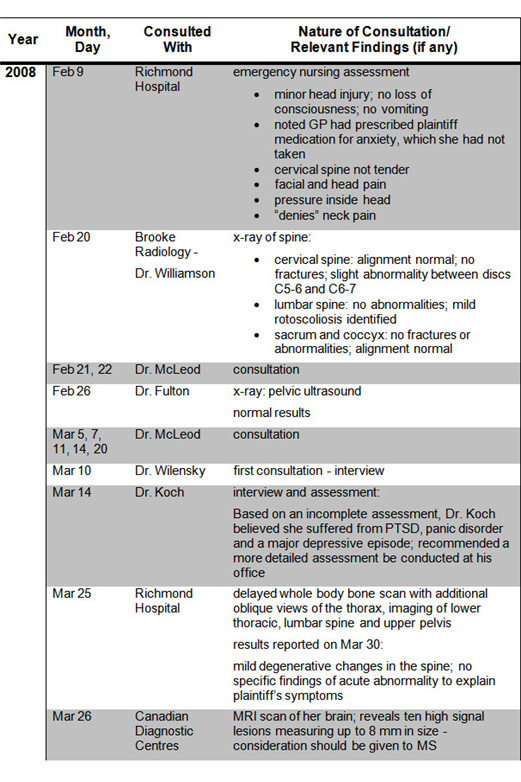
[10] A common sense inference of "but for" causation from proof of ***negligence*** usually flows without difficulty. Evidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant's ***negligence*** probably caused the 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.

**515**  The trial judge must 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 para. 29. 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).

**516**  The plaintiff must also establish legal causation, which arises once factual causation is proved. Legal causation is examined at the damages stage of the analysis. 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: *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. It is a basic principle of damages in tort law that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway. This principle is referred to as the crumbling skull rule. At the same time, the defendant must take his victim as he finds him (the thin skull rule): *Blackwater v. Plint*, [*2005 SCC 58*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B153-00000-00&context=) at para. 78 - 79.

***Chart Tracking the Plaintiff's Medical History***

**517**  As an aid for determining causation, I have organized key findings relating to the plaintiff's symptoms admitted as evidence at trial in a chart. It attempts to instill some chronology into the evidence compiled on her symptoms, with the qualification that this is not a fulsome summary of the evidence and is not solely relied upon in the determination of causation.



***Causation - Physical Injuries***

**518**  The plaintiff has reported a number of physical injuries resulting from MVA #2. It is helpful to specify those injuries.

**519**  Ms. Warren's evidence indicates she complained of pain in her pelvis, upper and lower back, tailbone, neck and throat, chest, head and jaw. She suffered from numbness and nerve pain. She complained of stiffness in her neck and lower back. She experienced muscles spasms in her low thoracic region.

**520**  Ms. Warren also alleges she sustained a mild traumatic brain injury (in other words, a concussion) in MVA #2. She claims she suffers from "post-concussion syndrome", involving the following physiological symptoms: fatigue, nausea, dizziness, headaches, tingling, difficulty with vision (spatial awareness, sensitivity to movement and problems with focusing), loss of memory, tinnitus, hypersensitivity to light and noise and cognitive difficulties. She also claims she suffered amnesia.

**521**  At the outset of this analysis, I note that there is not a single piece of medical evidence that indicates an organic basis for these complaints. The scans of Ms. Warren's bone structure and brain indicated she was normal (aside from the lesions), and did not reveal any physiological evidence to explain her symptoms.

**522**  Of course, not all of her complaints can or need to be proved with a MRI.

**523**  I find that MVA #2 did cause some physical injury to the plaintiff: it caused her to suffer mild soft tissue injury in her back and neck. These soft tissue injuries were resolved in one year. I further find that she sustained a concussion from the accident. Her concussion was resolved by June 2008. No neurological damage stemmed from that injury.

**524**  I accept that not all symptoms will emerge immediately post-accident, so I accord less weight to the emergency nursing assessment from the Richmond General Hospital noting that she did not report any pain in her cervical spine or neck on February 9, 2009.

**525**  On April 28, 2008, Dr. Stewart made some observations on Ms. Warren's physical condition, but his opinion was limited to examining her neurological condition. His comments do not provide insight upon whether she sustained soft tissue injuries.

**526**  With regard to her soft tissue injuries, I rely heavily upon Dr. Turnbull's findings in June 2008 of: "slight tenderness in the upper trapezius muscles on both sides of the neck and the paraspinal muscles in the low thoracic region and upper lumbar region are tender to palpation." He believed she had sustained soft tissue injuries from MVA #2. There is no other opinion from a medical doctor on Ms. Warren's physical symptoms in 2008.

**527**  It would have been helpful to have her GP Dr. McKenzie's evidence before the Court.

**528**  It also would have been helpful to have a physiatrist's evidence before the Court on her presenting symptoms in the months subsequent to the accident.

**529**  Dr. Turnbull's findings were later confirmed by Dr. Boyle, who diagnosed mild myofascial strain from which she would have quickly recovered. I found him to be a thorough and reliable expert. I accord his evidence significant weight, subject to the limitation that his opinion was provided three and a half years after the accident.

**530**  Dr. McLeod's findings were not particularly helpful. Her report makes general observations on decreased range of motion and ability to extend, flex or bend. She does not specify when she made those findings. She did not make any comments on the progress, or lack thereof, of Ms. Warren's symptoms, beyond slow improvement. Yet, she contradicted that statement in her testimony. In any event, Ms. Warren stopped meeting with Dr. McLeod around April 2009, just over a year after the accident.

**531**  Dr. Weiss' report, prepared after his examination of Ms. Warren on February 26, 2009 noted a normal physical examination.

**532**  The only other physician to examine Ms. Warren within the first year following MVA #2 was Dr. Mintz, on January 5, 2009. However, his report only appears to take her clinical history. In that meeting, she only discussed her adverse reaction to the medication she was taking, Gabapentine.

**533**  I believe it is telling that the consultations leading up to and taking place in 2010 document the return of Ms. Warren's health and I infer from that evidence that her physical health was normal.

**534**  I do not accord weight to Dr. Hershler's examination of Ms. Warren on May 28, 2009. He did not seem to be particularly observant. His report attributes her presenting symptoms to MVA #1. His diagnosis is also problematic: severe soft tissue injury to the cervical spine, severe soft tissue injury to the lumbar spine and severe injury to the sacrum, right sacroiliac joint and pelvic floor ligaments. This diagnosis is completely disproportionate with prior findings regarding her physical symptoms. I note that he did not have Dr. Turnbull's report provided to him. I also note the only objective basis for his findings were palpation of her back, a slightly more prominent sacrum and a "somewhat" restricted movement of the head and neck. Her movements were otherwise normal. He relied extensively upon her expression of pain.

**535**  There is also sufficient evidence to establish that Ms. Warren sustained a minor concussion from the accident. The emergency nursing assessment from the Richmond General Hospital reported that she had a minor head injury as well as facial and head pain.

**536**  Even though the MRI taken in March 2008 did not document any head injury resulting from MVA #2, Ms. Warren was presenting symptoms that suggested she had sustained a minor concussion. I draw this causal inference on the basis of her reported symptoms to Ms. Rose at GF Strong in April 2008. She complained of suffering from mild headache over her right temple. She had cognitive and physical fatigue. She complained of hypersensitivity to noise. She had difficulty thinking, processing information and reading. These complaints indicate that it is likely she suffered from a concussion. By June 2008, Ms. Warren reported being cognitively improved to Dr. Loopeker and Dr. Turnbull. This recovery is in keeping with the typical trajectory of recovery for persons that sustain a concussion.

**537**  Finally, I rely upon Dr. Boyle's conclusion that she likely sustained a mild traumatic brain injury, if any. He qualified this conclusion by noting she did not have any objective basis to support a finding that she sustained a concussion.

**538**  I am not satisfied, on balance, that but for the accident, Ms. Warren would not have suffered neurological injury. Beyond evidence to suggest she suffered a concussion, from which she recovered, there is nothing to support an inference that she suffers from a neurological injury.

**539**  I accept that Ms. Warren had lesions on her brain. These lesions were probably asymptomatic before the accident. I do not have any evidence to suggest these lesions were rendered symptomatic by the accident.

**540**  When Ms. Warren met with Dr. Stewart on April 2, 2008, he concluded she had not presented any indications of a neurological problem. Instead, he found her to be an anxious person.

**541**  Nor do I have any evidence to suggest the lesions made Ms. Warren vulnerable to a traumatic brain injury, other than the opinion of Dr. Lanius, who did not support this proposition with any authority. He preferred to characterize this proposition as "common sense" knowledge for neuropsychologists.

**542**  In 2009, Dr. Weiss and Dr. Hershler both found normal neurological condition. Dr. Boyle later made a similar finding.

**543**  Dr. Ancill found Ms. Warren had suffered from a mild traumatic brain injury and found she had continuing symptoms of post-concussion syndrome. He then found, contradictorily, that the totality and persistence of her symptoms and functional impairments could be fully accounted for by depression and pain. Nor did he explain why his opinion differed from that of Dr. Stewart, whose opinion he relied upon in preparing his report. I finally note that it was beyond Dr. Ancill's area of expertise to diagnose a brain injury.

**544**  Dr. Lanius also diagnosed the plaintiff with extensive cognitive impairments. His findings are based upon subjective cognitive diagnostic tests that cannot be relied upon for determining a brain injury or neurological disorder. His adversarial behaviour in the courtroom prevented counsel from exploring the reliability of his methods.

**545**  I cannot accord any weight to Dr. Loopeker's findings relating to the visual therapy he administered upon Ms. Warren, since brain injuries are beyond his areas of expertise. In any event, I was not provided with any authority to support the reliability of this form of treatment.

**546**  The absence of a neuroradiologist opinion significantly undermines Ms. Warren's claim. The only other neurological opinions tendered to Court were from Dr. Stewart and Dr. Turnbull, who did not diagnose any neurological problem.

**547**  Finally, I find the plaintiff has not satisfied me that there are no other possible causes of her presenting. The evidence from Dr. Ancill and Dr. Lanius indicates that psychological problems can present similar symptoms. The evidence clearly establishes that Ms. Warren is an anxious person, which may very well have manifested in a way that suggested ongoing neurological problems.

**548**  I do not accept that Ms. Warren continues to suffer from a neck extension problem.

**549**  It is only in 2011 that the plaintiff is documented to have an issue with the extension of her neck. No doctors were permitted to extend her neck. Dr. Boyle had Ms. Warren undertake a different extension exercise that showed indeed she could extend her neck. I find it concerning that none of the medical experts were able to pinpoint when Ms. Warren's neck extension problem arose or explain why. This physical problem is certainly only documented in examinations conducted in 2011. This is confirmed by the testimony of Dr. McLeod. The plaintiff has not tendered any proof to explain why her neck's condition would decline in 2011, when previously it was improving. Given her credibility is impugned as a witness and in view of Dr. Boyle's conclusion that her neck extension problem was not objectively founded, I do not find her neck extension problem documented in 2011 is causally related to MVA #2.

**550**  I cannot find that Ms. Warren suffered a pelvic injury from MVA #2.

**551**  The pelvic ultrasound performed on Ms. Warren on February 20, 2008 revealed normal results. Also, the delayed whole body scan performed on Ms. Warren at the Richmond General Hospital did not indicate any specific findings of abnormality to explain her symptoms.

**552**  Two doctors expressly did not find that she had suffered from pelvic injury as a result of MVA #2: Dr. Stewart and Dr. Boyle.

**553**  Dr. Turnbull makes no note of pelvic issues arising from his examination of the plaintiff, even though Ms. Warren said she met with her for her pelvic symptoms.

**554**  Dr. Hossack's report on February 24, 2009 does not specify the location of Ms. Warren's pain.

**555**  Dr. Hershler documents Ms. Warren's response to palpations in the left groin as painful. He diagnoses a severe impact injury to her pelvic floor ligaments. He was not provided with her pelvic ultrasound to review.

**556**  There is no evidence from other medical doctors in the first year to suggest that Ms. Warren suffered from a pelvic injury. Dr. McLeod noted problems with rotation in Ms. Warren's pelvis. She was not provided with the pelvic ultrasound or the report of Dr. Stewart.

**557**  I also do not accept that MVA #2 caused Ms. Warren's jaw injury, despite Dr. William's opinion. Dr. Williams did not meet with Ms. Warren until a year following the accident. She also qualified her opinion by finding that Ms. Warren's jaw problem could be attributed to parafunction.

**558**  Finally, I dismiss the claim that Ms. Warren suffered amnesia post-accident. Dr. Ancill opined that Ms. Warren's memory of the accident was fragmented and discontinuous. On the other hand, Dr. Boyle expressly found she had not suffered from amnesia.

**559**  In view of the statement taken from Ms. Warren four days after MVA #2 that revealed a fairly detailed description of the accident, I reject the claim that she suffered amnesia.

***Causation - Psychological Injuries***

**560**  Ms. Warren also says MVA #2 caused her to develop anxiety, PTSD, somatoform disorder and depression.

**561**  The principles to be applied in assessing psychological injury claims were summarized in *Yoshikawa v. Yu* [*(1996), 21 B.C.L.R. (3d) 318*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G2J5-00000-00&context=) in para. 12:

1. The plaintiff must establish that the pain, discomfort or weakness is "real" in the sense that the victim genuinely experiences it.

...

1. The plaintiff must establish that his or her psychological problems have their cause in the defendant's unlawful act.
2. The plaintiff's psychological problems do not have their cause in the defendant's unlawful act if they arise from a desire on the plaintiff's part for such things as care, sympathy, relaxation or compensation.
3. The plaintiff's psychological problems do not have their cause in the defendant's wrongful act if the plaintiff could be expected to overcome them by his or her own inherent resources, or "will-power".
4. If psychological problems exist, or continue, because the plaintiff for some reason wishes to have them, or does not wish them to end, their existence or continuation must be said to have a subjective, or internal, cause. (NOTE: I consider that this proposition must deal with the conscious mind, otherwise it seems to me to beg the question; ....
5. If a court could not say whether the plaintiff really desired to be free of the psychological problems, the plaintiff would not have established his or her case on the critical issue of causation.
6. Any question of mitigation, or failure to mitigate, arises only after causation has been established.
7. It is not sufficient to ask whether a psychological condition such as "chronic, benign pain syndrome" is "compensable". Such a psychological condition may be compensable or it may not. The identification of the symptoms as "chronic benign pain syndrome" does not resolve the questions of legal liability or the question of assessment of damages.
8. It is unlikely that medical practitioners can answer, as matters of expert opinion, the ultimate questions on which these cases often turn.
9. Mr. Justice Spencer, at trial in the *Maslen* case, put the overall test quite correctly in these words:

[C]hronic benign pain syndrome will attract damages ... where the plaintiff's condition is caused by the defendant and is not something within her control to prevent. If it is true of a chronic benign pain syndrome, then it will be true also of other psychologically-caused suffering where the psychological mechanism, whatever it is, is beyond the plaintiff's power to control and was set in motion by the defendant's fault.

1. There must be evidence of a "convincing" nature to overcome the improbability that pain will continue, in the absence of objective symptoms, well beyond the recovery period, but the plaintiff's own evidence, if consistent with the surrounding circumstances, may nevertheless suffice for the purpose.

**562**  The assessment of causation in relation to psychological injury cannot accord too much weight to the temporal link between the presenting symptoms and the time of the accident. As noted by Madam Justice Ballance in *K.T. v. A.S*., [*2009 BCSC 1653*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B2JY-00000-00&context=):

[220] Care must be taken not to overly rely on the temporal relationship between the accident and the time that the plaintiff first reported psychological symptoms to her physician. The onset of psychological injury is often not as obvious as a physical injury; it can be subtle and may be undetectable in its early manifestation. In instances where a temporal connection between the wrongful act and the harm appears tenuous, causation may nevertheless be established where other factors link those essential elements in a causative way. Having said that, however, the massive time gap in the plaintiff reporting her psychological symptoms is problematic.

**563**  Madam Justice Dickson 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=) (*Gilbert*) also cautioned against placing weight on the temporal relationship between the accident and the presenting symptoms of psychological injury:

[62] In some cases, causation is asserted based primarily on a temporal relationship between the negligent conduct and the damage in question. In *White v. Stonestreet*, [*2006 BCSC 801*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1CF-00000-00&context=), Ehrcke J. commented on the need for close scrutiny of the evidence in cases of this kind. At paras. 74 and 75 he stated:

1. The inference from a temporal sequence to a causal connection, however, is not always reliable. In fact, this form of reasoning so often results in false conclusions that logicians have given it a Latin name. It is sometimes referred to as the fallacy of *post hoc ergo propter hoc*: "after this therefore because of this".
2. In searching for causes, a temporal connection is sometimes the only thing to go on. But if a mere temporal connection is going to form the basis for a conclusion about the cause of an event, then it is important to examine that temporal connection carefully. Just how close are the events in time? Were there other events happening around the same time, or even closer in time, that would provide an alternate, and more accurate, explanation of the true cause?

**564**  I find Ms. Warren has failed to put forward sufficient evidence that she suffers from any psychological disorder.

**565**  Ms. Warren was certainly shocked and upset by MVA #2. This would be a normal response from an accident, but our law does not compensate victims for that kind of harm.

**566**  On February 9, 2008, the emergency nursing assessment noted that Ms. Warren had been prescribed anxiety medication by her GP.

**567**  Dr. Wilensky met with Ms. Warren on March 10, 2008, and they discussed the MVAs. His notes from that meeting do not clearly relate her psychological issues; it seems that meeting was an initial interview to gather the facts on the MVAs.

**568**  Dr. Koch is the first mental health professional to evaluate Ms. Warren's psychological condition. However, she obstructed this assessment by acting defensively, refusing to complete the diagnostic tests and completing errands in their meeting. He had tentatively diagnosed her with PTSD, panic disorder and a major depressive episode, recommending that he meet with her again for re-evaluation.

**569**  Ms. Warren was diagnosed with anxiety after attending the Vancouver General Hospital Emergency on March 31, 2008.

**570**  She presented as anxious to Dr. Stewart. She also reported feeling anxious to Ms. Rose.

**571**  In June 2008, the plaintiff had reported emotional improvement to Dr. Loopeker. Dr. Turnbull had noted the plaintiff seemed "bright, alert and cheerful" upon examination.

**572**  Obviously, a psychologist or psychiatrist's evidence would be particularly crucial for assessing the plaintiff's mental health. Dr. Wilensky is the only treating psychologist to have consistently met with the plaintiff after MVA #2.

**573**  However, Dr. Wilensky did not prepare his medical legal report until 2011, at which time he diagnosed Ms. Warren with chronic PTSD and major depressive disorder. The report is cursory: it does not provide any time frame to contextualize his findings so as to measure the development of her symptoms. Also, it became apparent in cross-examination that Dr. Wilensky had not administered the PTSD diagnostic upon Ms. Warren since October 2008; that test considered an unspecified MVA and the trauma of her son's birth. Dr. Wilensky's report failed to disclose the scientific basis for his diagnosis of Ms. Warren's major depressive syndrome. His clinical notations revealed Ms. Warren had discussed other traumatic events with him, some of which she described in detail in her testimony.

**574**  I also find it particularly striking that in Dr. Wilensky's report, when expressing his opinion on causation, he concludes that her psychological distress is caused by the inquiry of health professionals into her physical injuries:

The ongoing psychological distress from the investigations and iatrogenic aspects of treatment are therefore also caused by the accidents. For example, had it not been for the accidents, Ms. Warren would not have had an MRI of her brain that raised the possibility of multiple sclerosis. There has been no positive diagnosis of this disease in her case but there has been considerable emotional distress associated with further investigations and the possibility of the illness being present. Thus, the accidents are causally related to the continuous medical procedures and examinations that are highly stressful for Ms. Warren.

**575**  I accept that ongoing treatment for physical injuries can cause psychological distress. However, the emotional trauma of discovering the presence of brain lesions is separate and apart from MVA #2. Furthermore, Ms. Warren's "ongoing treatment" seems to have been limited to massage therapy, chiropractic sessions and physiotherapy - not particularly interventionist treatment.

**576**  There are other sporadic consultations with health professionals specializing in mental health: Dr. Hossack, Dr. Lanius and Dr. Jung.

**577**  On February 24, 2009, Dr. Hossack diagnosed chronic pain syndrome. However, she did not describe the basis for this finding. Later, in May 2009, Dr. Hossack noted the plaintiff was complaining about being falsely labelled as suffering from MS.

**578**  In Dr. Lanius' report, which is based on two meetings he had with Ms. Warren in 2009, he noted that with regard to depression:

... Ms. Warren did not feel depressed during her examination by Dr. W.J. Koch, but that she developed depression later, both in response to pain activity but also due (sic) side effects of the medication that affected her respiratory system that in turn evoked memories of her experience of anaphylactic shock during childhood. Ms. Warren developed unstable blood pressure, initially with a subsequent drop. She felt unable to breathe, was experiencing diplopia, as well as vertigo. That resulted in her attending Emergency.

**579**  Dr. Lanius did not identify the date of that incident.

**580**  He determined her mood functioning was a product of exhaustion and change in her cognitive functioning. As I have found earlier, she has not proved she sustained neurological injury.

**581**  Dr. Lanius also documented Ms. Warren's past history of traumatic events, including her post-partum depression after the birth of her third child. She had also described intrusive thoughts and nightmares relating to MVA #2 and the birth of her first child.

**582**  Dr. Lanius concluded this trauma history predisposed Ms. Warren to PTSD. He diagnosed PTSD, administering a diagnostic in relation to a number of different traumatic events, including but not limited to the MVAs.

**583**  He concluded the depressive symptoms were at least in part in response to the loss of cognitive function.

**584**  He further diagnosed Ms. Warren with chronic pain disorder. The basis for the latter finding is "multiple General Medical Conditions and Psychological factors, attributable at least to a significant extent to both the February 5 and 7 MVA's (sic)". Evidently, this diagnosis is extremely imprecise.

**585**  In 2011, Dr. Ancill examined Ms. Warren 41 months after MVA #2. He found she suffered from post-concussion syndrome. Depression, anxiety and pain acted as amplifiers of her post-concussion syndrome symptoms.

**586**  Dr. Ancill surmised that Ms. Warren's depression was caused by her traumatic brain injury. He later noted in his report that her depression was untreated.

**587**  It was his opinion that she did not suffer from PTSD or panic disorder at the time of her consultation.

**588**  He concluded she suffered from chronic pain disorder, again based on both "psychological factors and a general medical condition". He then observed "[a]s Mrs. Warren's neck pain is her primary focus, the diagnosis is of Pain Disorder". Of course, this neck pain was a new presenting symptom, not causally related to MVA #2.

**589**  Dr. Jung met with the plaintiff on four occasions in July and August 2011. He diagnosed PTSD in remission, major depressive disorder (partial remission), panic disorder and pain disorder. It does not appear he conducted any tests to determine these diagnoses. It seems he relied solely on her reported symptoms and previous medical reports.

**590**  I find there is no evidence of a "convincing" nature to support her claim. Certainly, her reported symptoms seem unreasonable and unlikely. Not only is Ms. Warren's reaction disproportionate to the severity of the accident, there is no strong independent evidence to corroborate her claims.

**591**  On the evidence, I find the plaintiff has convinced herself that the accident occurred in a certain way and that she experienced certain symptoms. She has presented this story to her treating doctors who have relied upon the accuracy of her reported symptoms. These doctors have found support for their diagnoses in other medical reports, that similarly rely upon the accuracy of plaintiff's reported symptoms. This evidence superficially seems reliable, but its foundation is fictitious.

**592**  I turn to the issue of damages.

**Damages**

**Non-Pecuniary Damages**

**593**  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. A non-exhaustive list of relevant factors for the court 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=):

[46] The inexhaustive list of common factors cited in ***Boyd***, [*[2004] B.C.J. No. 472*](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=)).

**594**  However, a non-pecuniary damages award will ultimately turn on the particular circumstances of the case.

**595**  The plaintiff claims she suffers from "severe chronic pain and profound cognitive dysfunction." She proposes an award at the top end of the spectrum for this head of damages: $275,000.00. She relies on the following authorities:

1. *Harrington v. Sangha*, [*2011 BCSC 1035*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22SH-00000-00&context=) ($210,000.00);
2. *Chowdhry v. Burnaby (City)*, [*2008 BCSC 1337*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3NS-00000-00&context=) ($200,000.00);
3. *Grewal v. Brar*, [*2004 BCSC 1157*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FCSB-S2P9-00000-00&context=) ($294,000.00);
4. *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=) ($200,000.00);
5. *Spehar (Guardian ad litem of) v. Beazley*, [*2002 BCSC 1104*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-JCJ5-251B-00000-00&context=) ($280,000.00) (affirmed [*2004 BCCA 290*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X3NB-00000-00&context=));
6. *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=) ($275,000.00);
7. *Gilbert* ($200,000.00).

**596**  In *Harrington*, the plaintiff was 45 years old at the time of trial. She suffered extensive physical injuries, including limited movement in her left arm and shoulder, traumatic brain injury and dramatic change in her personality.

**597**  In *Chowdry*, the plaintiff was 64 years old at the time of the accident. He suffered PTSD and major depression as a result of his injuries. He was catatonic for six months after the accident. His improvement was slow. He also suffered from physical injuries, including back, neck and shoulder pain. The trial judge found it was likely he suffered a mild traumatic brain injury as a result of the accident. He was found to have a large measure of who he was given the impact upon his character and behaviour.

**598**  In *Grewal*, the plaintiff was 25 years of age when she sustained injuries in a motor vehicle accident. She was diagnosed with incomplete quadriparesis, causing her pain throughout her body as well as limitations in her motor and sensory functions. These injuries were permanent. She had also suffered from depression. These injuries were devastating for her and her young family.

**599**  In *Dilello*, the plaintiff was discovered unconscious at the scene of the accident. She sustained panic, neck pain, numbness in her hands and extreme pain from x-rays. She had multiple fractures to her spine, which had to be supported by a brace that was secured to screws in her skull. For a month she lay in traction to remain still, relying on others to live. She was 19 years old at the time of the accident.

**600**  *Spehar* involved a plaintiff who was 16 years of age at the time of the accident. She was discovered unconscious at the scene of the accident. She suffered a seizure en route to the hospital. She was diagnosed as having suffered from a severe brain injury. Her emotional, cognitive and behavioural functions were devastated as a result.

**601**  *Izony* involved a plaintiff that had suffered extensive and significant physical injuries from the accident. He underwent surgery which caused him to develop multiple system organ failure. His mobility was affected. He could no longer operate his business and enjoy activities he had formerly engaged in. He was still self-sufficient. Additionally, the plaintiff had suffered from a mild traumatic brain injury, and his cognitive abilities were impaired. He was 55 years old at the time of the accident.

**602**  *Gilbert* involved a plaintiff who suffered a traumatic brain injury with permanent sequelae, a fractured clavicle and soft tissue injuries. She had permanently lost her capacity to work and to engage with others emotionally.

**603**  The defendant relies on *Roeske v. Grady*, [*2007 BCSC 15*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-61MH-00000-00&context=), affirmed in [*2008 BCCA 88*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JWR6-S20W-00000-00&context=). In this case, the plaintiff did not meet the burden of proof of demonstrating she suffered a brain injury as a result of two relatively minor accidents. It was the opinion of her treating neurologist that she had MS. Despite the fact that not all of her symptoms could be attributed to this condition, the court found she had not met her burden of proof. The court awarded $7,500.00 for mild soft tissue injuries in relation to the first accident and $15,000.00 for the moderate soft tissue injuries caused by the second accident.

**604**  All of these cases relied upon by the plaintiff involve severe or catastrophic injuries that significantly impacted the lives of the plaintiffs. Notably, the accidents were violent. These cases are simply not comparable to the facts found in this case. I find them to be of no assistance.

**605**  At the same time, the plaintiff has established moderate physical injuries resulting from MVA #2, including soft tissue injuries to her back and a concussion.

**606**  She suffered from pain in the first year as a result of those injuries. Her ability to move was impaired, but she enjoyed improvement in her first year.

**607**  Ms. Warren suffered from a concussion and striking symptoms of cognitive deficit as a result of that injury. This affected her for the five months subsequent to the accident, impacting her ability to properly fulfil her role as mother and house maker, which is clearly the joy of her life.

**608**  In view of my finding that Ms. Warren had completely recovered from those injuries that are attributable to MVA #2, I award the plaintiff $50,000.00 in non-pecuniary damages.

**Past Income Loss**

**609**  I decline to consider this head of damages. There is insufficient evidence to suggest that Ms. Warren lost income as a result of MVA #2 that she would have earned had the accident not occurred. No compensable loss arises under this head of damages.

**Loss of Future Earning Capacity**

**610**  The essential question under this head of damages is whether there is a substantial possibility that lost capacity will result in pecuniary loss. A future possibility will be taken into consideration so long as it is a real and substantial possibility and not mere speculation: *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=). Two questions are raised in this analysis: (1) whether the plaintiff's earning capacity has been impaired by her injuries and, if so, (2) what compensation should be awarded for the resulting financial harm that will accrue?

**611**  Is there a real and substantial possibility of a future event leading to a loss of income?

**612**  The challenge that Ms. Warren faces is that by her own admission, she planned to return to the workforce when her son Gregory reached grade seven, or 13 years of age. There is no evidence beyond her opinion, the opinion of her husband and the vague testimony of her friends on this point. The evidence does indicate she had not worked (beyond helping her husband and one project with her husband's client) since 1997. Before that she had worked part-time from 1991 onward.

**613**  Interestingly, despite Ms. Warren's claim that she has not worked in the period post-accident, her 2010 Line 150 income says she earned $16,556.99 from Mr. Warren's business. Her 2011 Line 150 income declares she earned $15,351.16.

**614**  Nonetheless, if we accept her timeline for returning to the workforce as true, her recovery was complete within this timeline and the accident-caused injuries did not impair her return to the workforce. I note that Dr. Boyle estimated she could have returned to the work force within four to six weeks post-accident. He made a similar finding about returning to her household duties.

**615**  I decline to grant any compensation under this head of damages.

**Cost of Future Care**

**616**  The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-accident condition, insofar as that is possible: *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.). There must be (1) evidence of a medical justification for claims for cost of future care and (2) the claims must be reasonable.

**617**  Again, Ms. Warren has failed to meet the burden of proof to establish cost of future care based on my findings on causation.

**Special Damages**

**618**  The plaintiff is entitled to recover the reasonable out-of-pocket expenses she incurred as a result of the accident.

**619**  While the presentation of evidence on special costs was unconventional, I do award some of the special costs claimed on the basis that the plaintiff reasonably incurred those costs as a result of her injuries caused by MVA #2. Claims must be for treatment or prescriptions as per her treating physician's instruction. Some of the claimed special damages do not have supporting receipts. Those claims are rejected. I also reject novel therapeutic treatment claims. I reduced the claim for costs attributed to Dr. McKenzie to remove the cost incurred for the serola belt prescribed for Ms. Warren's pelvis.

**620**  The special costs that she is awarded are as follows, subject to adjustments that will be undertaken by counsel to limit special damages recoverable up to February 8, 2009:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Ambulance |  |  |  |
|  | (Richmond General Hospital) | $ | 80.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | GF Strong |  |  |
|  | (early response brain injury report) | 301.20 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Heather McLeod |  |  |
|  | (chiropractic treatment) | 5,296.12 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Kelli Lawson |  |  |
|  | (physiotherapy) | 304.50 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Melissa Tull |  |  |
|  | (massage therapy) | 189.86 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Mike Murray |  |  |
|  | (massage therapy) | 3,309.49 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Nancy Buchan |  |  |
|  | (physiotherapy) | 40.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Parking |  |  |
|  | (for Dr. McLeod, Dr. McKenzie, |  |  |
|  | Ms. Tull, Mr. Murray and Dr. Turnbull) | 1,218.87 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Robert McKenzie |  |  |
|  | (family physician) prescription for |  |  |
|  | pain | 1,200.13 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Taxi charges (to see Dr. McKenzie) | 1,036.23 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Housekeeping (Ms. Avila) | 5,338.50 |  |

**621**  The total award is $18,314.90, which will be reduced to account for the limited recovery period.

**Mitigation**

**622**  In view of my findings on causation, I find that Ms. Warren's failure to attend some health specialists until 2011 is because of new developments in her health, and not her failure to mitigate.

**Conclusion**

**623**  In sum, I award the following quantum in damages.

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-pecuniary damages | $50,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Special Damages | 18,314.90 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Total: | $68,314.90 |  |

**624**  The total is subject to adjustments to special damages to account for the temporal limit on recovery, from February 8, 2008 to February 8, 2009.

**625**  I award costs to the plaintiff, but I limit this award by granting costs to the defendants for the first two days of trial. Plaintiff's counsel was unprepared for trial and delayed the proceedings.

L.D. RUSSELL J.

**End of Document**

[***British Columbia v. Canadian Forest Products Ltd., [2016] B.C.J. No. 1444***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K86-HW41-JC0G-642Y-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

B.M. Greyell J.

Heard: September 14, 15 and 28-October

2, 5-9, 13-16, 19-23, 26-30, November

2-6, 9, 10, 16-20, 23, 24, December 10, 11 and 14-16, 2015.

Judgment: July 7, 2016.

Docket: S124299

Registry: Vancouver

**[2016] B.C.J. No. 1444** | [*2016 BCSC 1261*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5M5J-P5B1-JWBS-6185-00000-00&context=) | [*28 C.C.L.T. (4th) 194*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5M5J-P5B1-JWBS-6185-00000-00&context=) | [*2016 CarswellBC 1881*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5M5J-P5B1-JWBS-6185-00000-00&context=)

Between Her Majesty the Queen in Right of the Province of British Columbia, Plaintiff, and Canadian Forest Products Ltd. and Barlow Lake Logging Ltd., Defendants, and Barlow Lake Logging Ltd. and Canadian Forest Products Ltd., Third Parties

(189 paras.)

**Case Summary**

**Tort law — *Negligence* — Causation — Dangerous things and situations — Fire — Action by the plaintiff Province of British Columbia in *negligence* against the defendants Canadian Forest Products (Canfor) and Barlow Lake Logging (Barlow) dismissed — The Province claimed that Barlow's logging operation caused a 2010 forest fire, which took seven weeks to extinguish and cost damages of $5.52 million — The expert and eyewitness evidence established that lightning had more likely than not caused the fire — The Province had not established any *negligence* by the defendants in failing to keep more than a one-hour fire watch — The defendants' counter-claim for *negligence* was also dismissed — Wildfire Regulations, ss. 6, 13.**

|  |
| --- |
| Action by the plaintiff Province of British Columbia in ***negligence*** against the defendants Canadian Forest Products (Canfor) and Barlow Lake Logging (Barlow) dismissed. On July 18, 2010, a forest fire broke out near Cutblock B2, where the sub-contractor Barlow was performing logging operations pursuant to a timber harvesting permit issued by the Province to Canfor. The Province claimed that Barlow's logging operation caused the fire, which took seven weeks to extinguish and cost damages of $5.52 million. The Province relied on the provisions of the Canfor's 2006 Forest Licence, which contained an indemnity clause obligating Canfor to indemnify the Province for damages caused by ***negligence*** of Canfor or its contractors. The Province claimed that it was more likely than not that Barlow's operation of feller bunchers on July 18, 2010 caused the fire. The Province submitted an expert report and testimony by Armitage, an expert on fire behaviour and modelling, who agreed that the most likely cause was the operation of the feller bunchers. The Province also claimed that the defendants had not consulted the most accurate weather station in determining whether lengthier fire watches were required on July 18, 2010. The Province argued that, had there been a fire watch on when the fire began, it could have been contained. The defendants' expert and eyewitness evidence that lightning had more likely than not caused the fire. Several employees at the site testified that there had been lightning strikes in the area on the day of the fire. An expert meteorologist's report and testimony was that there had been a cluster of lightning activity at the time. The defendants claimed that they had met their standard of care and obligations under the Wildfire Regulations in implementing a one-hour watch on the day of the fire. The defendants counter-claimed against the Province in ***negligence*** with respect to its response to the fire, claiming financial losses.  HELD: Action dismissed.  The expert and eyewitness evidence established that the lightning had more likely than not caused the fire. The defendants' employees were consistent and credible witnesses, who all testified to seeing lightning in the area around the time the fire began. The meteorological data showed that there had been lightning activity in the area at the time. Further, there was no direct evidence that the defendant Barlow's operations at B2 caused the fire. The Province had not established any ***negligence*** by the defendants in failing to keep more than a one-hour fire watch. The Province had similarly not established that any of the weather stations produced data representative of the conditions at Block B2; in fact, the evidence supported the contrary position of the defendants. The Court found that on July 18, 2010, the conditions required a one-hour fire watch pursuant to the Wildfire Regulations and Canfor's policies, which the defendants had implemented. It was not possible to conclude on the evidence that the fire reached the flaming ignition stage before 4:45 p.m. when the watch had ended. Given this finding, the Province had not established that a fire watcher would have been able to effectively action or suppress the fire. Finally, the Province had not established that a longer watch would have resulted in better containment of the fire and prevented the losses. The defendants' counter-claim for ***negligence*** was also dismissed, as the evidence did not support a finding of ***negligence*** on the part of the Province in fighting the fire. |

**Statutes, Regulations and Rules Cited:**

Forest Act, [*R.S.B.C. 1996, c. 157, s. 6*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FN1-FCCX-61TS-00000-00&context=)(2), s. 6(3), s. 9(1), s. 9(3), s. 15

Forest and Range Practices Act, *S.B.C. 2002, c. 69*,

Forest Fire Prevention and Suppression Regulation, B.C. Reg. 169/95, s. 4, s. 4(1)

Forest Practices Code of British Columbia Act, *R.S.B.C. 1996, c. 159*,

***Negligence*** Act, [*R.S.B.C. 1996, c. 333, s. 4*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JBDT-B069-00000-00&context=)

Wildfire Act, *S.B.C. 2004, c. 31*,

Wildfire Regulations, [*B.C. Reg. 38/2005, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5S18-H641-JKHB-627C-00000-00&context=)(1), s. 6(2), s. 6(3), s. 6(4), s. 13(1), s. 13(2)

**Counsel**

Counsel for the Plaintiff: J.D. Eastwood, Q.C., M.N. Weintraub, M.A. Witten.

Counsel for the Defendant and Third Party, Canadian Forest Products Ltd.: M.S. Oulton, S.P. Ramsay, C. DiPuma, K.E. Webber.

Counsel for the Defendant and Third Party, Barlow Lake Logging Ltd.: E.E. Vanderburgh, H.A. Bromley.

[Editor's note: A correction was released by the Court July 21, 2016; the change has been made to the text and the correction is appended to this document.]

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SUMMARY

**Reasons for Judgment**

|  |
| --- |
| **B.M. GREYELL J.** |

**Overview**

**1**  On the late afternoon of June 18, 2010, a patrol plane under contract to the British Columbia Ministry of Forests, Lands and Natural Resources Operation (the "Ministry" or "Province"), spotted smoke from a forest fire southeast of Vanderhoof, B.C. (the "Fire"). The pilots reported their observations to the Ministry's Prince George Fire Centre ("PGFC") and flew to the scene of the Fire. When they arrived, they reported the Fire was 0.1-0.2 hectares in size and was burning at Rank 3 (Vigorous Surface Fire, Moderate Spread, May See Candling) out of a ranking system 1 to 5. When they left, approximately 20 - 25 minutes later, the Fire was burning at Rank 4 (Moderate to Fast Spread, Short Aerial Bursts, Spotting). The pilot observed "...now rank 4 send someone pretty quick there is lots of machinery here needs to be saved...". By the morning of June 19, the Fire was 50 hectares in size with a perimeter of several kilometres. The Fire was not extinguished until several weeks later after burning some 6,100 hectares of Crown land.

**2**  The Province has brought this action against Canadian Forest Products Ltd. ("Canfor") and its subcontractor, Barlow Lake Logging Ltd. ("Barlow"), for causing the Fire. Canfor and Barlow have defended the action and counterclaimed for damages against the Province alleging the Province did not take sufficient action to suppress or extinguish the Fire.

**3**  The evidence at trial centred on the obligations of Canfor as a licensee and Barlow, Canfor's harvesting contractor, to take steps to prevent the Fire and on the obligations of the Province to respond to the Fire. The court heard evidence from many employees who worked for the Province, Canfor and Barlow who were involved in arranging resources for or who attended and assisted in fighting the Fire. In addition, the court heard evidence from a number of experts in fire origin and cause, fire behavior and fire growth modelling, climatology and weather, lightning and lightning detection systems in Canada, fire suppression and industry practice.

**Background**

**4**  The Fire started on Cutblock 85B (the "Cutblock"). The Cutblock was the subject of a Replaceable Forest Licence A18157 (the "Licence") granted by the Province to Canfor which was being logged under a contract between Canfor and Barlow.

**5**  Barlow had commenced active logging for the season in late May/early June 2010, and on the day of the Fire, was operating four feller bunchers, as well as other heavy equipment, on the Cutblock.

**6**  One of the feller bunchers was parked near the location of the Fire when the spotter plane arrived over the Fire. The parties agree the operation of a feller buncher constitutes a high risk activity and a potential cause of fire.

**7**  The parties agree the Province sustained total damages in the amount of $5,522,465 which includes fire suppression costs, replanting and reforestation costs, lost stumpage revenue for harvested timber and lost value to immature timber.

**The Claims to be Adjudicated**

**8**  The Province claims against Canfor for damages in ***negligence***, breach of contract--under the indemnity clause and breach of the *Wildfire Act*, *S.B.C. 2004, c. 31* [*Act*], and *Wildfire Regulation*, [*B.C. Reg. 38/2005*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W2C-X5N1-DYFH-X0KN-00000-00&context=) [*Regulation*] -- and against Barlow for damages in ***negligence***. Each of Canfor and Barlow deny the Province's allegations and both advance claims against the Province for contributory ***negligence*** and failure to mitigate damages. Canfor counterclaimed against the Province asserting ***negligence*** and seeks to recover losses it sustained as a result of the Fire.

**9**  Canfor issued a Third Party claim against Barlow in which it asserts that it relied on Barlow to carry out harvesting operations "in a good, workmanlike, safe and diligent manner that was consistent with the *Act* and *Regulation* and Canfor's policies and procedures" and that should Canfor be found liable to the Province, Canfor claims contribution and indemnity for such damages against Barlow pursuant to s. 4 of the ***Negligence*** *Act*, *R.S.B.C. 1996, c. 333*.

**The Parties**

**10**  The Province owns Crown lands including timber and range lands which it administers through the Ministry. One of the functions of the Ministry is to manage Crown land forests through, *inter alia*, a system of tree farm licences where annual cuts are granted to forest companies such as Canfor who pay a stumpage fee to the Province generally based on the quantity and quality of the wood it harvests.

**11**  Canfor is a large public forest products company operating in British Columbia and elsewhere in North America. Canfor engages contractors to harvest trees on various blocks (or parts of blocks) of forest on its behalf.

**12**  In the present case Canfor had contracted with Barlow for the harvesting of timber on the Cutblock, located some 30 kilometres to the southeast of Vanderhoof, B.C.

**13**  Barlow is a family-owned timber harvesting contractor based in Vanderhoof. It has subcontracted with Canfor for the harvesting of timber for a number of years. Barlow owns and operates a number of large machines which it uses in its harvesting operations including feller bunchers, processers, skidders, excavators and tractors.

**14**  I will commence these Reasons with an outline of additional facts agreed to by the parties before outlining the issues and the facts pertaining to those issues.

**The Organization of the Wildfire Management Branch of the Ministry**

**15**  The Ministry operates the Wildfire Management Branch ("WMB") which provides wildfire management and wildfire fighting response on Crown and private lands pursuant to Part 2 of the *Act*.

**16**  The WMB's preparedness and response to wildfires is coordinated through fire centres in each forest region. WMB resources and responsibilities within each fire centre are further broken down and assigned to Zone offices located in various fire zones delineated throughout the Province.

**17**  In this case the WMB's preparedness and response to the Fire, including dispatch of ground resources and rotary wing aircraft, was managed through the PGFC in coordination with the Vanderhoof/Fort St. James Zone office (the "VanJam Zone").

**18**  WMB also oversees the Province's air tanker fleet through the Provincial Air Tanker Centre ("PATC") in Kamloops. Air tankers provide initial attack on fires and/or support to crews working on the ground as requested or directed by WMB personnel. In the present case requests for air tankers on the Fire were directed by the PGFC through PATC. Air tanker preparedness and response were managed through PATC.

**19**  The general approach to fighting fires in the region agreed to by the Ministry and the forest companies is that industry personnel are on call to marshal equipment to be used in fighting fires (such as cutting fire guards around the perimeter of fires) and Ministry firefighters are deployed to fight the fire.

**20**  All industry personnel engaged in harvesting on the Cutblock had taken the basic Ministry firefighting course (S-100) and at the commencement of the 2010 harvesting season had placed required firefighting equipment on the Cutblock and had reviewed the operation of that equipment in the event of having to use it should a fire occur. Most of both Barlow and Canfor's employees had experience fighting forest fires in the region and elsewhere.

**The Forest Licence between the Province and Canfor**

**21**  The Licence was entered into between the Province and Canfor on November 1, 2006 renewing a previous licence granted in 1998. The Licence was granted pursuant to s. 15 of the *Forest Act*, *R.S.B.C. 1996, c. 157*, and permitted Canfor to harvest an allowable cut of 769,366 cubic metres per year of Crown timber in the Prince George Timber Supply Area to be specified in cutting permits.

**22**  On July 23, 2009, the District Manager of the Vanderhoof Forest District (one of the Districts in the Prince George Timber Supply Area) issued Cutting Permit 85B (the "Permit") under the Licence to Canfor.

**23**  The Licence contained an Indemnity Clause providing for indemnity for any "cost, expense or loss" incurred by the Province as a result of acts or omissions of the licensee or its contractors which cause loss or damage to the Province. I will review the terms of this clause under a separate section of these Reasons as the Province claims the damages it sustained as a result of the Fire are recoverable under the Indemnity Clause of the Licence.

**24**  "Forestry legislation" is defined in s. 16.02 of the Licence to include the *Forest Act*, *Forest Practices Code of British Columbia Act*, *R.S.B.C. 1996, c. 159*, the *Forest and Range Practices Act*, *S.B.C. 2002, c. 69*, and the regulations under those acts.

**The Logging Contract between Canfor and Barlow**

**25**  Canfor entered into a Replaceable Logging Contract ("RLC") with Barlow on June 29, 2006 with a term from June 1, 2006 to May 31, 2011. The RLC described the work to be performed as timber harvesting on a "stump to mill basis" including felling, bucking, skidding, sorting, decking, loading, log hauling, road construction, deactivation and other work relating to harvesting operations. The timber harvested was delivered to Canfor's Plateau Mill near Vanderhoof.

**26**  The terms of the RLC covered, *inter alia*, the Cutblock. The terms relevant to the issues in this case provide Barlow will:

1. carry out its operations in strict accordance with, and observe and perform the provisions and requirements of:
2. the *Forest Act*, *Forest and Range Practices Act*, *Fisheries Act (Canada), Industrial Roads Act, Waste Management Act*, *Wildfire Act* and the *Workers Compensation Act* and the regulations, standards and orders thereunder and all other applicable federal, provincial and municipal laws, regulations, standards and order which relate in any way to the performance of the Contractor's obligations under this Contract" and
3. any operation plans, guidebooks, silviculture prescriptions, logging plans, cutting permits, road permits or other plans, permits, prescriptions or documents provided by the Company to the Contractor which apply to the Contractor's operating area (collectively "Operational Documents");

**27**  The RLC also provided:

|  |  |  |  |
| --- | --- | --- | --- |
| 3.4 |  | Forest Fires: The Contractor shall take all reasonable precautions, make all reasonable efforts and exercise all due diligence to prevent any fire starting or spreading from its area of operations and will at all times comply with the requirements of the *Wildfire Act* and regulations thereunder and any other applicable law or regulation concerning the reporting, control, suppression and extinguishment of forest fires. In particular the Contractor will maintain sufficient fire fighting equipment in good working order in accordance with the requirements of the Company's Forest Fire Attack Plan (as prepared by the Company) and the *Wildfire Act* and regulations, will promptly notify the Company of any fires it discovers and will do its utmost to prevent, control and extinguish any fire in or in the vicinity of the Contractor's operating areas regardless of the cause or origin or the fires, utilizing to the fullest extent the personnel, equipment and resources available to the Contractor. The Contractor shall also at the request of the Company diligently assist the Company in controlling and extinguishing fires in other areas using its personnel and appropriate firefighting equipment. The Company will reimburse the Contactor for all reasonable out of pocket costs and expenses incurred by the Contractor (except the costs of lost or damaged equipment) in suppressing, controlling and extinguishing a fire referred to in this paragraph subject to the following: ... |  |

[Emphasis added.]

**28**  Significantly, Clause 8(d) reads:

1. the Contractor acknowledges that the majority of Work during the Term of this Contract may be in respect of mountain pine beetle infested timber, ...

**29**  The latter clause is important to the issues in this case given mountain pine beetle infested trees and slash from harvesting those trees have particular characteristics relating to fire behaviour.

**The Cutting Permit**

**30**  Cutting Permit 85B was issued to Canfor on July 23, 2009 permitting the harvesting of Crown timber on the Cutblock for four years beginning July 22, 2009. The Permit was subject to the terms of "the Licence and the forestry legislation".

**31**  Barlow commenced harvesting on the Cutblock in 2009 and, after a seasonal shut down, had recommenced operations in late May, early June, 2010.

**Relevant Canfor Policies and Procedures**

**32**  The parties agree at all material times in and around the time of the Fire, Canfor had established plans, policies and procedures for wildfire prevention, detection and response in respect of timber harvesting operations, including:

1. a revised 2010 Emergency Preparedness and Response Plan (the "2010 EPRP")
2. a Fire Preparedness and Responsibilities plan, and
3. a Forest Fire Attack Plan.

...

**33**  The parties also agree Canfor provided training and instruction to its personnel and contractors, and required its contractors, including Barlow, to take training and instruction in respect of wildfire prevention, detection and response.

**34**  In the 2010 EPRP, Canfor set out that it would "minimize the risk of a wildfire starting by promoting fire prevention throughout our operations". The EPRP provides that "[s]taff and contractors are required to meet or exceed the [*Act*] and [*Regulation*]" and ensures staff and contractors are trained in fire preparedness and response. In addition, the EPRP provides Canfor will monitor the Fire Danger Ratings provided by Ministry weather stations and Canfor weather stations that cover the operating area; will specify which weather station the contractor is to monitor for determining the Fire Danger Rating; and will appoint a fire duty officer during fire season.

**35**  The 2010 EPRP sets out the provisions of Schedule 3 of the *Regulation* when a fire watch is required, the duties of a fire watcher, the definition of "high risk activities" as well as the procedure to be followed in the event of a wildfire. The EPRP emphasises safety is first and no firefighting should be carried out if it will place a person in a situation of unacceptable risk. The EPRP was distributed to Barlow and its employees.

**36**  The EPRP was prepared, in part, because of the increasing danger of wildfires cause by the mountain pine beetle infestation affecting the forests in the region.

**Operations on the Cutblock on June 18, 2010**

**37**  The parties agree the timber harvesting operations carried out by Barlow on the Cutblock on June 18, 2010 included mechanical tree felling, skidding logs, piling of woody debris/slash and tree processing (trimming and cutting trees into proper length for transport). Barlow was operating four feller bunchers; three skidders; five processers; two log loaders; a bulldozer; and an excavator on the Cutblock on the day of the Fire.

**38**  A common method of cutting the trees being harvested is by use of a mechanical feller buncher fitted with a large saw for the felling of trees and arms for holding and moving the harvested trees onto a platform on the feller buncher. The machine seizes a tree. The blade, which rotates at a high rate of speed, saws the tree off close to the base of the trunk. Once the feller buncher has cut and collected a number of trees the machine places the harvested trees on a roadside pile to await trimming and sizing by a processer before being loaded on a truck for transport to the mill.

**39**  The feller buncher Operator's Manual provides a warning to operators of the danger of fire when operating the equipment in a forest environment. The manual warns of the danger of combustible debris collecting in tight corners of the machine, particularly near hot engine components such as the exhaust manifold, exhaust pipes and muffler, and advises the operator to ensure all debris is blown off the engine at the end of each work shift. The operator is warned "[e]ven small accumulations close to hot exhaust components can ignite and smolder. If dislodged by vibration this smoldering debris can fall into other areas of the machine and thereby spread a fire." The operator is advised that for "Fire Prevention" he is to "[r]emain with the machine for at least 45 minutes at the end of operations while the machine cools."

**40**  A feller buncher on the Cutblock known as B2, which was closest to the origin of the fire and the subject of significant evidence ("B2") was equipped with two-ten pound fire extinguishers, a fire suppression system and a shovel. In addition, Barlow had another skidder on the Cutblock equipped with various firefighting equipment including a full 1,350 L water tank, pump and suction hose, two fire extinguishers and other firefighting equipment.

**41**  Barlow also maintained a cache of firefighting equipment (extinguishers, water jugs and firefighting tools) in a locked trailer to which each employee had a key.

**42**  The parties agree Barlow was engaged in "high risk activities" as that term is defined in the *Regulation*. Canfor and Barlow also agreed during the course of the trial a one-hour fire watch was required after the cessation of high risk activities on the Cutblock on June 18; that each defendant was responsible for ensuring such fire watch was conducted; and that a one-hour fire watch was not conducted as required.

**43**  The Province does not take the position Barlow had insufficient equipment on site to meet its responsibilities under the *Act* and *Regulation*. The Province argues a fire watcher, properly conducting his or her duties under the *Regulation*, would have been able to utilize Barlow's resources to extinguish or at least control the Fire on the afternoon of June 18 and to report it to the Ministry such that it would been actioned earlier and would not have spread.

**The Nature of the Timber being Harvested**

**44**  Much of the forest in the interior and the northern portion of British Columbia has been affected by mountain pine beetle infestation. The infestation commenced in the Vanderhoof area in about 2000/2001. Within two to three years, pine trees, being one of the predominant species of tree in the region, had progressed from green living trees to the "dead and red" stage.

**45**  Much of the timber being harvested on the Cutblock was in the intermediate "grey" stage, when the trees had lost most of their moisture content and their needles. The wood of a grey stage tree is often cracked; the bark loosens and drops to the forest floor as do some of the branches making a very flammable fuel for fire. When cut, for example by a mechanical harvester, the resulting sawdust is fine and dry.

**46**  Mr. Deveny, the operator of the feller buncher B2 located closest to the area of the Fire when initially spotted by the patrol plane, testified that prior to a mechanical check he did on his feller buncher between 2:00 and 2:30 p.m. on the afternoon of June 18, he was harvesting in an area on the Cutblock roughly comprised of an equal proportion of green spruce and grey dead beetle kill pine. He said when he resumed harvesting operations in an adjacent area after he serviced his machine, the proportion of grey dead pine trees comprised roughly 75% of the trees he cut.

**47**  The Harvesting Plan Map of the Cutblock showed over 80% of the forest was lodgepole pine. An appraisal done in May 2009 showed 85% of the pine was in grey attack; 4% in red attack; and 2% beetle infested green timber. One can assume the percentage of trees on the Cutblock in the grey attack stage had increased by June 2010.

**Canadian Forest Fire Guidelines**

**48**  The Canadian Forest Fire Behavior Prediction System ("FBP") is used across Canada to assess wildfire behaviour potential. The system utilizes a combination of inputs - weather, fuel moisture and topographical conditions for some 16 benchmark fuel types to attempt to predict wildfire behaviour. The Danger Rating System ("DRS") is "a standard national system of rating wildfire danger in Canada. Fire potential and fire spread rates are used to determine day-to-day preparedness and suppression requirements for fire centre operations": (Forest Service S-100 Basic Fire Suppression and Safety Course Exhibit 12).

**49**  The type of fuel in which a wildfire burns has a direct relationship to the fire's behaviour including the rate of spread of the fire. The fuel type, weather (relative humidity ("RH"), precipitation, wind and temperature) and topography are the key factors influencing fire behaviour.

**Weather Information**

**50**  Weather information is critically important to the conducting of harvesting operations as information gathered from various weather stations is used to make operational decisions relating to the potential for wildfires and relates to fire prevention, preparedness and response.

**51**  Both the WMB and Canfor maintain a network of weather stations throughout the Province which are used to make fire management decisions including decisions relating to fire prevention, preparedness and response.

**52**  The WMB and Canfor weather stations monitor and collect weather data on an hourly basis, including: temperature, RH, precipitation, wind speed and wind direction. Weather station standards are prescribed by the Weather Guide for the Canadian Forest Fire Danger Rating System.

**53**  Under the FBP, weather data is used, together with fuel moisture codes, to calculate fire behaviour indices. Fire behaviour indices are used, among other uses, to determine the appropriate DGR under the *Regulation*, and where applicable, the restriction on certain operational activities including prescribing when operations will cease and when a fire watch is required.

**54**  During fire season, weather forecasters employed by WMB collect and monitor WMB data from weather stations to determine the applicable DGR for the geographic area immediately surrounding the weather station. That data is used, along with other information, to generate daily weather forecasts for each fire centre and zone office.

**55**  In the Prince George region, the WMB weather forecasts are typically issued at 8:00 a.m. and form part of a weather briefing between the fire centre and zone offices at 9:00 a.m. each morning.

**56**  At the time of the Fire, the WMB maintained six weather stations in the general region of the Cutblock. Canfor operated three weather stations. The topographic features (elevation, whether located in a valley, proximity to water and orientation); the actual physical site of each weather station (that is, the ability to accurately measure precipitation, wind, temperature and RH on the site); and the maintenance of each station are important to the relevance of the reading to a particular harvesting operation. The Ministry and the defendants differ on which weather station or stations were the appropriate weather station(s) for monitoring operations on the Cutblock at or about the time of the Fire.

**Discovery of the Fire on June 18, 2010**

**57**  Mr. James Wiens, a co-owner of Barlow and the onsite supervisor on the Cutblock, and Mr. Norman Giesbrecht, a Barlow employee, left the Cutblock at about 4:15 p.m. on Friday, June 18. They were the last employees to leave the Cutblock that day. At that time neither observed smoke or other indicia of fire.

**58**  As noted, smoke from the Fire was first observed by a Ministry spotter plane. The pilot gave evidence. Not surprisingly, given the time since the Fire, the pilot's recollection of the timing of events and distance from which he initially spotted the Fire was unclear. I accept his evidence that he and his son (who was assisting him) spotted smoke from the Fire when they were some 8 km from the site and that it likely took some further five to six minutes for them to reach the site of the Fire. I prefer to accept the times recorded on various reports sent from the spotter plane to the PGFC and the time recorded on photographs taken by the pilots as it is likely those time recordings more accurately record events as they occurred.

**59**  The Initial Fire Report ("IFR") was made to the PGFC at 5:17 p.m. (by Ministry records) and at 5:15 p.m. (by the spotter place record) on June 18, 2010 and records that at that time the Fire was 0.1-0.2 ha in size and the Fire Rank was "Rank 3" ("Vigorous Surface Fire, Moderate Spread, May See Candling") and was burning in "Decked Wood". The "Values at Risk" were "Equipment" and "Adjacent Fuels" were noted to be "Heavy Timber". The 5:15 IFR contained the same information except the Fire was noted to be burning at Fire Rank 3 and 4. The pilot testified his son put a time of 5:15 p.m. on the IFR likely after completing most of the information on the form. The pilot testified the report could have taken 15 minutes to complete. However, judging by the limited amount of information on the IFR, I am of the view the pilot over-stated the time required to complete the report: that is, that the IFR did not require 15 minutes to prepare before sending the report to the PGFC.

**60**  "Phone Reports" logged by the Ministry show that the pilot called at 5:26:49 to report the fire was then at "Rank 4", that "tankers (were) probably needed" and the fuel was "Brush, Trees, Equipment"; the Fire Size was noted as "House" (size) and Rate of Spread as "Fast".

**61**  A Resource Log kept by the Ministry records the following transmission from the spotter plane at 5:24:

Have an IFR. Still over fire. Its in an active logging area. Advancing fast into standing timber. Lots of machinery and fresh cut logs here. Doesn't look like anyone on site. ...

and at 5:26

Fire is now rank 4 send someone pretty quick there is lots of machinery here needs to be saved here heading off to Lima [home base] now.

**62**  While circling the Fire, the pilots took date/time stamped photographs. The first photograph was taken at 5:20 p.m.; the last at 5:34 p.m. from some distance after the plane had left the Fire site. The photographs show an expanding fire with smoke obscuring the perimeter of the flames.

**The Issues**

**63**  The following is the list of issues which must be addressed in this case:

1. What was the most likely cause of the Fire?
2. Was early shutdown or a fire watch required on June 18, 2010?
3. What are the duties of a fire watch under the *Regulation*?
4. What was the probable time of detection of the Fire by a fire watcher had one been posted?
5. Could a person properly carrying out the duties of a fire watcher have extinguished, contained or reported the Fire in a manner that would have either eliminated or significantly reduced the damages to the Province?
6. What, if any, liability does Canfor or Barlow have to the Province in ***negligence***?
7. What, if any, liability does Canfor have to the Province under breach of contract?
8. What, if any, liability does the Province have to Canfor in ***negligence*** for its response to the Fire?
9. If the Province and/or the defendants are found at fault, what is the apportionment of damages?

**What was the most likely cause of the Fire?**

**64**  The parties agree there are only two potential causes of the Fire: the operation of B2 or lightning.

**65**  As the Province asserts the Fire was caused by the ***negligence*** or breach of contract of the defendants, the Province bears the onus of establishing it is more likely than not that the cause of the Fire was the feller buncher.

**66**  In *Aviva Canada Inc. v. Isolation Chaleur Insulation Ltée/Ltd.*, [*2009 NBQB 20*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7H-KWB1-FGY5-M00V-00000-00&context=) at paras. 43-44, Mr. Justice Léger stated:

[43] The plaintiff must therefore provide sufficient evidence to enable a reasonable inference to be drawn that the fire originated as a result of the ***negligence*** or breach of contract on the part of the defendant Isolation Chaleur, and further exclude any other fair inferences as to the cause of the fire. As a result, the plaintiff has the burden of proving that Isolation Chaleur, out of ***negligence*** or through breach of contract, caused the fire at the plaintiff's place of residence on December 19, 2000.

[44] The law recognizes that the plaintiff is not required to prove conclusively that the defendant's ***negligence*** caused the fire. The plaintiff only has to convince the court that a reasonable inference can be drawn from the totality of the evidence that supports the fact that it is more likely than not that the defendant's ***negligence*** was the cause of the fire. See **Westco Storage Ltd. v. Inter-City Gas Utilities Ltd.**, [*[1989] 4 W.W.R. 289*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DG1-K054-G3HF-00000-00&context=) (Man. C.A.).

**67**  In *Elder v. City of Kingston*, [*[1954] 3 D.L.R. 369*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJS1-JN6B-S3FH-00000-00&context=) at 375 (Ont. C.A.), the Ontario Court of Appeal commented on the burden of proof on a plaintiff in proving the cause of a fire:

Of course, those are all possible sources, but it is not enough to say that there was some other possible source. The plaintiff has satisfied the burden which rests upon him as to the origin of the fire if he produces proof to enable a reasonable inference to be drawn as to the origin of the fire and to exclude any other fair inference: see *per* Davies J. in *C.P.R. v. Kerr*, [*49 S.C.R. 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YGV1-JCJ5-22GF-00000-00&context=) *supra*.

**Position of the Province**

**68**  The Province's position is that the Fire was most likely caused by the operation of B2, one of the feller bunchers operating on the Cutblock on June 18, 2010. The Province says B2 finished work that day in the general area of the origin of the Fire. The operation of a feller buncher is known to be (and is defined in the *Regulation* as constituting) a high risk activity and a potential cause of wildfires.

**69**  The Province says there is strong circumstantial evidence to suggest the Fire was caused by the use of B2. In support of this conclusion, the Province says the origin of the Fire occurred in the immediate area where Mr. Deveny had operated B2 and where he had serviced B2 at 2:30 p.m. that afternoon. The Province argues the evidence establishes that Mr. Deveny stopped the B2 at approximately 3:50 p.m. on June 18, stayed with it for approximately ten minutes while it cooled down, shut off the engine at 4:00 p.m. and then left the site immediately thereafter. The Province says Mr. Deveny did not remain with his machine for the 45 minutes recommended by the manufacturer in the operator's manual (that is he did not comply with standard operating procedures) and did not conduct a fire watch as the Province submits was required before leaving a site of high risk activity.

**70**  The Province argues it is more likely that not that sawdust or other flammable forest debris could have gathered in or near the exhaust components of B2 and dislodged onto the forest floor when Mr. Deveny cleaned B2 that afternoon, which then began smoldering and subsequently ignited. The Province noted a number of circumstances including the weather conditions on the Cutblock on the day of the Fire; the type of wood being harvested which created more debris and dust; and there having been an earlier fire on another feller buncher working on the Cutblock. In addition, Mr. Wiens, a Barlow employee, advised Ministry personnel that evening the Fire "could have" started when B2's tracks struck rock.

**71**  In support of its position that B2 was the cause of the fire, the Province relies on the report and evidence of Mr. Armitage, an expert in fire behaviour modelling, as well as the photographs taken by the spotter plane when it first arrived over the Fire, to determine the area of origin of the Fire as being near to B2. Mr. Armitage opined the feller buncher is a probable and the most likely cause of the Fire. Mr. Armitage includes the following possible causes of fire from a feller buncher: friction when cutting the tree with the saw; the saw blade hitting an unseen rock; leaked hydraulic fluid igniting after contact with hot exhaust or engine parts; or cleats (metal tracks) contacting rocks and producing sparks.

**Position of Canfor and Barlow**

**72**  Canfor and Barlow take the position the Province has not demonstrated that B2 was the likely source of the Fire. The defendants say the evidence establishes that it was at least as likely the Fire was caused by lightning.

**73**  While the onus is on the Province, there is a considerable body of evidence to suggest lightning was, in fact, the cause of the Fire, as argued by the defendants.

**74**  Various Barlow employees testified as they were leaving the Cutblock after work at about 5:00 p.m. the evening of June 17, they observed a "bolt of lightning" during a heavy downpour of rain on the Cutblock in the general vicinity of the origin of the Fire identified by Mr. Armitage.

**75**  Mr. Bublitz testified the flash was "very close"--perhaps 1,000 m away from him to the west. He described the lightning strike as "very vivid" and that within a second or two he heard "a big crash". He testified it was a "memorable" experience and he recalled the lightning because he could "still see it today".

**76**  Mr. Brent Werstuik testified he was sitting in his feller buncher waiting for a co-worker to pick him up because of the heavy downpour of rain; he ran to the truck when it arrived; and, when in the vehicle, he saw a "bolt of lightning ... straight in front of us".

**77**  Mr. Deveny testified that as he was leaving the Cutblock at about 5:00 p.m. on June 17 there was heavy rain, thunder and lightning. He testified that as he was walking to his pickup truck it started to rain "really hard" and that "there was a lightning strike and simultaneously thunder". He estimated the lightning strike to be not more than 300 m away from where he was standing. He testified "I felt the air move and I felt all the hairs on the back of my neck stand up".

**78**  Mr. Giesbrecht, a Barlow supervisor, testified as he was leaving the Cutblock the evening of June 17 "a sudden cell of weather that came through that had lots of hail, lightning and thunder".

**79**  Mr. Montague testified he recalled a thunderstorm passing southeast of Vanderhoof the evening of June 17, 2010 and being concerned about the fact his daughter was playing soccer at the time. He spoke to the coach to get the girls inside if the storm approached closer.

**80**  Ms. Beverly Archibald, a meteorologist who prepared an expert opinion report for the defendants and was cross-examined at trial, testified that both of Canada's lightning detection networks, the Canadian Lightning Detection Network ("CLDN") and the Pelmorex Lightning Detection Network ("PLDN"), showed a cluster of lightning strikes on June 17. CLDN showed three between 4:40 and 4:53 p.m. at a distance of 4.4 to 7.2 km from the Fire site. PLDN showed three between 5:01 and 5:17 p.m. at a distance of 3.25 to 8 km from the Fire site.

**81**  Ms. Archibald testified that neither detection network had proven particularly accurate in the past; that a Ministry study of the 2009 fire season showed "that many lightning strokes that caused forest fires in British Columbia are undetected by the CLDN"; that the CLDN "rarely detects lightning within 1 km of fire origin"; and that it is "quite common" for lightning-caused fires to be associated with lightning strikes that occur 5-10 km from the ignition point.

**82**  Ms. Archibald opined that the weather conditions on the Cutblock on June 18 were "precisely" the type of weather conditions that would support the discovery of a holdover fire (that is, a fire that remains dormant and not detected for a considerable period of time before it breaks into flaming ignition). She stated at p. 25 of her report:

From my experience, the conditions at Corkscrew during the late afternoon and early evening of June 18, 2010 were precisely the type of conditions that would support the discovery of a holdover fire.

...

In my opinion, it is quite possible that lightning may have resulted in fire ignition in CP 85B on June 16 or 17, 2010. High RH values and low temperature readings on those days could have easily allowed the ignition to remain dormant until more aggressive fire weather conditions developed over the area during the late afternoon and early evening of June 18, 2010.

[Emphasis added.]

**83**  A number of the witnesses, both lay and expert, including Mr. Michael Pritchard, Ms. Lindsey Kanary and Mr. Armitage, called as witnesses by the Province, testified (or agreed in cross-examination) that in their experience lightning can cause a holdover fire. One of these conditions referenced above by Ms. Archibald is the phenomenon of "crossover", when the temperature rises higher than the RH, creating "excellent burning conditions" and which occurred at 6:00 p.m. on June 18.

**84**  The Province says the eyewitness evidence of lightning was unreliable and that Ms. Archibald's opinion is speculative and that she was not qualified to give evidence on the technical aspects of lightning location systems. The Province says I should give Ms. Archibald's evidence on the accuracy and reliability of the systems little or no weight. Counsel noted neither Mr. Armitage nor Ms. Archibald could say lightning was the probable cause of the Fire. At p. 5 of her Report Ms. Archibald wrote "In my opinion, lightning cannot be eliminated as a possible or probable cause of the Fire".

**85**  The Province relies on the opinion of Mr. Armitage who says the chance of a holdover fire due to an undetected lightning strike, starting in the same area as Mr. Deveny was operating B2 is "possible but unlikely"(p. 47 of his Report).

**Discussion**

**86**  I find the evidence of the Barlow and Canfor employees to be consistent and credible. The issue of lightning on the Cut Block was reported to Ministry investigators during the course of their investigation within days of the Fire.

**87**  The weather forecasts issued for the PGFC for June 17 support there was lightning in the area of the Cutblock in the late afternoon. The Forecast for June 17 read "... the airmass is unstable over the southern half of the Fire Centre which will give some widely scattered convection..." and for the Vanderhoof region predicted "... [a] few scattered afternoon showers or thundershowers" with a chance of lightning of 40%.

**88**  The evidence supporting the Province's submissions B2 was the cause of the Fire is premised on two bases: that feller bunchers are inherently dangerous and known to cause fires and that B2 was parked in or about the area of the origin of the Fire on June 18 prior to the Fire being spotted.

**89**  There is no evidence B2 actually caused the Fire. The evidence was that B2 was functioning properly on June 18. There is no evidence of a fire starting on or of smoldering debris being in the engine compartment or elsewhere on B2. The area around which B2 was operating was examined by Ministry investigators. There was no indication it had struck rock in or about that area.

**90**  In my view, the Province has not established it is more likely than not the Fire was started as a result of the operation of B2. In my view there is a fair inference to be drawn that the Fire was a holdover fire which was the result of lightning on the evening of June 17.

**91**  The next four issues are related. First, was either an early cessation of operations or a one-hour fire watch required on June 18, 2010; second, if a fire watch was required, what are the duties of a fire watcher under the *Regulation*; third, what was the probable time of detection of the Fire by a fire watcher had one been posted; and fourth, whether a person properly carrying out the duties of a fire watcher, have extinguished, contained or reported the Fire in a manner that would have either eliminated or significantly reduced the damages to the Province.

**Was Early Shutdown or a Fire Watch Required on June 18, 2010?**

**92**  The *Regulation* requires that "a person who carries out a high risk activity ... must determine the Fire Danger Class for the location of the activity ... by reference to representative weather data for the area". This issue turns on what weather station should have been relied on for the purposes of assessing the fire danger on the Cutblock. On May 31, 2010, Canfor had issued a notice to its contractors including Barlow entitled "Fire Watch Required/Equipment Ready" asking that a one-hour fire watch be implemented.

**93**  For the purpose of complying with this provision, both the Ministry and Canfor maintained various weather stations throughout the region. The "Weather Guide" for the Canadian Forest Fire Danger Rating System, a publication of Natural Resources Canada, is a comprehensive document which sets out the standards required for the location of a weather station and equipment required for measuring the elements of fire weather: temperature, RH, wind speed and precipitation. The Guide discusses the importance of topography, elevation, moisture content of the forest floor, crossover conditions when temperature is higher than the RH, which may indicate potentially severe fire behaviour and the relationship of these factors to forecasting fire behaviour.

**94**  The weather stations closest to the Cutblock were Canfor's Corkscrew weather station ("Corkscrew") (7 km) and the WMB's weather stations Holy Cross 2 (28 km) and Vanderhoof Hub (38 km).

**Corkscrew**

**95**  The DGR readings from Corkscrew from June 14 - 21, 2010 show that June 18 was the sixth day of Fire Danger Class III. After three consecutive days of DGR III, the *Regulation* requires a one-hour fire watch. Relying on the data from Corkscrew, Barlow would have been required to perform a one-hour fire watch.

**96**  The Province says that because the Corkscrew station did not comply with the standards for weather stations outlined in the Weather Guide, the weather readings from that station were unreliable. In this argument the Province relies on the expert report of Mr. Armitage who opined that the Corkscrew weather station did not meet the recommended location characteristics for a fire weather station including being positioned close to the trees rather than in the centre of the clearing; having the rain gauge base too close to the stand edge and surrounding vegetation; being positioned at the base of a concave slope; and not being enclosed within a fenced off area to avoid interference by wildlife. However, Mr. Armitage found that he did not have sufficient information to definitely determine the potential effect these changes had on the data collected at Corkscrew.

**97**  Canfor and Barlow say Corkscrew was the most representative station and that the Province has not established the data from Corkscrew that Canfor received was unreliable. The defendants rely on the expert opinion of Ms. Archibald, who opined that on her analysis of the readings from the various weather stations, Corkscrew was not only generating reliable data but was generating the most representative to those weather conditions experienced at or about the area where the Fire originated. It was her opinion that Corkscrew provided the best estimate of the conditions on the Cutblock given its close location "in nearly an identical topographic area".

**98**  Andrew Soux, a senior climatologist, visited the Corkscrew site in December 2010. His report, while identifying some problems with the siting of the station, confirmed the instrumentation at Corkscrew was performing properly, with the exception of the rain gauge (which was under-recording the amount of precipitation) and that a comparison of hourly measurements for June 2010 between all Canfor stations and the WMB stations showed no significant variance in the Canfor data.

**Holy Cross 2 and Vanderhoof Hub**

**99**  The Province says the more representative readings were the DGR readings taken from Holy Cross 2 and Vanderhoof Hub. Holy Cross 2 provided a reading on June 18 of Fire Danger Class V and on the three previous days of Fire Danger Class IV and would have required Barlow to cease high risk activities at 1:00 p.m. and maintain a fire watcher for two hours after work had ceased. Holy Cross 2 was the weather station the Province relied on in responding to the Fire and the one it says provided the most accurate reading.

**100**  Vanderhoof Hub provided that June 18 was the second day of a Fire Danger Class IV reading and required Barlow to institute a two-hour fire watch.

**101**  Canfor and Barlow say that the Province has also not established that the data received by the Ministry from Holy Cross 2 was reliable. Ms. Archibald, a meteorologist, who testified on behalf of the defendants, testified there were other inconsistencies with the Holy Cross 2 readings relating to RH and temperature. She concluded the readings from Holy Cross 2 were affected by its unique topography and localized weather effects.

**Discussion**

**102**  I agree with the position taken by Canfor and Barlow on this issue. The Province adduced no evidence the weather data received at Holy Cross 2 or, for that matter, from any of the WMB weather stations was representative of the weather conditions at the Cutblock. In fact, the contrary would appear to be the case. For example, the evidence of Barlow employees Messrs. Deveny, Bublitz, Werstuik and Giesbrecht was there was a significant downpour of rain on the evening of June 17, 2010. The Holy Cross 2 station recorded no precipitation during the period from June 14-24, 2010. Those who offered expert opinion evidence were all of the view precipitation is the most important factor in determining whether a weather station is a representative one.

**103**  Mr. Armitage, the Ministry's expert on fire modelling agreed he was unable to conclude that any one of the weather stations was most representative of the Cutblock. As a consequence he chose to use an average of four WMB stations (Holy Cross 2, Vanderhoof Hub, Kluskus and Carrott Lake) in his modelling, described in further detail below, as there was a significant variation between each of the stations. Mr. Armitage opined that based on the Corkscrew station, a one-hour fire watch was required.

**104**  I find that Corkscrew provided the most representative weather conditions for the Cutblock and Barlow was not required to cease operations by 1:00 p.m. on June 18. The Ministry did not seriously pursue the issue Barlow was required to shut down early on June 18. However, Barlow was required to maintain a fire watch for one hour after operations ceased on June 18, 2010.

**What are the Duties of a Fire Watch under the *Regulation*?**

**Relevant Forestry Legislation**

**105**  Sections 6(2) and (3) and ss. 9(1) and (3) of the *Act* provide:

6 (2) A person who carries out an industrial activity must do so

1. at a time, and
2. in a manner

that can reasonably be expected to prevent fires from starting because of the industrial activity.

1. If, except in the prescribed circumstances referred to in section 5 (1) or subsection (1) of this section, a fire starts at, or within 1 km of, the site of the industrial activity, the person carrying out the industrial activity must
2. immediately carry out fire control and extinguish the fire, if practicable,
3. continue with fire control for the fire until
4. the fire is extinguished,
5. it becomes impracticable to continue with fire control, or
6. an official relieves the person in writing from continuing,
7. as soon as practicable, report the fire as described in section 2, and
8. in accordance with prescribed requirements, rehabilitate the land damaged by fire control carried out by the person.

...

9 (1) The government may enter on any land and carry out fire control if an official considers that a fire on or near the land endangers life or threatens forest land or grass land.

1. After carrying out fire control under subsection (1), the government may remain on that land or re-enter the land for the purposes of investigating the cause of a fire, rehabilitating the land or for other prescribed purposes.

**106**  The *Regulation* provides the definition and scope of a "high risk activity":

1. **"high risk activity"** means

...

1. any of the following activities carried out in a cutblock excluding a road, landing, roadside work area or log sort area in the cutblock:
2. operating a power saw;
3. mechanical tree felling, woody debris piling or tree processing, including de-limbing;
4. welding;
5. portable wood chipping, milling, processing or manufacturing;
6. skidding logs or log forwarding unless it is improbable that the skidding or forwarding will result in the equipment contacting rock;
7. yarding logs using cable systems.

...

6 (2) A person who carries out a high risk activity on or within 300 m of forest land or grass land on or after March 1 and before November 1, unless the area is snow covered, must determine the Fire Danger Class for the location of the activity

1. by reference to representative weather data for the area,
2. by reference to
3. the Danger Region from Schedule 1,
4. the applicable numerical rating under the Buildup Index, and
5. the applicable numerical rating under the Fire Weather Index, and
6. by cross-referencing the Buildup Index with the Fire Weather Index, for the applicable Danger Region, under Schedule 2.
7. If there is a risk of a fire starting or spreading, a person carrying out a high risk activity on or within 300 m of forest land or grass land must
8. do so in accordance with the applicable restriction and duration set out in Schedule 3 for the Fire Danger Class, and
9. keep at the activity site
10. fire fighting hand tools, in a combination and type to properly equip each person who works at the site with a minimum of one fire fighting hand tool, and
11. an adequate fire suppression system.
12. A person who, in accordance with subsection (3) (a) and Schedule 3, is required to maintain a fire watcher, must ensure that the fire watcher
13. can reasonably see the site of the high risk activity during the time the fire watcher is required,
14. has at least one fire fighting hand tool,
15. actively watches and patrols for sparks and fires on the site of the high risk activity,
16. immediately carries out fire control and extinguishes the fire, if practicable, and
17. has the means on site to report the fire.

...

13 (1) A person carrying out an industrial activity who is required by section 6 (3) of the Act to carry out fire control for a fire started other than in the prescribed circumstances referred to in section 6 (1) of the Act, to which fire that provision applies, must make available to fight the fire

1. if it started on Crown land, all of the person's
2. workers who are working within 30 km by road of the site of the industrial activity,
3. fire suppression systems located within 30 km by road of the site of the industrial activity, and
4. heavy equipment located within 30 km by road of the site of the industrial activity,

...

1. fire fighting hand tools, in a combination and type to equip all of the workers referred to in paragraph (a) (i) or (b) (i) with a minimum of one fire fighting hand tool.
2. The person who, under subsection (1), is required to make workers, fire suppression systems, heavy equipment and fire fighting hand tools available must deploy them as appropriate, given the circumstances and conditions applicable to the fire.

**107**  Schedule 3 of the *Regulation* provides for "Restrictions on High Risk Activities" and requires that when the Fire Danger Class ("DGR") has been rated III (moderate) for three consecutive days the person carrying out the high risk activity is required to maintain a fire watch after work for a minimum of one hour and when the DGR is rated IV to carry out a fire watch after work for a minimum of two hours and after three consecutive days of DGR IV to cease activity after 1 p.m. to sunset each day. The *Regulation* sets out the duties of a person required to conduct a fire watch. I will discuss these duties in more detail below.

**108**  Other terms contained in the *Regulation*, including "drought code value", "duff moisture code value", "fine fuel moisture code value" and "Fire Weather Index" are stated to be determined in accordance with the "Canadian Forest Service's publication, the Canadian Forest Fire Weather Index System, as amended from time to time".

**109**  The Province says based on the legislative purposes underlying the requirement for a fire watch, more than one fire watcher may be required on a cutblock depending upon the size and nature of the forestry operations on the cutblock. In the present case, the Province says more than one fire watcher was required given the requirements under the *Regulation* and the fact there were a number of feller bunchers operating at different locations of the Cutblock. The Province submits that had Mr. Deveny fulfilled the requirements of the *Regulation*, he would have observed the Fire at an early stage and had an opportunity to suppress it or at least report it to the PGFC.

**110**  The Province submits that a comparison between the present language of the *Regulation* and the language of s. 4 of the predecessor *Forest Fire Prevention and Suppression Regulation*, [*B.C. Reg. 169/95*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F97-RC71-JBDT-B2XC-00000-00&context=) [*FFPS Regulation*], demonstrates the legislature intended to make the present *Regulation* more prescriptive. Section 4 of the former *FFPS Regulation* read:

**4.** (1) If a fire watcher is required to be present by this regulation, the fire watcher must

1. watch for sparks and fires,
2. report any fires to a designated forest official, a peace officer or the person carrying out an industrial activity at the worksite at which the fire watcher is engaged, and
3. assist in fighting any fire that occurs in the area being watched by the fire watcher.

**111**  The former *FFPS Regulation* required a fire watch to "watch for sparks and fire" has been replaced with "actively watches and patrols for sparks", and "can reasonably see the site of the high risk activity". "(R)eport and assist" have been replaced with a requirement to "immediately carry out fire control and extinguishes the fire, if practicable".

**112**  The Province says that given the circumstances including that the Cutblock was 297 ha in size; that extensive forestry operations and numerous high risk activities were occurring in discrete and dispersed areas of the forest; that there was an extensive system of roads throughout the Cutblock; and that driving the road system to cover all sites of high risk activity would take some time and would involve getting out of a patrol vehicle to access sites that could not be seen from the road mandated that one fire watcher would not be sufficient to comply with the *Regulation*.

**113**  Canfor and Barlow say the *Regulation* refers to "fire watch" in the singular: that had the legislature intended the *Regulation* to refer to multiple fire watchers it would have specified that requirement.

**114**  Further, the defendants rely on industry practice. Mr. Vahi, an experienced firefighter and certified trainer for the S-100 Basic Wildfire Fighting course, opined industry practice was to have one fire watcher on a Cutblock who would use a vehicle to travel from site to site of high risk activity to watch and patrol for smoke or fire. Mr. Vahi's opinion was supported by several of the defendant Canfor's witnesses. Mr. Vahi acknowledged in cross-examination that by driving by a high risk site a fire watcher could miss a small fire.

**Duties of a Fire Watch**

**115**  Section 4 of the *Regulation* clearly requires a fire watch be in a position to "*reasonable see*" and "*actively watch and patrol for sparks and fires on the site of the high risk activity*". A fire watch must be in such a position so as to "*immediately* carr[y] out fire control and extinguish the fire, if practicable" (emphasis added).

**116**  In my view the language of the *Regulation* does not permit the interpretation the defendants seek to support. The circumstances under which a fire watcher is required must be considered in the context that equipment that by its nature constitutes a high fire risk is operating in an area where the fire hazard is and has been high for a period of time. I do not accept that the fire watcher requirement of "actively watch[ing] and patrol[ling] for sparks and fires on the site of the high risk activity" is met by one person patrolling the entire Cutblock in a vehicle. The evidence is that it would take a vehicle some 11 1/2 minutes to circumvent the Cutblock by road, let alone taking into account time spent by the fire watcher to walk to viewpoints to see other sites of high risk activity on the Cutblock, a fire watcher may not be able to easily see (as a result of forest or topography) from the road.

**117**  The ever-present danger and potential for loss arising from wildfires is recognized in the firefighting equipment the *Regulation* required Barlow to have present on the Cutblock and by the firefighting equipment each member of Barlow's crew was required to have ready access to and the inclusion of the definition of "high risk activities" in the *Regulation.* In my view, the legislative purpose underlying the *Act* and *Regulation* is to mandate a proactive approach to preventing wildfires which requires an active presence at each site of dangerous activity on a cutblock. One fire watch may comply with the *Regulation* if that fire watch can see and actively watch and actively patrol more than one site of high risk activity if the fire watch can "immediately" carry out fire control activities. Such a scenario would not have been possible in the circumstances of the harvesting activities being undertaken on the Cutblock on June 18.

**118**  In my view the number of fire watchers required under the *Regulation* will be situational and will depend, among other factors, on the size of the Cutblock; the number, type and location of equipment being used; and the terrain, topography and viewpoints available to the fire watcher to conduct "watching activities". I am of the view the position taken by Canfor and Barlow does not satisfy the intent of the *Regulation* to "actively watch" and to "reasonably see the site of the high risk activity..." and to "immediately" action the site given the circumstances present in this case.

**119**  Under the wording of the previous *FFPS Regulation* which required a watch keeper to be present "at the worksite" to "watch for sparks and fires", which is arguably more vague that the language of the new *Regulation*, Mr. Justice McEwen in *British Columbia (The Ministry of Forests) v. Pope & Talbot Ltd.*, [*2007 BCSC 1600*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-F5KY-B1VN-00000-00&context=), held at para. 46:

While the attenuations of the courtroom sometimes render what is simple complex, nothing in the evidence affects the plain meaning of the ***Regulation***. Mr. Hancock was obliged to be present at the worksite to watch for sparks and fires, and he was not. He was below the site, behind a screen of trees, and perhaps (although it may not have mattered from that vantage) preoccupied with his machine.

**120**  I do not accept Mr. Vahi's opinion that one fire watcher would have met the standards set forth in the *Regulation*. My opinion in this regard is fortified by the change in the language of the *Regulation* from the predecessor legislation and by the law of ***negligence*** which requires a party to take "special care" or a "very high standard of care" when dealing with issues relating to the risk of fire: *Elk River Timber Company Ltd. v. Bloedel, Stewart & Welch Ltd.*, [*[1941] 3 W.W.R. 97*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6R1-JGPY-X14Y-00000-00&context=) at 124, [*56 B.C.R. 484*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6R1-JGPY-X14Y-00000-00&context=) (B.C.C.A.); *Ayoub v. Beaupré*, [*[1964] S.C.R. 448*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-FJDY-X3B7-00000-00&context=) at 451-452, [*45 D.L.R. (2d) 411*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-FJDY-X3B7-00000-00&context=).

**When did high risk activities cease on the Cutblock on June 18?**

**121**  The Province says the high risk activities ceased when the operators of the machines conducting such activity stopped work. All the operators of equipment involved in high risk activities except Mr. Deveny stopped work at 3:30 p.m. None of these operators carried out a fire watch as required. Had they done so their fire watch relating to those high risk activities would have finished at 4:30 p.m.

**122**  Mr. Deveny stopped harvesting trees with B2 about 3:45 p.m. He then walked B2 some 70-80 metres to the edge of a road where he stalled the saw in a stump at 3:48 p.m. (as noted in his log book); got out of the cab; cleaned the debris off the top of B2; inspected the engine compartment; and then turned the engine off after it had cooled. He was picked up by a co-worker at 4:00 p.m. and left the Cutblock. He did not conduct a fire watch.

**123**  Canfor and Barlow say Mr. Deveny ceased performing high risk activities at 3:45 p.m. when he stopped harvesting and moved to the roadside to park B2. Canfor and Barlow rely on the definition of "high risk activity" in the *Regulation* which excludes mechanical tree felling from the definition if such activity is carried out on "a road, landing, roadside work area or log sort area in the cutblock".

**124**  I agree with the defendants' position that Mr. Deveny stopped performing high risk activities when he stopped harvesting and moved B2 to the side of the road as the location of B2 would then be within a roadside work area where the cut trees are piled and processed for loading onto trucks and excluded under the *Regulation*. The result of so concluding is that the one-hour fire watch period for that high risk activity would commence at 3:45 p.m. and continue until 4:45 p.m.

**What was the probable time of detection of the Fire by a fire watcher had one been posted?**

**Position of the Province**

**125**  The Province and the defendants each retained experts qualified in fire behaviour and modelling to opine as to the time the Fire reached flaming ignition. The Province relies on the opinion evidence of Mr. Armitage, who opined, based on a range of weather variables and size estimates and using a fire behaviour prediction calculator to determine how long it would have taken the Fire to grow to various sizes (as observed by the spotter plane pilot), the start time of flaming ignition was at 4:33 p.m.

**126**  Mr. Armitage came to this estimate of the start of "flame production" by working backwards through various points of the observed estimates of the fire size before any fire suppression activities had been performed and matching those to estimates using the FBP System. He used Mature Jack or Lodgepole Pine as the fuel type ("C-3") in this modelling despite acknowledging there was a component of dead pine in the area due to the mountain pine beetle.

**127**  Mr. Armitage also found the 8.0 ha size estimate was an outlier and was likely to have been incorrect given the difficult of estimating the size of a fire that large given the amount of smoke being produced. After taking that size out of the calculations, Mr. Armitage took an average of the start time based on three weather stations: Holy Cross 2, Vanderhoof Hub and Carrott Lake. He did not take into account the Kluskus weather station as it indicated a start time before the Barlow employees left the site.

**Position of Canfor and Barlow**

**128**  Canfor and Barlow rely on the opinion evidence of Mr. Blackwell that flaming ignition started at or after 4:45 p.m. In arriving at this time estimate, Mr. Blackwell used both S-1 (Jack or Lodgepole Pine Slash) and C-3 fuel types and ran models starting at both 4:30 p.m. and 4:45 p.m. He opined that even starting at 4:45 p.m., the model grew to 0.3 ha in just 32 minutes, indicating that the start time was after 4:45 p.m. Mr. Blackwell also used the Farsite model (used in the U.S.) because of the additional available fuel types and opined that if the Fire started at 4:45 p.m., the Fire would have been 0.4 ha in 30 minutes, or almost double what was observed by the spotter plane. Mr. Blackwell relied on the weather data of Corkscrew for this modelling.

**Discussion**

**129**  Both Mr. Armitage and Mr. Blackwell are experienced fire behaviour modellers. Mr. Armitage co-authored the Weather Guide for the Canadian Forest Fire Danger Weather Rating System and helped develop and test one of the models used by Mr. Blackwell in coming to his conclusions. Mr. Blackwell has 28 years of experience as a practicing Forest Professional in British Columbia and holds a Master of Science specializing in Fire Science.

**130**  I have difficulty accepting either expert's opinion on the precise time the Fire reached the stage of flaming ignition. The problem both faced in conducting their analyses is that the Canadian Fire Behavior Prediction System does not have a fuel type for dead gray beetle kill pine (or for that matter dead pine at any stage). Mr. Armitage's opinion is premised on modelling which has the Fire burning in C-3 fuel (mature (green) jack or lodgepole pine) and on an average of data from the Ministry's weather stations because, in his view, no individual Ministry weather station was representative of the weather on the Cutblock at the time of the Fire.

**131**  I am concerned with the individual data used by Mr. Armitage from Ministry weather stations to arrive at his average fire start time of 4:33 p.m. If the 8.0 ha data point is removed as Mr. Armitage suggests, the average of 4:33 p.m. start time is derived from an average of 4:51 p.m. for Holy Cross 2; 4:23 p.m. for Vanderhoof Hub; and 4:26 p.m. for Carrott Lake. It is inconsistent to rely on Holy Cross 2 for the fire watch requirement but overlook the fact that the modelling for Holy Cross 2 alone would result in a later than 4:45 p.m. fire start time. It also seems to me that by including Holy Cross in the average, the 4:33 estimated start time becomes a very "soft" estimate with is considerable latitude for error.

**132**  I find that the use of C-3 as the fuel base did not accurately represent the fuel in which the Fire smoldered and subsequently ignited. A number of witnesses testified to the prevalence of grey dead pine trees in the areas Mr. Deveny was cutting and generally on the Cutblock as discussed above. Mr. Armitage's use of type C-3 fuel would result in the Fire burning at a slower spread rate than in the fuel actually available to the Fire and would materially affect Mr. Armitage's opinion of the time of flaming ignition. I am persuaded that the use of the average of the Ministry's weather stations also impacted his analysis. The fire behaviour was the result of weather conditions on the Cutblock, not an average of various sites. I conclude I cannot rely on Mr. Armitage's opinion on the start time of the Fire.

**133**  Mr. Blackwell's opinion was based on modelling which included S-1 (jack or lodgepole pine slash) as the fuel type to predict the time of flaming ignition. He agreed in cross-examination the use of S-1 would over-predict fire behaviour on the site. When Mr. Blackwell was shown the photographs taken by the spotter plane pilot in cross-examination he agreed the fire "definitely" would have been "visible to someone on the cut block" at "4:50" or "well before that".

**134**  The pilot's evidence was relied on by both Mr. Armitage and Mr. Blackwell. As stated, smoke from the Fire was first spotted by the pilot at approximately 5:10 p.m. He advised a Ministry investigator in September 2011 he was 8 km away (three flying minutes) when he first spotted smoke from the Fire. He commenced circling between 5:10 and 5:15 p.m. when the size of the Fire was 0.1-0.2 ha.

**135**  I am unable to conclude on the basis of the evidence before me the Fire reached the stage of flaming ignition prior to 4:45 p.m. on June 18, 2010. The evidence of Messrs. Armitage and Blackwell establishes that predicting the start time of flaming ignition based on the modelling and the assumptions upon which each based their respective opinions is an imprecise tool particularly when attempting to determine such start time on the finite facts in this case: that is, whether the Fire reached the stage of flaming ignition prior to the end of the fire watch period at 4:45 p.m. In my view the evidence as to the precise time the Fire ignited is speculative at best. The evidence does not, in my view, establish it was more likely than not that flaming ignition started prior to 4:45 p.m. on June 18, 2010.

**Could a person properly carrying out the Duties of a Fire Watcher, have extinguished, contained or reported the Fire in a manner that would have either eliminated or significantly reduced the damages to the Province?**

**136**  Given the above findings I cannot, on the balance of probabilities, conclude a fire watcher would have been able to effectively action or suppress the Fire.

**137**  The Province says the Fire started shortly after Mr. Deveny left the Cutblock and should have been detected by him had he conducted a proper fire watch as required by the *Regulation*. The onus in on the Province to establish the Fire would have been detectable to a fire watcher within the short period of time he or she had available to detect the Fire before he or she left the site. I am of the view the Province has not established it is more likely than not that the loss it sustained by the Fire was caused by, contributed to or would not have occurred but for the failure of a fire watcher properly carrying out his or her duties to extinguish, suppress or report it.

**What, if any, liability does Canfor or Barlow have to the Province in *negligence*?**

**138**  I have concluded it was more likely than not the Fire was started by a holdover fire caused by lightning on the prior evening than by embers or smoldering debris from B2. The actual place of origin of the Fire has not been determined. While the area the Fire started was generally depicted in the photographs taken by the spotter plane pilot, that area is reasonably large and includes areas of unharvested timber. Even had the Fire started during the period of the fire watch, the actual place of flaming ignition may not have been in the area harvested by Mr. Deveny, but outside and perhaps considerably outside "the site of the high risk activity" the fire watcher was to watch and conduct patrols.

**139**  Mr. Deveny harvested trees in large area on the day of the Fire. The area the fire watcher would have been required to actively patrol would have involved movement from place to place. I am not satisfied a fire watch at those locations would have been able to reasonably been able to detect and been able to action the Fire. The Fire may have commenced in a part of the depicted area obscured by trees and/or by topography. The signs of Fire may not have been apparent: that is, seeing it, smelling smoke or hearing. If the Fire broke into flaming ignition sometime between the time estimated by Mr. Armitage and Mr. Blackwell, say at 4:33 or 4:40 p.m., the fire watcher would have had little if any time to detect it. If the Holy Cross reading was accurate, the fire watch would have left the Cut Block.

**140**  The Province submits that even if there had been a holdover fire, the work Mr. Deveny did on the site on June 18 would have allowed air to access the holdover fire such that it would have flamed and would have likely been detected by Mr. Deveny before he left the Cutblock. In my view the argument is speculative and unsupported on the evidence. Based on all the evidence, including the observations of the spotter plane pilot, the timing of calls from concerned residents, and the opinion evidence of Messrs. Blackwell and Armitage, I am unable to conclude the Province has established the Fire, whether before or after it reached the stage of flaming ignition, would have been detectable to a fire watcher properly performing his or her duties under the *Regulation* up to 4:45 p.m. when the fire watcher would have left the site.

**141**  What is clear from the evidence is that the Fire found a very receptive fuel base in which to smoulder and then to break into flaming ignition and that very soon thereafter the Fire grew quickly, moving from Rank 1 to Rank 4 within a matter of 15 - 20 minutes. While Canfor and Barlow may have been in breach of the *Regulation* for failure to post a fire watcher, I conclude that this breach was not the cause of the damage incurred by the Province. I find neither is liable in ***negligence*** to the Province.

**What, if any, liability does Canfor have to the Province under breach of contract?**

**Indemnity Clause**

**142**  The Province claims, as an alternative remedy, that Canfor is in breach of Clause 11 of the Licence:

11.01 The Licensee must indemnify the Government against and save it harmless from all claims, demands, suits, actions, causes of action, costs, expenses and losses faced, incurred or suffered by the Government as a result, directly or indirectly, of any act or omission of:

1. the Licensee,

...

1. a contractor of the Licensee who engages in any activity or carries out any operation under or associated with this Licence or a road permit, or ...

11.02 For greater certainty, the Licensee has no obligation to indemnify the Government under paragraph 11.01 in respect of any act or omission of:

an employee, agent or contractor of the Government, in the course of carrying out his or her duties as employee, agent or contractor of the Government, or ...

**143**  In order to succeed on a claim under the Indemnity Clause, the Province must establish its losses occurred, as a result, directly or indirectly, of any act or omission of Canfor or Barlow.

**144**  As stated in *Lumbermens Mutual Casualty Co. v. Herbison*, [*2007 SCC 47*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B19W-00000-00&context=) at para. 14:

All the judges in the Ontario Court of Appeal considered that in the interpretation of s. 239, they were bound to apply the "no-fault" test set out in *Amos* [*[1995] 3 S.C.R. 405*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3KC-00000-00&context=). However, for the reasons set out in *Citadel General Assurance Co. v. Vytlingam*, [*[2007] 3 S.C.R. 373*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B19V-00000-00&context=), [*2007 SCC 46*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B19V-00000-00&context=), released concurrently, I believe their interpretation of *Amos* goes too far. *Amos* was a no-fault benefit case. Although the language of the "injuries arising" term in *Amos* is similar to the language of s. 239(1), that phrase does not exhaust the requirements of indemnity insurance. It is simply not enough to find that the use or operation of the tortfeasor's motor vehicle "in *some manner contributes to or adds to* the injury" (*Amos*, at para. 26, cited by Borins J.A., at para. 105). While I agree with the Ontario Court of Appeal that the addition of the "directly or indirectly" language to s. 239 relaxed the causation requirement, nevertheless, *some* causation link must be found and it must constitute a link in an unbroken chain. I agree with the dissenting judgment of Cronk J.A. that here the source of Wolfe's liability to the Herbisons was a tort quite independent of the use and operation of his truck.

[Emphasis in original.]

**145**  As I have found the Fire was more likely than not caused by lightning and that it is more likely that not that a fire watcher, had one been properly posted, would not have detected the Fire within the period of the fire watch, I find the Province has not met the onus of establishing any direct or indirect causal link between the conduct ("act or omission") on the part of Canfor and/or its contractor Barlow and the loss "faced, incurred or suffered". Simply put, I have found that nothing done or not done arising from the harvesting operations being conducted by Canfor and/or Barlow on June 18, 2010 caused or contributed to the Fire. The Province has not established a causal link between the breach and the resulting damage and accordingly its claim under the Indemnity Clause is dismissed.

**146**  Similarly, Canfor argues the Wildfire Act

**Breach of Clause 15.06**

**147**  Section 15.06 of the Licence provides:

15.06 The Licensee must ensure that its employees, agents and contractors comply with the forestry legislation when engaging in or carrying out activities or operations under or associated with the Licence.

**148**  Given the above findings, I find that the breach of contract claim against Canfor with respect to the statutory requirements also fails on the basis of the lack of sufficient proof of causation between the breach of the statutory provision to post a firewatch and the loss caused by the Fire. I do not accept the Province's position that a breach of the *Regulation* by failing to institute a fire watch results in damages being awarded for the loss occasioned by the Fire.

**149**  Given this conclusion it is not necessary to address Canfor's argument that "forestry legislation" as defined in clause 16.02 of the License "includes the *Forest Act*, the *Forest Practices Code of British Columbia Act* and the *Forest and Range Practices Act* and the regulations under those Acts" and that no reference is made to the *Wildfire Act* and the *Wild Fire Regulation.*

**What, if any, liability does the Province have to Canfor in *negligence* for its response to the Fire?**

**150**  Canfor claims damages against the Province for failing to meet the requisite standard of care in failing to recognize the risk posed by the Fire; for failing to develop an appropriate action plan to fight the Fire overnight on June 18 and in the morning of June 19, 2010; and for failing to appropriately assess and assign proper resources to the Fire on the morning of June 19, 2010. Canfor seeks damages against the Province to recover Canfor's losses as a result of the Fire.

**151**  Canfor acknowledges it must establish four elements to succeed in its claim: that the Province owed Canfor a duty of care; that the Province's action breached the standard of care owed to Canfor; that Canfor sustained damage and that such damage was caused, in fact and law, by the Province's breach of the standard of care: *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.

**Province's Response to the Fire**

***June 18, 2010***

**152**  At about the time the pilot was over the Fire, Mr. Scott Elo, a long-time Canfor employee and an experienced firefighter, was notified at home of smoke coming from the area of the Cutblock at 5:23 p.m. by a logging contractor in the area. Mr. Elo reported this to Mr. Robert Montague, the Canfor operations manager for the area, who asked Mr. Elo to check the Cutblock. Mr. Elo did so and called Mr. Montague back about 10 minutes later advising there was a fire on the Cutblock. Mr. Montague immediately contacted Mr. Michael Pritchard, the senior WMB employee for the VanJam Zone.

**153**  Mr. Elo arrived at the Fire site at approximately 6:00 p.m. With the assistance of two contractors he met driving to the site, he commenced moving equipment out of danger. He testified the flames were about 20 feet away from B2 at the time. The three made no attempt to fight the Fire as "it was too big". Photographs he took at the time he arrived show the Fire was a significant one which was growing and spotting in advance of the flaming trees. He described the Fire as burning "hot" and "aggressively".

**154**  The Ministry deployed two initial attack teams from Vanderhoof to the Fire. The first, Nifac 42, headed by Mr. Dave Fleming, arrived at the Fire at approximately 7:04 p.m. The second, Nifac 32, headed by Mr. Arlen Kanary with two crew members, arrived at 7:15 p.m. The Nifac 42 crew was discharged at 9:56 p.m. and returned to Vanderhoof. Mr. Kanary and the two Nifac 32 crew members took control of fighting the Fire.

**155**  Mr. Kanary had a crew of three firefighters. Upon a helicopter arriving at the scene, he and others took a reconnaissance flight and developed a plan to commence the fire guard. His crew could not work (nor is it suggested by the defendants they should have worked) while the air tankers were dropping suppressant nor could they have worked for safety concerns during darkness because of a concern with "danger trees" falling (either caused directly by the Fire or by equipment creating the fire guard).

**156**  Mr. Kanary spent a number of hours the evening of June 18 and on the morning of June 19 conducting a survey of the Fire and an assessment to determine how to best attack the Fire. He did this both by vehicle and by walking the circumference, accessing areas the Fire was actively burning as and where he could. There were areas he could not access as he could hear falling trees. During this period his crew worked on several hot spots outside the fire guard, on one occasion driving a pump truck and running hose to do so.

**157**  The PGFC called for air tanker support at 5:32 p.m. Six air tankers and a "bird dog aircraft" arrived at the Fire at 6:36 p.m. from Kamloops and began dropping fire retardant on the Fire at about 6:42 p.m., making some 15 drops until air activity was discontinued at 9:27 p.m. because of oncoming darkness. When the tankers arrived, Mr. Sommerville, the air attack officer in charge of directing the retardant drops, estimated the Fire was 8 ha in size burning at Rank 3 - 4. When the tankers left, it was estimated to be 18 ha and burning at Rank 1 - 2 in fuel type 3.

**158**  Mr. Sommerville was of the opinion when they left the Fire that evening the air tankers had achieved their objective of boxing in the Fire.

**159**  After the air tankers departed, Messrs. Elo, Kanary and Mikolash, the VanJam Zone Forest Protection Officer, took a reconnaissance flight over the Fire. After the flight, Mr. Elo planned the layout of a machine-constructed fire guard around the circumference of the Fire.

**160**  Mr. Elo testified that by about 9:00 p.m. that evening, the Fire had "laid down". Commencing about 10:00 p.m., Canfor and Barlow employees started constructing the guard with Mr. Elo acting as equipment boss. Mr. Elo did not recall anyone from the Ministry directing him where the fire guard should go. Barlow's equipment operators who had arrived at the Fire broke into two groups and commenced building the guard to tie into existing road spurs, working until shortly before daylight. Their idea was to encircle the Fire to contain it. They were successful in building a large part of the guard until both groups ran into wet ground and had to turn around.

**161**  Neither the equipment crew nor the initial attack crew could actively fight the Fire while the air tankers were discharging retardant. Mr. Kanary testified Nifac 32 could not fight the Fire during darkness for fear of "danger trees" falling and related safety issues.

**162**  The equipment operators who were building the guard created at least two sumps in wetland areas from which water could be drawn. He testified he had expected Ministry firefighters would lay hose that evening and that water would have been pumped on the Fire on the morning of June 19, 2010.

***June 19, 2010***

**163**  Mr. Elo left the Fire about 8:00 a.m. after talking to Mr. Stephen Nevidon, a Canfor employee who relieved him as equipment boss, about a plan to continue the guard.

**164**  Mr. Elo testified when his crew had finished work on the morning of June 19, he "felt really good that we had it pretty much contained" by the fire guard. When the morning crew arrived he said the Fire was "laid down, small scattered fires, smoky". He said the Fire was burning at Rank 1. He testified it was his expectation after he left that "hose lays would have been put in and water would have been put on it". He said he did not see Ministry crew members take any suppression action that evening or before he left in the morning.

**165**  As local unit crews were deployed elsewhere, about 8:00 p.m. on June 18 the Ministry assigned the Burns Lake unit crew, which was the nearest available unit crew and composed of 19 firefighters and lead by Mr. Mike Allen. The unit crew was directed to be at the site of the Fire by 9:00 a.m. on June 19. The unit crew assembled at their base in Burns Lake at 5:30 a.m. that morning and were directed to arrive at the Vanderhoof base by 8:00 a.m. with their vehicles (including a water delivery system, hose and firefighting equipment), where they received a briefing and then left for and arrived at the site of the Fire at 9:00 a.m. with their vehicles (including a water delivery system, hose and firefighting equipment). There they received a briefing and then left for and arrived at the site of the Fire at 9:00 a.m.

**166**  When the unit crew arrived, Mr. Kanary was away from the staging area conducting a survey of the Fire so he could report to and pass on control of the Fire to Mr. Allen, the leader of the unit crew. A helicopter, which had been on site the previous day and had been directed to return by 9:00 a.m., for an unexplained reason did not arrive at the site until 10:00 a.m. The briefing between Mr. Kanary and Mr. Allen occurred between 10:00 and 11:00 a.m. during which Mr. Allen, who was concerned about sending his crew in to fight the Fire without having a look at it from the air, then took a reconnaissance flight with Mr. Kanary when the helicopter arrived.

**167**  The flight gave Mr. Allen an overview of the Fire and how it was behaving. Following the flight, Mr. Allan and his three squad leaders drove into the Fire area in a vehicle as far as they could. Mr. Allen testified the Fire at that time was burning at Rank 1 with spots of Rank 2. He was optimistic there was an opportunity to conduct suppression activities and commenced organizing a plan to so do and how and where to apply water. He noted the northeastern portion of the Fire was exhibiting more aggressive behaviour and that there was more fire guard to be built. Mr. Allen then then deployed his crew.

**168**  At 12:20 p.m., one of the unit squad bosses reported the Fire had progressed across the fire guard. Mr. Allen returned to the staging area, took another helicopter flight and observed "a real change in fire behavior" as the fire had escaped the guard and the entire eastern flank had escalated. He ultimately told his unit to pull back and disengage for safety concerns. Mr. Allen requested air tanker support and four air tankers and three bird dog aircraft worked unsuccessfully to try to contain the Fire from 2:30 to 6:10 p.m. on the afternoon of June 19.

**Did the Province owe Canfor a duty of care to minimize the defendants' loss or damage as a result of the Fire?**

**169**  The Province denies it owes a duty of care "to protect the company's interest in Crown timber consumed by the Fire": that the facts do not meet the test of proximity or the policy considerations set out in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) and *Cooper v. Hobart*, [*2001 SCC 79*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M49J-00000-00&context=); *Childs v. Desormeaux*, [*2006 SCC 18*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B16R-00000-00&context=).

**170**  The first step in the *Anns* analysis is to determine whether the court has previously recognized the Province owes a duty of care under similar circumstances. In *British Columbia v. Canadian Forest Products*, [*2002 BCCA 217*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F900-G0N2-00000-00&context=), rev'd on other grounds [*2004 SCC 38*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B11G-00000-00&context=) [*Canfor #1*], the court recognized a standard of care on the Province in fighting wildfires. In *Canfor #1* the Court of Appeal upheld the decision of the trial judge that the Province had breached its standard of care. The question whether the Province owed a duty of care was not argued but by implication both the trial judge and the Court of Appeal must have concluded such a duty existed.

**171**  The Province has established a significant organizational structure through the Ministry's Wildfire Protection Program the mandate of which is to "provide wildfire management and emergency response support to protect life and assets, particularly forest and grass lands, as provided for under legislation, government plans and cost sharing arrangements": (British Columbia Forest Service: Protection Program Strategy, January, 2006 at p. 7). In my view the relationship between the parties does meet the proximity test. Certainly a significant part of the Province's responsibilities is to protect Crown lands and for that purpose the Province has enacted the *Act* and *Regulation*.

**172**  The Province is, however, more than a regulator, as in many of the cases involving the *Anns* test. It grants licences to harvest timber in exchange for a significant economic return: stumpage fees. The Province and the defendant Canfor are in an interdependent and mutually advantageous economic relationship. Each has an interest in maintaining Crown land for harvesting into the future. Accordingly, each has a vested interest in preventing and in fighting wildfires. Their relationship is a cooperative one.

**173**  In the Prince George region, the Province and the licensees and their contractors cooperate in providing different resources to the fighting of wildfires. Licensees and contractors provide their equipment to assist and suppress any wildfire which occurs within a certain distance from the location of their equipment while the Ministry deploys its firefighting resources from established centres, being available aircraft and firefighters with firefighting equipment. The Province, of course, does not have unlimited resources and its deployment of resources and response to any given wildfire must, of necessity, depend upon many factors including the nature of the Fire season and the potential for wildfires in various regions of the Province; the availability of firefighting resources for deployment at the time of any given wildfire; and the ongoing assessment each individual wildfire.

**Did the Province's response to the Fire satisfy the requisite standard of care?**

**174**  In support of its argument that the Province was negligent in failing to devote available resources to the Fire, there are two basic principles on which Canfor relies: the failure of provincial firefighters to apply water at an earlier time than they did and the failure to apply resources early on the morning of June 19 when the Fire was "laid down" before it jumped the fire guard about noon that day.

**175**  Particularly, Canfor says the Province failed to:

1. recognize the risk presented by the Fire;
2. develop and implement an appropriate action plan to fight the Fire overnight on June 18, 2010, and in the morning of June 19, 2010;
3. effectively and/or appropriately deploy the available ground crews and resources to support the fire guard and action the fire on the morning of June 19, 2010; and
4. requisition adequate and/or appropriate additional resources, and in particular a bucketing helicopter, to be available in a timely manner on the morning of June 19, 2010.

**176**  Canfor says the Province was aware or should have been aware a predominant fuel in which the Fire was burning was grey attack pine and standing green spruce, both of which had fast spread rates; that it should have been clear from the Fire's behaviour the evening of June 18 that additional ground crews, machinery and air support would be required for June 19, particularly as the weather was forecasted to be similar and the Fire could be expected to behave in a similar manner.

**177**  Canfor says the Province failed to develop and implement an initial attack plan to attack the Fire during the early morning of June 19, a period acknowledged by all witnesses, expert and lay, to be a period of lessened fire behaviour and the best opportunity to attempt to contain and prevent a wildfire from spreading.

**178**  The applicable standard of care is whether there is a "substantial departure from the basic principles of firefighting": *Canfor #1* at para. 38, citing *Hammond v. Wabana (Town Council) et al.* [*(1995), 133 Nfld. & P.E.I.R. 116*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-T8W1-F1H1-22N4-00000-00&context=) at para. 186 (Nfld. S.C.).

**179**  In my view it is important in applying the standard of care to take particular recognition of the words "substantial" and "basic principles". As demonstrated in this case, there are many factors that determine wildfire behaviour. Wildfires are powerful, dangerous and unpredictable. Considerable discretion must be granted to those experienced firefighters who are on the ground at the site of the fire in making decisions on how, where and when to fight the fire. Those decisions must take into account developing conditions on the ground, making assessments, developing the plan to fight the fire, having regard to the preeminent consideration of safety for the firefighters involved and having proper firefighting resources.

**180**  I find proper resources were available and were devoted to fight the Fire on the evening of June 18, 2010. The Province responded promptly when it was notified by the spotter plane of the Fire. The Ministry initially responded with two initial attack teams, one lead by Mr. Kanary with two firefighters and a second, led by Mr. Fleming.

**181**  An appropriate plan to have Barlow's equipment place a fire guard around the perimeter of the Fire was developed in a timely manner. The fire guard was finished by the relief crew of equipment operators on the morning of June 19.

**182**  The Fire was actioned by air tanker resources in a timely way on June 18 dispatched from the PATC in Kamloops and was, by the end of flying time that day, contained to about 18 ha. Mr. Sommerville, the bird dog officer in charge of the air attack, testified the Fire was one of the largest fires he had been able to box in in his career and that the goal was generally to try to contain a fire at or below 4 ha in size.

**183**  I do not accept Canfor's position the initial attack crew under Mr. Kanary could have taken action which would have effectively assisted in supressing the Fire the night of June 18 and morning of June 19.

**184**  While there are undoubtedly some actions, when viewed in hindsight, the Province may have done differently, in my view Canfor has not established the Province has breached the standard of care as set out in *Canfor #1*; that is, that the Province's efforts to suppress the Fire were a substantial departure from the basic principles of firefighting.

**185**  Canfor says the Ministry was negligent in not putting water on the Fire the evening of June 18 and particularly the morning of June 19. The early deployment of water on fire is recognized as a basic principle of firefighting. As noted, I accept there was limited opportunity to put water on the Fire the evening of June 18 although Mr. Kanary's crew did manage to get water to at least one hot spot outside the fire guard that evening and on the morning of June 19. Mr. Kanary's initial attack crew was composed of three persons. While there was delay deploying the unit crew, it was essential Mr. Kanary complete his assessment of the state of the Fire before turning control over to Mr. Allen and it cannot be said Mr. Allen's decision to take an aerial reconnaissance of the Fire was unreasonable given the Fire's size and growth overnight and his responsibility for the safety of his crew. The evidence was that process of change of command can take up to two hours depending on the size of the fire.

**186**  Canfor submits the Province was negligent because it failed to recognize the fire would behave on June 19 in the same manner it had behaved on June 18 because of the fuel type and the weather, which was predicted to be similar that day. I find the Province and its firefighters acted reasonably given the circumstances they were presented with on June 19 as described above. The fact the helicopter did not arrive on site until 10:00 a.m. is a delay which cannot be attributed to the Province.

**187**  I am of the view to the extent Mr. Guyan's opinion, relied on by the defendants, is critical of the Province's response to the fire because there was "...minimal or no fire suppression by the [Province] ground resources during the evening and night of June 18th and delayed fire suppression actions with insufficient resources assigned on the morning of the 19th," such opinion is hindsight and does not reflect the efforts taken by Mr. Kanary and Mr. Allen to assess the Fire and how to attack it safely.

**Summary**

**188**  To summarize, I have found:

1. The Fire was started by lightning and not by the operation of B2;
2. A fire watch was required commencing at 3:45 p.m. on June 18, 2010 for a one hour period;
3. The fire watch was required at the site of the high risk activity in the areas B2 operated on June 18, 2010;
4. The Province has not proved it was more likely than not that even had such fire watch been conducted, he or she would have discovered the Fire and hence been able to action or report it prior to the expiry of the fire watch period;
5. Canfor is not liable to the Province for breach of contract;
6. The Province owes a duty of care to the defendants; and
7. Canfor has not established the Province's conduct in fighting the Fire constituted a substantial departure from the basic principles of firefighting.

**189**  Should the parties be unable to agree on the issue of costs they have liberty to apply within thirty days of the issuing of these reasons.

B.M. GREYELL J.

\* \* \* \* \*

**CORRECTION**

Released: July 21, 2016

Please be advised that the attached Reasons for Judgment of Mr. Justice Greyell dated July 7, 2016 have been corrected as follows:

On the front page K.E. Webber has been added as Counsel for the Defendant and Third Party, Canadian Forest Products Ltd.; and

On the front page, the spelling of the name H.A. Bromly (Counsel for Barlow Lake Logging Ltd.) is a typographical error and has now been corrected to read as H.A. Bromley.

**End of Document**

[***Westcoast Landfill Diversion Corp. v. Cowichan Valley (Regional District), [2009] B.C.J. No. 122***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B119-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Nanaimo, British Columbia

S.J. Shabbits J.

Heard: July 31, August 1-3, 7-10, 13-17, 20, 21-24,

27-28, September 4, 17-21, 24-28, October 9-12, 15-19,

22-26, 29-31, November 1-2, 5-9, 2007, January 29-31,

February 1, 4-8, 11-13, June 23-25, 2008.

Judgment: January 30, 2009.

Docket: S45757

Registry: Nanaimo

**[2009] B.C.J. No. 122** | [*2009 BCSC 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DXHD-G2SP-00000-00&context=) | [*55 M.P.L.R. (4th) 208*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DXHD-G2SP-00000-00&context=) | [*41 C.E.L.R. (3d) 8*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DXHD-G2SP-00000-00&context=) | [*2009 CarswellBC 141*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DXHD-G2SP-00000-00&context=) | [*174 A.C.W.S. (3d) 264*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-DXHD-G2SP-00000-00&context=)

Between Westcoast Landfill Diversion Corp., Plaintiff, and Cowichan Valley Regional District, Richard Hughes, John Middleton, Lorne Duncan, Derek York and Frank Raimondo, Defendants

(495 paras.)

**Case Summary**

**Environmental law — Environmental legislation — Pollution control legislation — Enforcement and compliance — Action by recycler for damages from municipality for breach of contract, *negligence*, negligent misrepresentation, unlawful interference with economic relations and defamation dismissed — Municipality never contracted with recycler to provide it with materials if facility built — No *negligence* in enacting and enforcing waste bans and bylaws — Contacting recycler's customers to request stop to haulage of non-permitted waste to recycler not actionable as recycler had no right to earn from dealing with non-permitted wastes — No defamation on municipality's part based on statements by its officers against recycler in media.**

**Municipal law — Powers of municipality — Regulation of property and activities — Environmental — Garbage and recycling collection and disposal — Nuisances — Action by recycler for damages from municipality for breach of contract, *negligence*, negligent misrepresentation, unlawful interference with economic relations and defamation dismissed — Municipality entitled to initiate rezoning of recycler's property and to enact bylaw restricting activities on property in response to complaints about smells coming from recycling facility that were not addressed by recycler.**

**Municipal law — Bylaws and resolutions — Enactment of bylaws — Enforcement of bylaws — *Negligence* — Action by recycler for damages from municipality for *negligence* dismissed — Municipality not negligent in enacting and publishing bylaws and bans on disposal of commercial organics.**

**Municipal law — Contracts — Who has authority to bind municipality — Action by recycler for damages from municipality for breach of contract dismissed — Municipal director lacked authority to contract with recycler to ensure bylaws and resolutions enacted to provide recycler with waste products to deal with.**

**Municipal law — Actions by and against — Actions against municipality — Action by recycler for damages from municipality for breach of contract, *negligence*, negligent misrepresentation, unlawful interference with economic relations and defamation dismissed — Municipality never contracted with recycler to provide it with materials if facility built — No *negligence* in enacting and enforcing waste bans and bylaws — Contacting recycler's customers to request stop to haulage of non-permitted waste to recycler not actionable as recycler had no right to earn from dealing with non-permitted wastes — No defamation on municipality's part based on statements by its officers against recycler in media.**

**Municipal law — Liabilities of municipalities — Contractual — *Negligence* — Bylaw enforcement — *Negligence* misrepresentation — Vicarious liability for others' actions — Officers and employees — Action by recycler for damages from municipality for breach of contract, *negligence*, negligent misrepresentation, unlawful interference with economic relations and defamation dismissed — Municipality never contracted with recycler to provide it with materials if facility built — No *negligence* in enacting and enforcing waste bans and bylaws — Contacting recycler's customers to request stop to haulage of non-permitted waste to recycler not actionable as recycler had no right to earn from dealing with non-permitted wastes — No defamation on municipality's part based on statements by its officers against recycler in media.**

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| --- |
| Action by Westcoast against the Cowichan Valley Regional District for damages for breach of contract, ***negligence***, negligent misrepresentation, unlawful interference with economic relations and defamation. Westcoast constructed a recycling facility on property within the District, claiming a Director of the District, Hughes, promised the District would ensure a supply of organic wastes to the facility for production by adopting bylaws and resolutions. The District denied it made any representation to induce Westcoast to build its facility. The District enacted a waste ban on commercial organics subsequent to the construction of Westcoast's facility and published the ban, but Westcoast claimed the ban was not properly implemented or enforced. At one point, the District threatened to rezone Westcoast's property. It also contacted customers which had been hauling certain organic wastes to Westcoast, instructing them to stop. It subsequently enacted a bylaw prohibiting the operation of recycling facilities unless they complied with certain regulations with respect to enclosures and leachate control. It enacted the bylaw in response to numerous complaints from neighbours of the Westcoast facility about offensive odour emanating from the facility. The bylaw effectively put Westcoast out of business because it could not afford to make the necessary renovations to its facility. During the same time frame, certain District directors published comments in the media disparaging Westcoast.  HELD: Action dismissed.  Westcoast failed to establish the parties had entered into a contract. The District lacked the authority to agree to enact the proposed bylaws and resolutions. The District had a legitimate interest in taking measures to reduce the nuisance to Westcoast's neighbours caused by the escape of odour from its facility. It had the authority to enact bylaws to achieve this end. The District was not vicariously liable for Hughes' statements. It had no duty to comment upon his statements and was not deemed to have adopted them. The District itself made no representations it would enforce bans or designate Westcoast as one of only two recipients of organic waste. Westcoast did not act under any representation by the District in deciding to build its facility. It chose its location based on location and price. Westcoast had no actionable claim in relation to the District's enforcement of its waste bans or its initiation of the rezoning of Westcoast's property. The ban on commercial organic wastes was not implemented for the benefit of Westcoast. The District took sufficient steps to ensure the ban was observed. The District did not interfere with Westcoast's economic interests by seeking to rezone its property because the decision to do so was made for a valid reason, to prevent further problems with odour. Westcoast was not permitted to deal with certain wastes at the time the District informed its customer to stop hauling such wastes to Westcoast, so no argument could be made out for economic loss. The District was not responsible for any statements made to the press by its directors acting in their personal capacities as politicians. |

**Statutes, Regulations and Rules Cited:**

British Columbia Rules of Court

Business Corporation Act, *SBC 2002, CHAPTER 57*

Bylaw No. 2108, (Regional District of Cowichan), Condition 3(e), Condition 3(f), Provision 5, Provision 5(b), Schedule B

Bylaw No. 2570, (Regional District of Cowichan)

Community Charter Transitional Provisions, SBC 2003, CHAPTER 52, s. 353

Company Act, [*RSBC 1996, CHAPTER 27*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FF1-DXWW-20KM-00000-00&context=)

Crown Proceeding Act, *RSBC 1996, CHAPTER 89*

Environmental Management Act, *SBC 2003, CHAPTER 53*

Environmental Management Regulations, B.C. Reg. 722/2004

Local Government Act, *RSBC 1996, CHAPTER 323*

Municipal Act, RSBC 1996, CHAPTER 323, s. 174, s. 791, s. 791(6), s. 791(7)(e), s. 799

Waste Management Act, [*RSBC 1996, CHAPTER 482*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FK1-FJM6-60VK-00000-00&context=)

**Counsel**

Counsel for the Plaintiff: R.S. Tindale, J.M. Duncan.

Counsel for the Defendants: D.E. Gruber, R.W. Millen, J.L. Oliver.

**Reasons for Judgment**

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| **S.J. SHABBITS J.** |

**Introduction**

**1**  The plaintiff ("Westcoast") is a British Columbia Company. In 1999 and 2000, Westcoast constructed a Herhof in-vessel composting facility within the Cowichan Valley Regional District ("CVRD"). The venture was a financial disaster. Westcoast now seeks to recover from CVRD all of what it lost and other damages, including loss of profit and punitive damages.

**2**  Westcoast has discontinued its claim as against the five personal defendants. Westcoast now proceeds against CVRD alone for negligent misrepresentation, for breach of contract, for unlawful interference with economic relations, and for ***negligence***. Westcoast claims punitive damages because it alleges that CVRD acted in bad faith.

**3**  CVRD denies that it entered into an agreement with Westcoast and CVRD denies that it made any misrepresentations to Westcoast. Although CVRD concedes that the actions of its personnel minimally interfered with Westcoast's economic relations, CVRD denies that it acted unlawfully or that it intentionally interfered with Westcoast's economic relations. CVRD also denies that it is liable to Westcoast in ***negligence***. Furthermore, CVRD submits that Westcoast is advancing claims that are not actionable against it and that Westcoast is advancing claims that are unsound in law. Finally, CVRD submits that it acted in the public interest, in good faith and without malice.

**4**  A list of acronyms used in these reasons or used in the exhibits referred to in these reasons is at Appendix A.

**The Plaintiff**

**5**  571873 B.C. Ltd. was incorporated on September 17, 1998 under the *Company Act*[**1**](#Forward_fnref_fnr-1) of British Columbia.

**6**  571873 B.C. Ltd. changed its name to Westcoast Landfill Diversion Corp. on July 5, 1999.

**7**  Westcoast Landfill Diversion Corp. changed its name back to 571873 B.C. Ltd. on May 9, 2000.

**8**  Meadowlark Technologies Inc. was incorporated on December 13, 1999 under the *Company Act* of British Columbia.

**9**  597427 B.C. Inc. was incorporated on December 13, 1999 under the *Company Act* of British Columbia.

**10**  597427 B.C. Inc. changed its name to Westcoast Landfill Diversion Corp. on May 15, 2000.

**11**  This proceeding was commenced on July 10, 2003 by Westcoast Landfill Diversion Corp. incorporation number BC0597427.

**12**  571873 B.C. Ltd. incorporation number BC0571873 and Westcoast Landfill Diversion Corp. incorporation number BC0597427 were amalgamated as one company under the *Business Corporation Act*[**2**](#Forward_fnref_fnr-2) on March 23, 2006 under the name Westcoast Landfill Diversion Corp. and under the amalgamation (incorporation) number BC0752546.

**13**  Westcoast Landfill Diversion Corp. incorporation number BC0752546 and Meadowlark Technologies Inc. incorporation number BC0597425 were amalgamated as one company under the *Business Corporation Act* on March 28, 2007 under the name Westcoast Landfill Diversion Corp. and under the amalgamation (incorporation) number BC0786784.

**Westcoast's Principals**

**14**  Mr. Denis Maurice Cuerrier, Ms. Marie Claude Boucher and Mr. Alan Brooks were principals of Westcoast or of one or more of its antecedent corporations.

**Denis Maurice Cuerrier**

**15**  Mr. Cuerrier was born on May 10, 1964.[**3**](#Forward_fnref_fnr-3) He received a bachelor's degree in Economics from the University of Ottawa in 1986. He obtained employment with the Canadian Dairy Commission in human resources activities in 1986. By 1988 he was undertaking assignments for Agriculture Canada within its human resources department as a human resources officer. He advanced in that department and was a senior human resources officer by the time he left Agriculture Canada in 1992.

**16**  After leaving Agriculture Canada, Mr. Cuerrier became manager of human resources at Energy, Mines and Resources Canada. He described his responsibilities as manager of human resources at Energy, Mines and Resources. It was a senior position. He was responsible for 35 employees and for a budget of close to one million dollars. Following an amalgamation of departments in 1995, Mr. Cuerrier received a buy out and severance package. Under the terms of his buy out, Mr. Cuerrier was not allowed to work for the Federal Government for two years.

**17**  Prior to leaving in 1995, Mr. Cuerrier was involved in the organization of a trade fair. There he met Ms. Boucher and Mr. Brooks. They were there because HUWS was participating in the event. After the buy out, Mr. Cuerrier moved to Victoria to do consulting work, but also became a commissioned sales agent for HUWS.

**18**  Mr. Cuerrier explained that he had received training in Canadian securities, and in real estate. In Victoria he did contract consulting work for the Provincial Government. From 1995 to 1997 he sat on a composting committee with the CRD. He said that one of the purposes of that committee was to assess why a composting facility had not yet been constructed within the CRD.

**19**  Mr. Cuerrier went to trade shows, participated in conferences and seminars, and generally attempted to become knowledgeable in waste disposal. One of his objectives was to sell facilities for HUWS. He said that although he generated interest from municipalities, he did not complete any sales. Mr. Cuerrier testified that by early 1998 he understood waste management in the CRD and he decided to locate a composting plant in the CRD.

**Marie Claude Boucher**

**20**  Ms. Boucher testified that she is 59 years of age[**4**](#Forward_fnref_fnr-4). She graduated from the University of Ottawa with a Bachelor of Arts degree, and received a law degree from the University of Manitoba in 1972. She articled in Manitoba for six months and was then employed there as a lawyer for a further six months. She joined the Department of Justice in Ottawa in 1973. While at the Department of Justice, she worked with the Privy Council office drafting regulations and statutes for the Government of Canada and for its various departments. She gave opinions on interpretations of regulations and statutes to government departments and to the Privy Council.

**21**  She transferred to the Department of Supply and Services where she was assigned as legal counsel to the Canadian Commercial Corporation under the administration of the Department of Supply and Services. She handled bids received and prepared bid proposals on behalf of Canadian Corporations to bid on foreign contracts, usually with foreign governments. She did that until 1978, when she left to work as a corporate lawyer with Magna International. At Magna she handled government programs. She prepared proposals for the Government of Canada and acted for Magna in its negotiations with the Federal Government. In 1984 she went to work as a broker for Burns Fry Limited in Toronto. She worked as a securities broker until 1988 when she set up a wood recycling plant with her brother-in-law within the regional municipality of Peel. Ms. Boucher worked with Mr. Allan Brooks in the wood recycling plant.

**22**  In 1991 Ms. Boucher travelled to Germany with Mr. Brooks and became familiar with Herhof composting technology.

**23**  After returning from Germany, Ms. Boucher changed the name of her company from J.C. Environmental to HUWS Corporation. She explained that that was an acronym for Herhof Urban Waste Systems. She thought the name change was made about 1994 or 1995. After that Ms. Boucher became involved in the promotion of Herhof's composting technology in North America through her own corporate vehicle which, in turn, had a licensing arrangement with Herhof of Germany. Ms. Boucher said that by 1994 or 1995 HUWS had purchased exclusive rights to market the Herhof composting system in Canada. She said that she negotiated an option on rights for the whole of the United States by about the end of 1995.

**Allan Ward Brooks**

**24**  Mr. Brooks said at trial that he was 44 years of age and resident in Duncan.[**5**](#Forward_fnref_fnr-5) Mr. Brooks obtained a degree in Chemical Engineering in 1997 from the University of Waterloo. He was in a co-op program at the University of Waterloo, where he received a broad range of training experience, including employment in plastics testing, developing toners for copy machines, and upgrading computerization of sensors at a petroleum refiner and at a paper mill.

**25**  In 1989, Ms. Boucher hired Mr. Brooks for employment at the waste wood recycling project in which she was involved. Mr. Brooks was employed for about a year to help complete its construction.

**26**  Ms. Boucher then hired him again for her company, J.C. Environmental. Mr. Brooks travelled with Ms. Boucher to Germany and over a period of time became familiar with waste management and Herhof's in-vessel composting technology.

**27**  Mr. Brooks was involved with a J.C. Environmental project in the Region of Peel, Ontario, in which J.C. Environmental installed two of the Herhof composting biocells. That project finished in the mid-90s. Mr. Brooks became involved in various promotional activities for his employer company which eventually changed its name to HUWS. Mr. Brooks became its vice president. He said that Ms. Boucher dealt with financial matters and that he dealt with technology issues. He was not a shareholder of HUWS.

**28**  Mr. Brooks also testified that he met Mr. Denis Cuerrier at the job fair in Ottawa and that Mr. Cuerrier became a commission sales representative for HUWS. Mr. Brooks travelled to Western Canada on more than one occasion and involved himself in various proposals being advanced by Mr. Cuerrier.

**29**  Mr. Cuerrier showed Mr. Brooks the Cobble Hill site that is the subject of these proceedings in about May 1999. Mr. Brooks then re-attended in British Columbia in connection with the Cobble Hill project at about the end of October. He said that Meadowlark Technologies Inc. was incorporated around the end of 1999 as a vehicle for construction of the Cobble Hill plant. Mr. Brooks said that he was the majority shareholder of Meadowlark. Mr. Brooks became involved in the Cobble Hill project on a full-time basis in about February 2001.

**The Defendant**

**30**  CVRD is a regional district incorporated by Letters Patent pursuant to the *Local Government Act* of British Columbia[**6**](#Forward_fnref_fnr-6).

**31**  CVRD has a professional staff.

**32**  There are four municipalities and nine electoral areas within the CVRD.

**33**  The municipalities are the City of Duncan, the District of North Cowichan, the Town of Lake Cowichan and the Town of Ladysmith.

**34**  Each of the nine electoral areas is identified by a letter and by a geographical name or names.

**35**  The plaintiff constructed its facility within Area C, Cobble Hill.

**36**  There are fifteen directors on the CVRD Board. There is one director elected from each electoral area and six directors who are appointed by the municipalities.

**37**  There were minutes kept of all board meetings. The minutes were available to the public (other than in camera minutes).

**38**  Mr. Frank Raimondo was the Chief Administrator of CVRD from 1983 until his retirement at the end of December, 2007. Mr. Raimondo attended meetings of the board, serving as advisor to the board chair.

**39**  Mr. Raimondo gave evidence explaining CVRD's structure and its operation while he was Chief Administrator. He testified that regional districts are quite different than are other local government municipalities.

**40**  For example, the chief executive officer of a municipality is a mayor elected at large. The chairperson of the board of a regional district is elected by the directors of the board. The chairperson remains the director or representative of an electoral area or municipality.

**41**  Directors of a regional district do not always have a common interest on any given issue. A common interest on issues is typical for the members of a municipal council whose members are elected at large.

**42**  Mr. Raimondo said that the elected area directors of a regional district have more autonomy and exercise more independence than do council members of a municipal council.

**43**  CVRD had standing committees established by bylaw. A committee established by bylaw had any authority that may have been delegated to it by the bylaw.

**44**  The chairperson of CVRD established other committees by announcing them. The number of those committees and their names and their mandates and their membership changed from year to year. Those committees were advisory to the board. They made recommendations to the board. They had no delegated authority. The chairperson could not delegate board authority.

**45**  One of CVRD's committee's in 1999 was CRRC.[**7**](#Forward_fnref_fnr-7) CRRC's authority extended only to making recommendations to the board for its consideration. The general terms of reference of CRRC were:

To review composting and recycling initiatives and develop a strategy for the board's consideration on the implementation, regulation and monitoring of the processing of organic material and recyclables.[**8**](#Forward_fnref_fnr-8)

**46**  The members of CRRC for 1999[**9**](#Forward_fnref_fnr-9) were directors J. Clarkson, J. Allan, R. Hughes, R. Hutchins, M. Marcotte and D. Robinson. Mr. Clarkson was chairperson.

**47**  Mr. Raimondo testified that he had twelve 12 department heads who reported to him. Each of them was responsible for a department. The departments included engineering services and development services. Each department head was responsible for the committee(s) whose mandate fell within their department. Each department head attended committee meetings serving their role of advisor to the committee chair. Mr. Raimondo also frequently attended committee meetings as an observer.

**48**  There were minutes kept of all committee meetings. The minutes were available to the public (other than in camera minutes).

**CVRD's Personnel**

**49**  Mr. Frank Raimondo was the Chief Administrator of CVRD from 1983 until his retirement at the end of December, 2007.

**50**  Mr. Derrick Stanley York was the manager of engineering services. He is now retired.

**51**  Mr. Brian William Dirk Dennison was the deputy manager of engineering services. He is now its manager.

**52**  Mr. Thomas Robert (Tom) Anderson is the manager of development services.

**53**  Mr. Robert Alan (Bob) MacDonald is the deputy manager of solid waste and environment.

**54**  Mr. Richard Hughes was the elected director for Area C, Cobble Hill from December of 1992 to November of 2002.

**55**  A number of CVRD's former or present directors testified at the trial. Those directors included Mr. Hughes, Mr. Joseph Glendon (Joe) Allan, Mr. John Clarkson, Mr. Robert Roy (Rob) Hutchins, Ms. Mary Marcotte and Mr. Donald Harvey (Don) Robinson.

**The Plaintiff's Final Submissions**

**56**  Westcoast particularized its claims in its pleadings. Its pleaded claims are noted in the introduction of these reasons.

**57**  In its final submissions, Westcoast summarized its claims as follows:

Negligent Misrepresentation

1. This claim focuses on the representations made by the CVRD that they would do the following:
2. designate the plaintiff and IBR as the only authorized designated sites to accept organic waste,
3. implement and enforce a ban on industrial, commercial and institutional organic waste and prohibit its facilities from accepting such waste coincidental with the opening of the plaintiff's facility.
4. implement a prohibition-style ban on yard and garden waste and enforce the ban coincidentally with the opening of the plaintiff's facility, and finally
5. ensure through what has been characterized as an Administrative Agreement that the waste would flow to Westcoast.

***Negligence***

1. This claim deals primarily with the defendant's failures to enforce the bans in a timely and effective manner. Promises were made to Westcoast regarding the implementation of bans before the plant was built. These same promises were made again during the period of construction to the plaintiff and the plaintiff's financiers. The promises made were essentially that CVRD would ban and refuse to accept ICI organics and that CVRD would ban and refuse to accept yard and garden waste. A system of enforcement was enacted by bylaw in late 2000 for this purpose. With respect to ICI, the material was prohibited by the bylaw and a set of policies were put in place to govern enforcement. These policies of enforcement were ignored and were negligently applied when they were followed which resulted in clear loss of ICI feedstock by the plaintiff. With respect to the yard and garden, the material was never termed as "prohibited". Instead, it was classified as recyclable. As a result, yard and garden continued to be deposited at CVRD transfer stations and "small loads" could be deposited with normal garbage again resulting in a clear loss of potential feedstock by the plaintiff.

Interference with Economic Relations

1. This claim deals with the actions of CVRD to stop Westcoast from accepting biosolids despite the fact that Westcoast had the appropriate zoning in place to do so. These include the threatened down-zoning of Westcoast, the contacting of the Capital Regional District and having it suspend business dealings with Westcoast for a period of time, the implementation and cancellation of the 90 day Pilot Project with the District of North Cowichan and the various acts of defamation in regional newspapers and one town hall meeting. Most if not all of this occurred because of alleged odour issues which have not been proven and even though the CVRD clearly knew it had no jurisdiction over such matters.

**Breach of Contract**

**58**  The original Statement of Claim was filed on July 9, 2003. It does not directly plead that a contract was concluded between Westcoast and CVRD. However, it does plead that CVRD represented it would do specific things to ensure Westcoast's financial viability.[**10**](#Forward_fnref_fnr-10)

**59**  On August 8, 2003, Westcoast delivered particulars of the original Statement of Claim.[**11**](#Forward_fnref_fnr-11) In those particulars, Westcoast claimed that it had been promised a commercial organics ban and a yard and garden waste contract in exchange for constructing the facility and fixing a tipping fee at $5.00 below that charged at Bings Creek (one of CVRD's waste facilities). Westcoast did not claim that CVRD had promised authorized designation status nor did it claim that Westcoast had promised a total organics ban.

**60**  An Amended Statement of Claim dated June 8, 2003 was filed on July 9, 2003.[**12**](#Forward_fnref_fnr-12)

**61**  In paragraph 40 of the Amended Statement of Claim Westcoast claimed that after April 1999, Hughes, York and Raimondo, on behalf of CVRD, agreed to do a number of things. In paragraph 42, Westcoast alleged that it relied on those commitments in making the decision to locate its facilities in CVRD.

**62**  In paragraphs 148 and 149 of the Amended Statement of Claim, Westcoast claimed that Hughes, York and Raimondo, with the knowledge of and on behalf of CVRD, intentionally, recklessly, dishonestly or negligently made "the aforesaid commitments", and that the commitments constituted a collateral warranty or collateral contract.

**63**  Westcoast's Second Further Amended Statement of Claim was filed on July 14, 2006.[**13**](#Forward_fnref_fnr-13) The Second Further Amended Statement of Claim replaced the Amended Statement of Claim. Some, but not all, of the allegations in paragraphs 40 and 41 of the Amended Statement of Claim are repeated in paragraph 32 of the Second Further Amended Statement of Claim. However, paragraph 32 refers to the communications on which it relied as representations, not agreements.

**64**  Paragraphs 55 to 60 of the Second Further Amended Statement of Claim relate to Westcoast's breach of contract claim.

**65**  In paragraph 55 Westcoast pleads that an agreement was formed between CVRD and Westcoast in or about September 1999. Westcoast pleads that in consideration for it agreeing to build, own and operate the composting facility, and in consideration for it agreeing to cap its tipping fee for organic waste at $5 less than the amount charged from time to time by CVRD at its waste transfer station, CVRD, in or about September of 1999 agreed (a) to designate Westcoast as one of two approved facilities for receiving and composting of organic waste, (b) to implement and enforce a ban on the dumping of yard and garden waste and ICI waste at all facilities other than Westcoast, and (c) to pay a reasonable tipping fee to Westcoast for its receipt of organic materials.

**66**  Paragraphs 56, 58 and 59 of the Second Further Amended Statement of Claim particularize breaches of that contract.

**67**  Mr. Cuerrier testified that Westcoast only decided to embark on the project after CVRD said it would take specific measures to ensure a flow of feed stock to Westcoast's facility. His evidence in respect of a contract was not entirely clear. He said there was no "formal agreement" but there were representations that if "he" built, CVRD would do what it said it would do.[**14**](#Forward_fnref_fnr-14) Ms. Boucher testified that there was no signed legal agreement but that obligations arose outside of a legal agreement.[**15**](#Forward_fnref_fnr-15) Ms. Boucher testified Westcoast did agree to a tipping fee of $5 less than that of CVRD. She also testified that she understood that administrative agreements between CVRD's municipalities were still required. She said they were administrative acts that did not involve CVRD's board, although she also testified that she did not know what such administrative agreements entailed.[**16**](#Forward_fnref_fnr-16) Ms. Boucher did say that she understood those administrative acts would ensure the flow of feedstock to Westcoast.

**68**  Westcoast pleaded that the contracts were concluded with statements made by Mr. Hughes and Mr. Raimondo. Westcoast submitted that the minutes of CRRC meetings were evidence contracts had been concluded. The CRRC meetings that are of relevance are those of September 13, 1999,[**17**](#Forward_fnref_fnr-17) and September 20, 1999.[**18**](#Forward_fnref_fnr-18)

**69**  Mr. Hughes, Mr. Raimondo, Mr. York and Mr. Dennison all deny that they had agreed to a contract for the CVRD.

**70**  On March 22, 2000, Mr. Cuerrier wrote Ms. Echle at BDC stating:[**19**](#Forward_fnref_fnr-19)

The current situation is such that the Cowichan Valley Regional District (CVRFD) is proceeding towards implementing an organic ban for the Commercial and Institutional sector. The organic ban will benefit WLDC directly by guaranteeing a flow of material to the site and will increase the margin of profitability. Having the Cowichan Valley Regional District implement a ban means that haulers will be oblige (sic) to bring the organic material to WLDC instead of the transfer station. The tipping fee cost for WLDC will no longer be a mean (sic) of attracting haulers to the facility. The ban will enable WLDC to increase the tipping up to $85/tonne instead of $65/tonne. This represents an estimated increase in profitability of 24%.

**71**  This letter was written during construction of the facility. That was after the date of the pleaded agreement, and before CVRD is alleged to have breached it. This letter belies Westcoast's pleaded allegation that it had agreed to a fixed tipping fee. Clearly, Westcoast did not consider it was bound by a tipping fee agreement. I infer that was because it had not agreed to a tipping fee. This letter also suggests that it was a lower tipping fee that was to attract haulers to the facility, and not an agreement between Westcoast and CVRD.

**72**  Westcoast pleads that CVRD agreed to implement and enforce a ban on the dumping of yard and garden waste and ICI waste at all facilities other than Westcoast's facility.[**20**](#Forward_fnref_fnr-20) Such an agreement is entirely inconsistent with Westcoast being permitted to charge whatever tipping fee it wished. In my opinion, even if CVRD could have enacted legislation requiring its residents to dispose of organic waste only at Westcoast's facility (and Mr. Raimondo doubted that it could) it is inconceivable that either CVRD's staff or its elected representatives would have agreed to implement and enforce legislation requiring CVRD residents to deliver waste to Westcoast at a tipping fee left to Westcoast's discretion.

**73**  The ***Municipal Act*** *R.S.B.C. 1996 c. 323* applied to CVRD in 1999. This act was renamed the ***Local Government Act*** effective June 12, 2000.

**74**  Section 174 of the ***Act*** provides that the governing body of a regional district is its board, and that the powers, duties and functions of the regional district are to be exercised and performed by its board unless the ***Act*** or any other act provided otherwise.

**75**  The ***Act*** allows CVRD to authorize persons to enter into contracts on its behalf by resolution of the board pursuant to s.791. Resolutions must be decided by a majority of the votes cast. Section 791(7)(e) provides that resolutions and bylaws authorizing persons to enter into contracts on behalf of the regional district must be in accordance with s.791(6), which relates to the voting entitlements of board directors.

**76**  CVRD did not pass any resolutions or enact any bylaw authorizing anybody to enter into any contracts with Westcoast on its behalf. Neither Director Hughes nor Mr. Raimondo nor Mr. York nor Mr. Dennison could bind the board or CVRD. CRRC was an advisory body. It could make recommendations to the board. It could not bind the board or CVRD.

**77**  In ***Pacific National Investments Ltd. V. Victoria (City)***, [*(2000) 2 S.C.R. 919*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M46F-00000-00&context=), LeBel J. writes for the majority of the Supreme Court of Canada. At paragraph 68 he states:

[N]o indoor management rule protects someone dealing with a municipality from having to ensure that proper procedures were followed with respect to the contract, which is quite different from the situation with a private corporation; ... The record shows that as an experienced developer, PNI (the plaintiff) was aware of the special legal and political risks attendant on dealing with a municipality. Developers choose to take those risks.

**78**  ***Pacific National*** stands for the proposition that legislative powers are an integral part of government that municipalities cannot give up. One municipal council cannot fetter the discretion of successor councils to engage in the legislative process without undue influences. In ***Pacific National*** the majority declares that legislative powers are entrusted to municipalities for the public good and that municipalities must always be in a position to exercise them as the public good requires. A municipality may engage in business and proprietary contracts, but it cannot agree to terms that fetter its legislative power.[**21**](#Forward_fnref_fnr-21)

**79**  The British Columbia Court of Appeal arrive at the same result earlier in ***Vancouver v. Registrar, Vancouver Land Registration District***, [*[1955] 2 D.L.R. 709*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JG02-S3H1-00000-00&context=), in which Davy, J.A., writing for the majority of the court, states that any contract entered into by a municipality which covenants in advance that its council will pass a bylaw involving the exercise of discretion is contrary to public policy and not enforceable. He clarifies that such a contract is illegal because it restricts the freedom of the individual councillor to decide the merits of the bylaw solely on the relevant circumstances as the law requires.

**80**  If CVRD had entered into an agreement; (i) to enact a bylaw banning the delivery of commercial organics to Bing's Creek; or (ii) to pass a bylaw prohibiting the dumping of yard and garden waste at all facilities other than those of Westcoast and IBR, or (iii) to enact a bylaw or pass a resolution designating Westcoast as one of only two authorized sites to receive organic wastes, those agreements would have fettered the discretionary legislative powers of the directors. The residents of CVRD, including those in its municipalities, were entitled to have their legislators determine issues relating to the disposal of waste with regard to the public good and without regard to outside influences. Neither staff nor any individual director had the power to decide for the directors or for the board what legislation should be enacted.

**81**  I am of the view that Westcoast's claim for damages for breach of contract cannot succeed for three reasons.

**82**  First, the alleged contracts, if they were concluded, were *ultra vires* (or illegal) and of no effect because there was no bylaw or resolution of CVRD authorizing CVRD or any delegate to enter into them on its behalf.

**83**  Second, even if the board had agreed to enact and enforce bans and even if it had agreed in advance to the designation of authorized sites, the agreements would not have been enforceable because they would have been an illegal fettering of the discretion of CVRD's board members to decide later on what bylaws or resolutions should be enacted and maintained in force.

**84**  Third, in my opinion, Westcoast did not establish on a balance of probabilities that it and CVRD had entered into a contract. I find that there was no contract.

**85**  I dismiss Westcoast's claim for damages for breach of contract.

**Odour**

**86**  Odour is generated when organic materials decompose. The composting process was described by Westcoast in its proposal to CVRD,[**22**](#Forward_fnref_fnr-22) and by Mr. Al Spidel in his Compost Facility Review of Westcoast's facility.[**23**](#Forward_fnref_fnr-23)

**87**  Compost odour is of concern to the composting industry and to municipal planners and to government. The smell can become a nuisance to neighbours of composting facilities.

**88**  CVRD had encountered earlier odour difficulties with Hydroxyl, a sceptic sludge composting facility that had been located in the Koksilah Industrial Park near Duncan. Mr. Hughes testified that CVRD's enactment of certain zoning bylaw amendments and the creation of CRRC were related to CVRD's goal of promoting composting and recycling in a non-polluting and innocuous manner.

**89**  Westcoast was well aware of compost odour concerns. Odour control was a feature of the Herhof system. Mr. Cuerrier had prepared a number of proposals responding to municipal requests for proposals. The proposals stressed that the Herhof system that was distributed by HUWS eliminated problems with compost odour. Westcoast's proposal to CVRD included the claim that:[**24**](#Forward_fnref_fnr-24) "Odour control is the key success factor of the Herhof composting process."

**90**  Westcoast's response to CVRD's call for proposals was completed in May, 1999.[**25**](#Forward_fnref_fnr-25) It states:[**26**](#Forward_fnref_fnr-26)

The proposed Herhof facility will receive and pre-process all organic material from residential and IC & I in an enclosed building. The building's negative atmospheric pressure retains any possible odours from incoming waste within the building. This eliminates potential odours from leaving the site during the receiving and shredding stages. Equipment within our facility are electrically powered, thereby reducing both noise and air pollution from the facility.

**91**  The proposal also states that one of several special vector control measures would be that all incoming waste "will be delivered within the pre-processing building."[**27**](#Forward_fnref_fnr-27)

**92**  The system that Westcoast was then proposing was broken down into nine steps. Step two relates to the receiving bunker and it is described in the proposal as follows:

The source separated organic material is weighed at the scale and delivered to the facility, where the waste is dumped into an enclosed concrete bunker. The facility's door would then be closed to maintain the building's negative pressure and any odours.

**93**  After Westcoast's facility opened, its composting activities led neighbours to complain about noxious odours. There were complaints to Mr. Hughes, to CVRD, and to MWLAP (later renamed MOE). Some complainants demanded that steps be taken to eliminate the odours.

**94**  A good portion of the evidence at this lengthy trial related to odour and leachate issues involving Westcoast's facility.

**95**  For the most part, Westcoast denied that there was a compost odour problem. Ms. Boucher, Mr. Cuerrier and Mr. Brooks all minimized odour concerns. Ms. Boucher alleged that Mr. Hughes and CVRD and its staff invited odour complaints, and that publicity about unwarranted complaints generated other unfounded allegations. Westcoast alleged that some of the offending odours were not caused by its operations at all, but were caused by neighbouring operations. Overall, Westcoast submits that the odour difficulties with their facility were transitory and addressed by it in a timely and appropriate manner and of no real account.

**96**  Westcoast submits that odour issues were under the jurisdiction of MWLAP (now MOE) and that CVRD was without authority to deal with the odour complaints. Much of CVRD's activity in respect of compost odour complaints was therefore tortuous, according to Westcoast.

**97**  For almost all of the period of time relevant to this proceeding, Section 799 of the *Municipal Act* provided as follows: (1) A regional district may, by bylaw, establish and operate one or more of the following extended services: (b) control of pollution, nuisances, ... unsightly premises, unwholesome or noxious materials, odours.

**98**  CVRD did have the jurisdiction to enact and enforce a bylaw controlling odour. Its difficulty might have been a practical one-that of crafting a bylaw that was certain and capable of enforcement.

**99**  Section 799 of the *Local Government Act* was repealed and replaced by the *Community Charter Transitional Provisions, Consequential Amendments and other Amendments Act*, S.B.C. 2003, c. 52, s. 353.

**100**  The *Environmental Management Act* was enacted by *S.B.C. 2003, c. 53*. That legislation allowed CVRD to enact a bylaw that required this facility to make physical changes to address odour and leachate concerns.

**101**  Exhibits 506, 507, 508 and 509 record an extensive history of the escape of compost odour from Westcoast's facility.[**28**](#Forward_fnref_fnr-28)

**102**  Exhibits 506 and 508 record complaints received by MWLAP. Exhibit 506, Tab 85 summarises 49 odour complaints received by MWLAP from June 12, 2002, to December 11, 2003. Those complaints describe the odour emanating from the facility as smelling like "dead animals" or "rotten eggs" or "septic" or "sewage" or "rotten".

**103**  Exhibits 507 and 509 record complaints received by CVRD. Exhibit 507 Tab 12 summarizes odour complaints received by CVRD between November 29, 2000 and September 4, 2001. There were 21 complaints, including two complaints from a neighbouring greenhouse operation that on two occasions one or more workers were sent home because of the effect of the odour from Westcoast facility. In its written submissions, CVRD said that a total of 194 complaints were recorded by CVRD and MOE from the date of Westcoast's opening to mid-2005.

**104**  The evidence at trial as to compost odour included that of Cindy Little. Ms. Little lives with her husband and two children at a residence about one-quarter of a mile from Westcoast's facility.

**105**  Ms. Little testified that from late 2001 or early 2002 she smelled very strong bad rotting compost smells that she said came from Westcoast's facility. She said she and her husband complained to CVRD and MOE.

**106**  Ms. Little said that nothing happened as a result of her complaints, and so she stopped filing them because it seemed pointless. Ms. Little testified that after Westcoast stopped its operations the odours became non-existent.

**107**  Catherine James testified that she lives with her husband and two children at a site about half a kilometre away from the facility. Ms. James said that from "around 2000", Westcoast's operations resulted in their being "stunk out" of their yard. She described the smell as being "like someone had vomited up sour milk" and testified that the smell was not there before Westcoast began its operations.

**108**  She said the offensive odour was often about in the evening and during the night. She said they made complaints to CVRD and MOE, but nothing happened. Like Ms. Little, Ms. James said she eventually stopped making complaints because she felt that nothing was ever going to be done about them.

**109**  Ms. James said that after reading a newspaper article in which a Minister of the provincial government said that complaints were decreasing in number, she wrote a letter to the editor in which she said this:[**29**](#Forward_fnref_fnr-29)

I can tell you right now, complaints likely have dropped off because your ministry is doing nothing about them. Personally, I am sick and tired of faxing my odour incident report to your ministry only to have it filed in some cabinet never to be acted upon. I have never received any feedback or contact from your staff regarding these reports. What do you do with them anyhow?

Scrap paper?

She also wrote:

Yes, we hardly ever fax your ministry anymore, because we know your ministry does nothing with our faxes and that sentiment is echoed by the other people in our neighbourhood who are bombarded by the dreadful odour on a nightly basis.

**110**  Ms. James said the letter accurately summarizes her views.

**111**  On May 23 and May 24, 2001, Mr. Simpson, of CVRD Bylaw Enforcement, wrote these notes in his continuation report:[**30**](#Forward_fnref_fnr-30)

May 23/2001

Call from Margaret Peterson 743-5903

Westcoast Diversion - Foul smells on May 8, 9, 10, 11, 12, 22 and 23. Real bad on May 12. Had to send her staff home. Complained of headaches.

May 24, 3:00 p.m.

Denis Cuerrier to office. Discussed latest (complaints). Admitted receiving & grinding area may not be the answer. May have to build receiving bay with neg. airflow but money is a problem at this time.

**112**  On October 5, 2001, Herhof expressed the opinion that it was either the manner in which Westcoast was operating the facility that was causing an odour nuisance or it was because Westcoast was composting material it should not be composting such as septage.[**31**](#Forward_fnref_fnr-31)

**113**  Herhof wrote Westcoast to arrange for a Herhof staff member to attend at the facility "to help in finding a solution".[**32**](#Forward_fnref_fnr-32) Westcoast would not agree to a representative of Herhof visiting its facility for an assessment. HUWS and Herhof were embroiled in litigation in Ontario at the time which is one reason why Ms. Boucher may have refused to co-operate with Herhof.

**114**  The Spidel review of Westcoast's facility took place between September, 2002 and January, 2003. Westcoast did not permit Mr. Spidel to access the facility. For that reason some of the conclusions in the report are of limited use.

**115**  The report noted that if composting is contained in a controlled environment, the rate of composting can be accelerated and compost odour can be kept to a minimum. It said that leachate is the other issue of concern at composting facilities.

**116**  The report contains a chronological sequence of odour related events from February 7, 1999 to October 1, 2002.[**33**](#Forward_fnref_fnr-33)

**117**  Spidel Consulting authored a number of biweekly progress updates before it authored the Compost Facility Review.[**34**](#Forward_fnref_fnr-34) The progress report for September 20, 2002-October 7, 2002, says: "Odours from improper and or ineffective handling of materials have been reported and substantiated at the Westcoast site on a number of occasions", and "The actual number of occurrences is not the important issue".[**35**](#Forward_fnref_fnr-35)

**118**  On June 11, 2003, an information note[**36**](#Forward_fnref_fnr-36) about Westcoast's facility was prepared by Mr. Duncan A. McLaren, an environmental protection officer. In it Mr. McLaren suggests that unpleasant odour by itself may not be sufficient to be legally considered an air contaminant or pollutant for the purposes of enforcement of provincial legislation. Mr. McLaren said that Westcoast had been diligent in responding to complaints, but that due to the nature of their operations, odours would be generated despite all reasonable control efforts.

**119**  Westcoast may have been diligent in responding to complaints in the sense that it responded with inspections or denials or statements or explanations, but Westcoast did not address the source of the complaints. The issue was not that composting creates odours-it was that Westcoast did not stop the escape of compost odour from its property.

**120**  Mr. McLaren said that some of the issues with Westcoast's facility were related to land use and zoning. He said that CVRD could regulate the facility through land use and zoning bylaws. He said that CVRD could develop bylaws to regulate the management of composting facilities, pursuant to the WMA.

**121**  On December 11, 2003, Mr. McLaren wrote that Ministry staff had devoted a substantial amount of time in dealing with issues regarding Westcoast's facility and that their focus on this operation had been to the detriment of resources better spent on discharges with higher environmental risk.[**37**](#Forward_fnref_fnr-37)

**122**  On March 22, 2004, Mr. Bill Barrisoff, Minister of WLAP, wrote[**38**](#Forward_fnref_fnr-38) Mr. Robert Smethurst, President of the Arbutus Ridge Residential Rate Payers Association. Mr. Barrisoff noted that his Ministry's authority to address odour complaints flowed from provincial legislation including the OMRR and the WMA, and that the legislation does not prohibit odours from leaving property. He said that odour can be addressed under provincial legislation if it can be shown to be creating pollution, but establishing that an odour constitutes pollution is difficult. He noted that odour problems can sometimes be addressed by municipalities which have the authority to enact bylaws to control odours.

**123**  MWLAP may have been correct in concluding that the legislation it was enforcing did not allow it to require that Westcoast take measures to prevent the escape of compost odour from its property. That issue was not explored at this trial. MWLAP did establish a protocol for receiving odour complaints, but it did not or could not have the source of the complaints eliminated. That appears to have been a source of frustration for CVRD. Mr. Tom Anderson wrote two letters[**39**](#Forward_fnref_fnr-39) to MWLAP in December of 2001 in which he demanded action from MWLAP, and Mr. Hughes wrote a letter[**40**](#Forward_fnref_fnr-40) to the News Leader that was published on October 23, 2002 in which he was critical of MWLAP.

**124**  The provisions of the *Environmental Management Act* that are of relevance to this proceeding came into force on July 8, 2004, by B.C. Reg. 722/2004.

**125**  CVRD enacted facility licence legislation pursuant to the *Environmental Management Act*. CVRD's Bylaw No. 2570 was read a first time on September 29, 2004. The bylaw was adopted on August 25, 2005.[**41**](#Forward_fnref_fnr-41)

**126**  In its written submission, Westcoast submits that there were "alleged" odour issues that have not been proven. I disagree. In my opinion, the evidence that Westcoast's compost operations generated offensive odours that were a frequent nuisance to others was overwhelming.

**127**  I find that there was offensive compost odour, and that the odour is the reason for the contemporaneous written record of numerous complaints from a significant number of complainants, including complainants who had no involvement with CVRD, its staff or its directors.[**42**](#Forward_fnref_fnr-42)

**128**  I infer that one reason why Westcoast refused a review by Mr. Spidel and an assessment by Herhof (who Westcoast had always acknowledged was the expert in the operation of the biocells Herhof had designed and built) was that Westcoast did not really need a review or advice. In my opinion, Westcoast's failure to control the escape of compost odour was not because it did not know how odours might be controlled, but because it lacked the financial resources to build the structure necessary to do that. Furthermore, the only explanation that I can see for Westcoast not installing a concrete pad for leachate control during the curing process was a lack of funds.

**129**  Bylaw No. 2570 prohibited the operation of a facility where recyclable waste was managed unless the operator complied with a valid and subsisting *Facility Licence.*[**43**](#Forward_fnref_fnr-43) This permitted CVRD to require that the offending operations be enclosed in a structure. It also addressed leachate control concerns.[**44**](#Forward_fnref_fnr-44) CVRD delayed the enforcement of this bylaw until the end of 2006 in order to give waste processors time to make the changes needed for compliance.

**130**  Westcoast sold the facility during this proceeding. The facility is now being operated by a third party within an enclosed structure without apparent complaint.

**131**  I conclude:

1. Westcoast's composting facility created strong obnoxious compost odour that caused significant discomfort, inconvenience and unpleasantness to its neighbours.
2. Westcoast could have constructed its facility in a manner that would have reasonably contained odour created by its composting activities. Westcoast could have later taken remedial measures to contain the odour. The technology to reasonably contain compost odour was not only available but actually known to Westcoast and its principals.
3. Westcoast's failure to construct a facility that adequately contained compost odour and its failure to take remedial steps to correct the deficiencies in its control of compost odour was probably due to financial limitations.
4. WLAP considered that provincial legislation did not allow it to compel Westcoast to contain the compost odour that was the source of public complaint. WLAP personnel thought that CVRD had the authority to do that through bylaws relating to land use and zoning.
5. CVRD had a legitimate land use interest in taking measures to reduce or eliminate the nuisance to its residents caused by Westcoast's facility. CVRD had the authority to enact bylaws to achieve that end.
6. CVRD eventually enacted a bylaw that eliminated the escape of problematic compost odour from the facility and that addressed leachate control concerns.

**Vicarious Liability**

**The Statements and Actions of Mr. Hughes**

**132**  In support of Westcoast's claim that the CVRD is liable to Westcoast in ***negligence***, negligent misrepresentation and for unlawful interference with economic relations, the plaintiff relies on Mr. Hughes' conduct and on statements that it ascribes to him.

**133**  As an elected area director, Mr. Hughes was answerable to the electorate of his area. Neither CVRD nor its board nor its staff had control or direction over Mr. Hughes. On the other hand, Mr. Hughes had no particular control over CVRD or its board or its staff. He was entitled to vote at board meetings. But his influence and power at board meetings was the same as that of all other board members. Aside from voting, Mr. Hughes could do no more at CVRD board meetings than attempt to persuade others to his point of view.

**134**  It seems likely that in respect of matters that had particular significance to his area, Mr. Hughes' views and opinions at board meetings would have had particular persuasive force. It also seems likely that CVRD staff would have paid particular attention to his input in respect of matters of special concern to his area. Perhaps it is that to which Mr. Raimondo was referring when he said that as an elected area director of CVRD, Mr. Hughes had more autonomy and exercised more independence in relation to matters pertaining to his area than did other members of the board. Perhaps that also explains why Ms. Boucher said that Area C was Mr. Hughes' fiefdom. But Mr. Hughes' position and authority was never more than that of an elected member of CVRD and whatever authority was delegated to him by CVRD. There is no reason to think that Westcoast or its principals ever thought he had more authority than that. Mr. Hughes spoke for himself. He did not speak for CVRD.

**135**  Mr. Hughes met with Ms. Boucher and Mr. Cuerrier and Mr. Brooks and others at a meeting at the Arbutus Ridge Golf Club in April of 1999. Westcoast submits that Mr. Hughes made representations to them at that meeting that are binding on CVRD, including that CVRD was supportive to the concept of the facility being built within CVRD's district.

**136**  I find that Mr. Hughes attended this meeting as the elected director for Area C and not as CVRD's authorized representative. Ms. Boucher and Mr. Cuerrier were experienced in government and had advised government. I am satisfied that they and the others present at that meeting knew that Mr. Hughes was there as an elected director of CVRD.

**137**  On May 19, 1999, Mr. Hughes wrote a letter to Mary Ellen Echle of BDC. Ms. Echle was the account manager dealing with Westcoast's application for financing. The letter was a letter of support for the project.

**138**  Mr. Hughes did not write on CVRD letterhead.

**139**  He opened his letter by saying "As the Cowichan Valley Regional District Electoral Representative for Cobble Hill, I am pleased to endorse and support Westcoast Diversion Corporation's planned Herhof Composting Facility at 1355 Fisher Road".

**140**  Mr. Hughes then identified reasons why he endorsed the project.

**141**  He ended the letter by saying "This project is timely and important to all of us. If you have questions regarding this letter, please feel free to call me ... Sincerely Richard Hughes, Director Electoral Area "C"."

**142**  This letter speaks for itself. Mr. Hughes wrote as an elected director, and not for CVRD or its board. The opinions he expressed were his own.

**143**  Westcoast submits that Mr. Hughes made various representations to Mr. Cuerrier and Ms. Boucher that have particular relevance to its causes of action in ***negligence*** and in negligent misrepresentation, including representations at meetings that occurred between September and December 1999.

**144**  Westcoast submits that Mr. Hughes also made a number of statements after the facility was constructed that relate to its claim for damages arising from unlawful interference with economic relations. Mr. Hughes made those statements to the press and to the public. Westcoast alleges the statements dissuaded others from doing business with Westcoast and that injured Westcoast's reputation.

**145**  CVRD denies some of the statements Westcoast attributes to Mr. Hughes. Beyond this, CVRD submits that it is neither bound by, nor liable for, any statements made by Mr. Hughes nor any of his actions.

**146**  The statements and actions that Westcoast complains about were spoken or done by Mr. Hughes in his capacity as a director of CVRD. The issue is whether CVRD is vicariously liable for what Mr. Hughes said or did.

**147**  In asserting that CVRD is vicariously liable for statements and actions of Mr. Hughes, Westcoast states in its written submissions:

As for the directors themselves, the multiple acts of unlawful interference including illegal regulation and defamation by Richard Hughes appear to have taken place in circumstances where he was speaking or acting for CVRD and had apparent authority to speak or act on behalf of CVRD. CVRD never disclaimed his words or actions or corrected his views in any way. In fact, it appears other directors held the same views and supported him in doing so. As such, the Plaintiff submits that the CVRD ought to be found vicariously liable for the actions of its directors as well.

**148**  Mr. Hughes' authority, derived from statute, was that of an elected member of the council of a local government. The ***Municipal Act*** did not authorize an elected member of a regional board to speak for or act for the regional district or the board.

**149**  In ***Rogers***, ***The Law of Canadian Municipal Corporations,*** Second Edition, Volume II, paragraph 32.3, the authors state that a member of a council is not an agent or employee of the municipal corporation in any legal sense. Members are not employed by or in any way under the control of the local authorities while in office, and have no authority to act for the corporation except in conjunction with other members constituting a quorum at a legally convened meeting.

**150**  Mr. Hughes testified that he never spoke nor acted other than as an individual director of CVRD, nor did he ever purport to speak or act for CVRD or the board.

**151**  In my opinion, Mr. Hughes had no inherent authority to speak for or act for CVRD.

**152**  I note that Westcoast does not claim that Mr. Hughes was authorized by bylaw or resolution of CVRD or its board to speak or act for them. I find that there was no such specific authorization.

**153**  In ***Rogers***, ***The Law of Canadian Municipal Corporations***, *supra* at paragraph 256.4, the authors state that although a municipality may be liable for the wrongful acts of its council as a whole, it cannot be held liable in damages for injuries consequent upon the negligent or wrongful act of individual members of its council except in cases where they had been expressly commissioned by the council to oversee particular work on its behalf and the injury was a result of their ***negligence*** in discharging such a duty. This statement of the law was adopted by D.S. Crane J. of the Ontario Supreme Court of Justice at paragraph 267 of ***St. Elizabeth Home Society v. Hamilton*** ***(City)*** [*[2005] O.J. No. 5369*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDS1-F956-S0S2-00000-00&context=).

**154**  On the facts of the case before him, Crane J. refused to find a municipal corporation liable for the acts of a municipal councillor. He held that a significant indicator of liability is the level of control held by the defendant over the councillor. He concluded in that case that the municipality did not bear the risk of a tort committed by its elected representative.

**155**  In ***P.(N.I.) v. B.(R.)*** [*(2000), 193 D.L.R. (4th) 752*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G27J-00000-00&context=), Bouck J. of this court dismissed a sexual assault action against the Crown brought by a plaintiff who alleged that she was assaulted while a recipient of a public housing benefit. The plaintiff claimed that the Crown was vicariously responsible because the alleged assailant was a member of the provincial legislative assembly and provincial cabinet.

**156**  At paragraph 16 Mr. Justice Bouck states that for vicarious liability to exist the employer must have effective control over the employee. In support of this conclusion he cites ***Montreal v. Montreal Locomotive Works Ltd.***, [*[1947] 1 D.L.R. 161*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-WC31-F5KY-B4P9-00000-00&context=) (P.C.) at 169, and ***A.(C.) v. C.(J.W.)*** [*1998 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=) at 121 (BCCA).

**157**  He says at paragraph 18 that to prove vicarious liability on the part of the Crown, the claimant must establish on a balance of probabilities that the alleged sexual assault was connected with the defendant's duty as a Crown employee, and that the connection between the assault and his duties as a Crown employee was of such a nature that the assaults could be seen as ways, even improper ways, of performing his duties. The Crown is not vicariously responsible for sexual assaults that are independent acts done outside the course of his employment.

**158**  Bouck J notes that under the ***Crown Proceeding Act***, *R.S.B.C. 1996 c. 89*, the plaintiff's right to bring the action against the provincial Crown limited the nature of remedy she could recover from the Crown. If the Crown and the defendant did not have a master/servant relationship when the alleged assaults occurred, the Crown could not be found vicariously liable for his actions.

**159**  CVRD and Mr. Hughes were not in a master/servant relationship. Mr. Hughes' actions and statements were those of an elected director of CVRD. Mr. Hughes had no authority to act for or bind CVRD. He did not purport to do so.

**160**  In my opinion the preponderance of the evidence is that Mr. Hughes did not speak or act in any capacity other than that of the elected director of Cobble Hill Area C. Westcoast has not established that Mr. Hughes ever spoke or acted in circumstances where he had CVRD's apparent authority to do so.

**161**  Westcoast's submission that other directors of CVRD held the same views as Mr. Hughes and supported Mr. Hughes, even if true, does not advance its position. There is no allegation that the members together caused the board to do anything of which Westcoast complains.

**162**  Westcoast submits that CVRD never disclaimed Mr. Hughes' statements or actions nor corrected his views. There was no duty on the board or CVRD to do anything of the sort. There is no obligation for the board or council of a municipal corporation to monitor or comment upon statements or actions of its members. It is not deemed to have adopted the statements or actions of its individual members unless those statements or actions are formally considered and rejected. CVRD can not, by default, be vicariously liable for everything its elected members say or do.

**163**  For all of those reasons, I find that CVRD is not vicariously responsible for Mr. Hughes' statements or actions.

**Negligent Misrepresentation**

**164**  The Supreme Court of Canada discussed the tort of negligent misrepresentation 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=).

**165**  At page 110, Sopinka and Iacobucci J.J. set out the five required elements for a successful claim for the tort of negligent misrepresentation:

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 the misrepresentation;
4. The representee must have relied, in a reasonable manner, on the negligent misrepresentation;
5. The reliance must have been detrimental to the representee in the sense that damages resulted.

**166**  At page 129 the two note that authorities exist supporting the view that only misrepresentations of existing facts, and not those relating to future occurrences, can give rise to actionable ***negligence***. They do not proffer an opinion on the correctness of that view.

**167**  Westcoast's claim in negligent misrepresentation focuses on four representations: (i) that CVRD would designate Westcoast and IBR as the only sites designated and authorized to accept organic waste; (ii) that CVRD would implement and enforce a ban on ICI waste and prohibit its own facilities from accepting ICI organic waste; (iii) that CVRD would implement a prohibition style ban on yard and garden waste and enforce the ban coincidentally with the opening of Westcoast's facility; and (iv) that CVRD would make administrative agreements to ensure that waste would flow to Westcoast.

**168**  Mr. Cuerrier testified that he thought it improbable that IBR would actually construct a competing composting facility, and that the effect of the designation set out in (i) would be that Westcoast would be the only designated site authorized to accept organic waste. That is consistent with Westcoast's pleading at paragraph 55 d of its Further Amended Statement of Claim that CVRD had agreed to enforce a ban on the dumping of yard and garden waste at all facilities other than that of Westcoast.

**169**  CVRD published a list of places that took waste for recycling or processing.[**45**](#Forward_fnref_fnr-45) The list was informational. The list advised residents where specified wastes could be left. I find that the list was also a representation by CVRD that those places were acceptable recipients of those wastes.

**170**  Westcoast's position at trial was that the designation it expected was one that would have required the organic waste that was to be banned at CVRD's facility at Bings Creek to be delivered to it.

**171**  Mr. Raimondo seemed surprised by that concept. He said that none of the designated sites were "authorized". He said a designation was simply a listing telling people where they could take waste if CVRD would not take it.[**46**](#Forward_fnref_fnr-46)

**172**  Mr. Raimondo said it would have been impossible for CVRD to have guaranteed that there would be only two sites that would be permitted to take organic waste. He said anyone could set up shop at any point.[**47**](#Forward_fnref_fnr-47) He testified that CVRD had no control over where people took waste.[**48**](#Forward_fnref_fnr-48)

**173**  There is a fundamental difference between acknowledging that a site is available and acceptable for the receipt of waste, and implementing and enforcing a policy requiring CVRD's residents to deliver waste to a specific private site, particularly when the site is being operated for profit and receives waste at prices that it fixes. Mr. Raimondo was unsure whether CVRD even had the authority to require its residents to deliver waste to a specific private site. Westcoast's position does not pay any regard to the interests or rights of the operators of other sites. In order to give effect to the designation claimed by Westcoast, competing operations, including sites already in operation, would have had to be closed. Mr. Raimondo testified that he was certain that he did not tell Mr. Cuerrier that CVRD would designate Westcoast as the only authorized site to receive organic wastes.

**174**  During the RFP process, Westcoast and IBR were short listed by CRRC. Mr. Cuerrier took the position that the short listing meant that only Westcoast and IBR were authorized sites for receiving organic waste, even for non RFP purposes. Mr. Cuerrier seemed to think that the designation was irrevocable.

**175**  The RFP did not result in a contract. In my view, CRRC's RFP short listing of Westcoast and IBR did not mean organic waste had to be delivered to Westcoast or IBR, and it did not mean other sites could not be designated by CVRD as being acceptable sites for the receipt of organic waste.

**176**  The enactment and enforcement of a requirement that waste be delivered to Westcoast could only have been effected by CVRD-if it could have been effected at all-with a bylaw or resolution of the board.

**177**  The implementation of a prohibition on the delivery of yard and garden waste to CVRD's sites would also have required a bylaw or resolution of the board.

**178**  Mr. Raimondo, who had used the term "administrative agreement" in committee, said that by administrative agreement he meant an informal and short term arrangement whereby staff of CVRD could direct the flow of small amounts of organic waste that was within the control of staff.

**179**  Mr. Raimondo denied that he told Mr. Cuerrier that yard and garden waste from CVRD would flow to Westcoast's facility and he denied telling him that CVRD was going to implement a region wide ban on its receipt of organic waste.[**49**](#Forward_fnref_fnr-49)

**180**  Mr. Raimondo denied telling Mr. Cuerrier that CVRD was going to implement bans in exchange for Westcoast building the facility.[**50**](#Forward_fnref_fnr-50)

**181**  Mr. Raimondo denied telling Ms. Boucher that the only thing remaining in the RFP process was an administrative agreement.

**182**  Mr. Cuerrier and Ms. Boucher did not know what an administrative agreement entailed. It might have related to an agreement between Westcoast and CVRD, or it might have related to an agreement between CVRD and its municipality members. In either case, there was no agreement yet concluded. Finch C.J.B.C. discussed the enforceability of alleged agreements in ***Flint v. Taggar,*** [*2008 BCCA 504*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B0P5-00000-00&context=). An agreement must be certain to be enforceable.

**183**  CVRD did not conclude an agreement with Westcoast. Westcoast would have known if it had entered into such an agreement, and it knew it had not.

**184**  An agreement with a municipality would have required authorization from CVRD's board and from the council of the agreeing municipality. Neither CVRD's board nor any of CVRD's municipalities authorized a CVRD/municipality "administrative" agreement. There was no agreement between CVRD and any of CVRD's municipalities.

**185**  I am of the opinion that Westcoast's evidence in respect of "administrative agreements" does not assist it in this proceeding. Ms. Boucher said CVRD had agreed to make administrative agreements. CVRD did not make any agreements ensuring the flow of feedstock to Westcoast. Westcoast claims CVRD had agreed to enter into agreements. An agreement to agree is not enforceable.

**186**  Westcoast's claim in negligent misrepresentation includes the assertions that CVRD represented that it would enact, maintain and enforce bylaws banning the delivery of ICI organic waste and yard and garden waste to its own facilities and enter into administrative agreements ensuring the flow of organic waste to Westcoast.

**187**  In ***Pacific National***, the Supreme Court of Canada considered a claim by a developer that the City of Victoria was bound by an implied term in an agreement to keep zoning in place for a number of years and that it was liable in damages if it did not.[**51**](#Forward_fnref_fnr-51)

**188**  Writing for the majority of the court, LeBel J. states at paragraph 38 that zoning is a legislative power, and that the *Municipal Act* (B.C.) did not give a municipal council the ability to constrain the future use of that legislative power. He holds municipal legislative powers are an integral part of governance that municipalities cannot give up. Local authorities have no power to enter into an agreement the effect of which would be to restrict or divest the legislative powers of succeeding councils in respect of any matter affecting the public at large. He also notes that the legislature had generally considered that municipalities should not pay damages for how they used their legislative power.

**189**  LeBel J. writes at paragraph 55:

As the authorities make clear, a limitation on a municipality's legislative power is a very serious matter. As Rogers, ***the Law of Canadian Municipal Corporations, supra***, puts it at para. 199.4, "Unless expressly authorized to do so local authorities have no power to enter into an agreement the effect of which will be to restrict or divest the legislative powers of succeeding councils in respect of any matter affecting the public at large." Rogers goes on to note that this does not mean that a council acting in its proprietary or business capacity cannot make contracts. But it does mean that a council cannot somehow give up its legislative powers.

**190**  He goes on at paragraph 56 to declare that municipal councils cannot fetter the discretion of successor councils to engage in the legislative process without undue influences.

**191**  At paragraph 64, LeBel J. notes that the plaintiff claimed compensation precisely because the City exercised its legislative powers in a particular way. He states that a municipality's choice to use its legislative powers to rezone land so that zoning continues to reflect the municipality's best wisdom is a legitimate choice and a choice that is very much part of the municipality's legislative power. He takes note that the plaintiff never attacked the new zoning bylaw as illegal. He holds that a duty to compensate private parties for a particular legislative choice would necessarily make that legislative choice subject to considerations other than an objective examination of what is best for the entire community.

**192**  The plaintiff submits that CVRD represented that it would implement and enforce bans on industrial, commercial and institutional organic wastes and yard and garden waste.

**193**  During its final submissions, Westcoast did not submit that CVRD had agreed to enact those bylaws, rather Westcoast submitted that CVRD had negligently misrepresented that it would enact those bylaws. In ***Pacific National***, the Supreme Court of Canada refused to award damages to the plaintiff for the defendant municipality's alleged breach of an implied term in an agreement to keep zoning in place. The Court held that council members of council have to be free to exercise their discretion to rezone without regard to the consideration that the municipality might be liable in damages if it changes zoning.

**194**  Westcoast asserts that CVRD ought to have enacted a bylaw prohibiting CVRD's facilities from receiving yard and garden waste and requiring the delivery of that waste to the plaintiff's facility. Such a bylaw would have had far reaching effects. The transfer of yard and garden waste to the plaintiff's Cobble Hill facility would have entailed inconvenience and expense. Either the individual residents of CVRD would have had to transport their waste to Westcoast, or CVRD or the municipalities would have had to collect that waste and transport it at somebody's expense.

**195**  The bylaws that Westcoast asserts ought to have been enacted relate to matters of importance to the residents of CVRD. As mentioned previously, CVRD includes the municipalities of Duncan, North Cowichan, Lake Cowichan and Ladysmith. CVRD's member municipalities have their own waste collection systems and related bylaws.

**196**  Those are political decisions. ***Pacific National*** held that the responsibility of a municipal council to address such matters in the public interest can not be fettered by concerns about claims for damages by municipal vendors.

**197**  I am of the opinion that this aspect of Westcoast's claim against CVRD is not actionable; that is to say, CVRD's alleged negligent misrepresentation that it would implement bylaws is not actionable at the suit of the plaintiff. If a concluded agreement is not enforceable, then neither is a representation to implement such an agreement.

**198**  In my view, Westcoast's claims in negligent misrepresentation must fail for a number of reasons.

**199**  First, I am of the view that CVRD can not be held liable in damages for misrepresenting that it would make site recipient designations or that it would enact and maintain bans or that it would legislate the enforcement of bans. CVRD's board has to be left with the discretion to make designations or to enact bans or to enforce bans, without being concerned that CVRD might be liable in damages to Westcoast if it did not do those things.

**200**  Second, I find as a fact that neither CVRD nor any of its representatives ever did agree that CVRD would implement or enforce bans or designate Westcoast as one of only two authorized recipients of organic waste. It was, from time to time, the recommendation of employees of CVRD, and of its advisory committees, that such bans should be introduced and enforced. CVRD did resolve to implement some bans and it did introduce a ban of ICI organics. CVRD did tell representatives of Westcoast and it told Westcoast's lender, BDC, of its intention to implement an ICI ban when Westcoast's facility opened, but CVRD did not agree to do that.

**201**  Third, I find that Westcoast did not act on any CVRD representation in deciding to build its facility. In my opinion, the preponderance of evidence is that Westcoast decided to build a composting facility on Vancouver Island for its own commercial purposes, and that its decision to do so within the boundaries of CVRD was dictated by location and by its purchase of an acceptable site at an attractive price.

**202**  I do not think it possible the meetings that Mr. Cuerrier and Ms. Boucher said took place actually took place in the way they described with Mr. Cuerrier and Ms. Boucher misapprehending what Mr. Hughes and Mr. Raimondo told them. The evidence of Mr. Cuerrier and Ms. Boucher was unequivocal. Ms. Boucher's evidence is that she initiated a meeting with Mr. Raimondo to confirm information given to her by Mr. Cuerrier. A meeting that was held in those circumstances could not have led to error. The evidence of Mr. Cuerrier and Ms. Boucher is that Mr. Hughes and Mr. Raimondo deliberately made specific representations to them that caused Westcoast to build the facility. The evidence of Mr. Hughes and Mr. Raimondo is also clear - they say they did not make those representations. In my opinion, there could not have been some misunderstanding that might have given rise to the evidence of Mr. Cuerrier and Ms. Boucher.

**203**  I have had reference to a number of considerations in deciding that no such meetings occurred and that no such representations were made.

**204**  The first consideration is the evolution of the plaintiff's pleadings.

**205**  The Statement of Claim in this proceeding was filed on July 9, 2003. At paragraph 6, the Statement of Claim alleges that the plaintiff was induced by the false, negligent, deceitful and dishonest misrepresentations of Hughes and CVRD to purchase the Cobble Hill site on which it constructed the composting plant.

**206**  In particulars filed August 8, 2003, Westcoast describes an agreement. It does not allege that Westcoast had been promised an administrative agreement or authorized designation status or a total organics ban. It does not explicitly allege any representations by Mr. Raimondo prior to Westcoast's decision to build.

**207**  In its Second Further Amended Statement of Claim filed July 14, 2006 the plaintiff pleads that an agreement was concluded in or about September of 1999.

**208**  It is the defendant's submission that the plaintiff's allegation that an agreement was formed in September 1999 was advanced only after it became aware through document disclosure in this proceeding that the minutes of two of the meetings of CRRC could be misused by it to advance a false claim that Director Hughes and Chief Administrator Raimondo made representations to Mr. Cuerrier and Ms. Boucher in the fall of 1999 that caused it to construct the facility.

**209**  In my view, the pleaded September 1999 agreement is of great import to the plaintiff's case. The plaintiff's failure to even refer to the events that it later alleged took place in or about September of 1999 in the original Statement of Claim as particularized leads me to infer that no such events occurred.

**210**  Westcoast's evidence advanced at the trial was not that the plaintiff purchased the Cobble Hill site because of neglect or dishonesty or deceit on the part of Hughes and/or CVRD. That pleading was at the heart of the claim as originally filed.

**211**  In my opinion, the evolution of the pleadings leads to the inference that the pleadings are not based on what occurred, but were tailored to the proceeding as it unfolded. In short, the pleadings are based on what the plaintiff thought might lead to a successful prosecution of its claim.

**212**  The second consideration is that there are a number of documents that lead me to the conclusion that Westcoast made its decision to build a composting facility at Cobble Hill long before the fall of 1999. Furthermore, I find that before the fall of 1999, both Mr. Cuerrier and Ms. Boucher wrote or said that the decision to build had been made.

**213**  On July 27, 1995, a "License and Know-how Contract" was completed between Herhof and J.C. Environmental Inc. Under the agreement, J.C. is given the exclusive license to produce, use and sell Herhof's composting boxes in Canada.[**52**](#Forward_fnref_fnr-52)

**214**  On April 29, 1997, Mr. Cuerrier prepared a business plan for "BioKomp." BioKomp was a non-registered trade name used by Mr. Cuerrier. In the business plan, Mr Cuerrier wrote that in order to make the first sale of a composting facility, BioKomp needed to operate the facility.[**53**](#Forward_fnref_fnr-53)

**215**  On February 27, 1998, Herhof and HUWS entered into an "Additional Agreements to Licence Contract of 27.07.95". Under this contract, it was agreed that "In case no licensed businesses will be achieved in 1998, Herhof has the right to cancel the licence contract of 27.07.1995 and the contract of option, dated 28.07.1995 by one party per 31.12.1998. In this case, the remaining balance will be due immediately. A payment by HUWS without license business in order to avoid cancellation of the contract is not possible".[**54**](#Forward_fnref_fnr-54)

**216**  On April 3, 1998, BioKomp submitted a reply to a RFP issued by RDN on behalf of BioKomp, HUWS and Herhof.[**55**](#Forward_fnref_fnr-55)

**217**  On September 7, 1998, Mr. Cuerrier co-authored a business plan for a compost facility in Langford. Pages 26 to 28 identify the source of the feedstock. This observation is made at page 27 "the low tipping fee will serve as the main incentive for haulers and landscapers to come to the facility."[**56**](#Forward_fnref_fnr-56)

**218**  On November 18, 1998, Herhof sent HUWS a price quote on parts for "project of Victoria." The letter refers to Ms. Boucher's fax of November 11, 1998, which was not submitted as evidence at the trial.[**57**](#Forward_fnref_fnr-57)

**219**  On December 17, 1998, Herhof wrote HUWS Re: "Victoria" and said in part

We are very happy and would like to congratulate you for placing a new plant in North-America respectively in Canada. In our opinion, it is very important that it has been succeeded for the first time to build such a plant at Canada's West Coast.[**58**](#Forward_fnref_fnr-58)

**220**  I draw the inference from this evidence that by December of 1998 HUWS (through Ms. Boucher) had advised Herhof of the decision to build a compost facility on the West coast referred to as "project Victoria". HUWS had to sell a facility in 1998 in order to avoid losing its licence rights from Herhof.

**221**  On February 7, 1999, Mr. Cuerrier wrote WLAP for approval to operate a commercial organic disposal facility in Langford. He said "The construction of the first Herhof Technology will begin as soon as all approvals have been obtained from the Ministry of Environment.[**59**](#Forward_fnref_fnr-59)

**222**  I see no reason to doubt Mr. Cuerrier's assertion that the decision had been made to build a facility.

**223**  On February 18, 1999, Herhof wrote HUWS asking for detailed information on the Victoria project. Herhof reminded HUWS

We kindly asked to look into this matter and make the according arrangements. In accordance with the additional agreement, we reserve the right, to cancel the licence contract for 31 December 1998 by one party, if in 1998 no licences will be handled. Before we assert this right, we expected detailed information on the basis of all points mentioned above.[**60**](#Forward_fnref_fnr-60)

**224**  As president of HUWS, Ms. Boucher wrote the following to Mr. Michael Koch of Herhof on February 19, 1999 in reference to the Victoria project.

1. Ms. Boucher wrote as follows:

Dear Michael,

Believe me, I am as concerned as you that the progress on the projects is very slow. But better slow progress than no progress at all!

I am surprised that Herhof feels that it has not been involved in the Victoria project. Dr. Carten Schnorr was intimately involved in the preparation of the pricing which was formulated via correspondence Nov. 11-98, Nov. 15-98, Nov. 18-98 and by the subsequent visit of Alan and Sean to Germany in January 99 for technical conferencing with Arno lauber and others because we felt uneasy about the pricing and technical aspects of the new air system which will be required for this project. Alan and Sean felt that the week spent with the technical staff of Herhof was very productive.

We had really stuck our necks out by accepting a Purchase Order on the Victoria project without full verification of pricing. But due to our contractual obligations we felt we had no other option.

After Alan returned we were finally able to begin verifying the pricing that had already been given to the customer. These are very difficult circumstances under which to work and create a very risky financial situation for us.

We are currently re pricing some of the air components in North America and will soon be able to determine which components will be purchased from Herhof and which will be purchased here.

The Project is now under environmental permitting. The plant will be located at 979 Henry Eng Place, Langford BC and will service the Greater Victoria ICI and Commercial sector as well as participating area cities. A copy of the covering letter for the Application for the Environmental Permit is attached.

The plant is being built as a commercial venture that is there is no official guarantee of flow to the plant. The plant will have to operate at a tip fee lower than the government operated landfill to attract the waste. Attached is a sample of the relationships that are being developed by the client to attract flow to the plant. In addition, several municipalities are now going to their boards for approval for short term contracts to collect source separated organic waste and deliver it to the plant.

More and more, the municipalities in Canada are issuing Requests for Proposals where they are asking the private sector to set up plants without any guarantees of flow of waste and without investment by the community (viz. Nanaimo, BC). This creates an opportunity for private investment.

My view is that Canada is gradually moving towards a system that will be similar to the US system where the governments will not control the flow of waste. This is seen in the fact that municipalities are willing more and more to contract with existing facilities as opposed to setting up their own. Municipalities are concerned about 2 things: that technologies will change and that they will be struck with an obsolete technology and that they will lose a lot of money because the technology they have chosen is bad.

The Victoria project is going ahead on the basis that if the facility exists, the municipalities will come. There is 110,000 T of organic waste in the Victoria district and very strict regulations governing the operations of composting sites have been implemented which will take effect in the year 2000. These regulations incorporate a lot of the suggestions we made when we participated in the bid process there in 1995 which will make it difficult for companies to set up plants that have less environmental controls.

Initially, the plant will be set up to receive 12,000 T/yr. but it is expected that this plant will be expanded rapidly. It is projected that the plant will initially operate at the break even point and will begin making money only when it is expanded. The site could receive as much as 40,000 T/yr. at maximum expansion capacity.

We expect that all permits will have been issued so that construction will begin no late than May 1999.

**225**  The letter continues with reference to other projects.

**226**  In my opinion, this letter explains the basis on which HUWS participated in the Cobble Hill project.

**227**  The project was not being built on the basis that there would be any guarantees of flow of waste from the municipalities. The project was envisioned to be a commercial venture with no official guarantee of waste flow.

**228**  I see no reason to doubt Ms. Boucher's assertion on February 19, 1999 that the decision had been made to build a facility.

**229**  An agreement dated March 27, 1999 was completed between Westcoast and HUWS for the construction of a compost facility.

**230**  On April 27, 1999, Westcoast made an offer to purchase the Fisher Road site in Cobble Hill.[**61**](#Forward_fnref_fnr-61)

**231**  On May 7, 1999, Westcoast applied to Ministry of Environment Lands and Parks for a permit to operate at 1355 Fisher Road, Cobble Hill, British Columbia.

**232**  Mr. Cuerrier wrote:

All designs, plans and finance are now in place. The construction of the first Herhof Technology will begin as soon as all approval have been obtained from the Ministry of Environment.

We look forward to hearing from you no later than June 15, 1999. The purchase of the land is subject to approval from the Ministry of Environment.[**62**](#Forward_fnref_fnr-62)

**233**  On May 12, 1999, Westcoast submitted an application for financing to BDC.[**63**](#Forward_fnref_fnr-63)

**234**  Although the application for financing does not identify the site, BDC's preliminary assessment (letter of intent) that followed, dated June 29, 1999, relates to Westcoast's "first organic composting facility in Cobble Hill B.C."[**64**](#Forward_fnref_fnr-64) The assessment is based on Westcoast's representations that the facility would be receiving organic material from CRD, CVRD and RDN.[**65**](#Forward_fnref_fnr-65)

**235**  On May 24, 1999, Ms. Boucher wrote Herhof Re: "Victoria British Columbia" to ask about pricing of the biocells.[**66**](#Forward_fnref_fnr-66)

**236**  On June 14, 1999, the subject condition on the offer to purchase the land for MOE approval for an in-vessel composting facility was removed.[**67**](#Forward_fnref_fnr-67)

**237**  On June 15, 1999, HUWS wrote BDC confirming its intention to invest $450,000 in the shares of Westcoast.[**68**](#Forward_fnref_fnr-68)

**238**  On June 22, 1999, Mr. Cuerrier attended a CRRC meeting. For reasons that I explain below, I find that he told those present that Westcoast would be building the facility, and that construction was not dependant on anything that CVRD did or did not do.[**69**](#Forward_fnref_fnr-69)

**239**  On July 30, 1999, Westcoast completed its purchase of the Fisher Road property.[**70**](#Forward_fnref_fnr-70)

**240**  The minutes of another meeting of CRRC, this one held on August 19, 1999, record that Mr. Cuerrier said that he would be building the facility with or without a CVRD commitment to supply the feedstock, although a commitment would make things easier for him.[**71**](#Forward_fnref_fnr-71)

**241**  There is a logical explanation why Mr. Cuerrier told CVRD directors that Westcoast would be building without a RFP agreement. It is because by June of 1999 there was considerable interest from others in building a compost facility in CVRD. If CVRD awarded a RFP contract to a third party, that party might well build a facility in CVRD that would have been in competition to the facility that Westcoast intended to build. It was obvious to everybody, including Mr. Cuerrier, that if Westcoast intended to build its facility without CVRD guaranteeing it feedstock, that CVRD was unlikely to guarantee it feedstock. There would be no reason why CVRD would assume that risk.

**242**  I have concluded that the reason why Mr. Cuerrier told the CVRD directors on the CRRC that he was going to build with or without a RFP agreement was because that was true. Westcoast did not think it would have any difficulty in attracting a sufficient supply of feedstock to its facility and it had decided to build. Mr. Cuerrier decided to tell the CRRC members of the decision to build in order to discourage the construction of a competing facility. This is not to say that Mr. Cuerrier did not want a RFP agreement. He did, and he continued to do what he could to obtain one. Such an agreement would have been of benefit to Westcoast, but Mr. Cuerrier's dealings with CVRD and CRRC after June 22, 1999 played no part in Westcoast's decision to build.

**243**  Westcoast's decision to build a composting facility at Cobble Hill was made by June 22, 1999. Westcoast still had to obtain financing and investment funds and it still had to work out construction details. The project may not have gone ahead, but if it had not it was not because of any lack of intent on the part of Westcoast, or Ms. Boucher or Mr. Cuerrier. They had decided to build, and nothing said by CVRD or its staff or its directors in the fall of 1999 played any part in that decision.

**244**  On July 15, 1999, Mr. Cuerrier wrote the following in a memo to BDC:[**72**](#Forward_fnref_fnr-72)

"Please be reminded that we have not address (sic) 1% of the total organic waste available within the three proposed Regional District and that two of the three Regional District need to export their waste outside their Region'.

Getting the feedstock is not the problem".

**245**  That memo confirms that there was only one facility contemplated, and that it was to receive material from all three regional districts-CRD, CVRD and RDN.

**246**  The memo also confirms that Westcoast was not concerned about getting a feedstock guarantee from CVRD.

**247**  On August 24, 1999 CIC Innovation Consultants Inc. submitted a market and technical assessment report for Westcoast.

**248**  At page 19 of the report, the authors referred to Westcoast's tipping fees as being "attractive." At page 24 they noted that Westcoast had designed its facility to accommodate 1% of the total organic waste generated in CRD, CVRD and RDN. They concluded that that was a reasonable projection.[**73**](#Forward_fnref_fnr-73)

**249**  On September 7, 1999, Mr. Brown, an investor in Westcoast and a Chartered Accountant, wrote BDC enclosing a statement of projected cash flow. Mr. Brown's documentation must refer to the Cobble Hill project, as that is the loan that BDC was assessing, and the Cobble Hill project was the only project then under consideration. Mr. Brown wrote that "It appears that a February 1, 2000, completion start date is more realistic."[**74**](#Forward_fnref_fnr-74)

**250**  On September 8, 1999, Westcoast wrote a cheque to BDC for the $7,500 "complex zone study fee."[**75**](#Forward_fnref_fnr-75) I think it unlikely that Westcoast would have paid for this study before it decided to build.

**251**  On September 9, 1999, Mr. Brown sent updated cash flow projections to BDC. He assumed the loan would be fully funded in December, 1999, on completion of construction.[**76**](#Forward_fnref_fnr-76)

**252**  On September 10, Ms. Boucher wrote BDC to confirm that HUWS would finance Westcoast's third biocell on certain terms.[**77**](#Forward_fnref_fnr-77)

**253**  On September 13, 1999, HUWS ordered equipment from Herhof for delivery on November 30, 1999.[**78**](#Forward_fnref_fnr-78)

**254**  All of those events occurred before Westcoast says CVRD made the representations to it causing it to build.

**255**  On September 27, 1999, BDC sent Mr. Cuerrier a commitment for financing.[**79**](#Forward_fnref_fnr-79)

**256**  On November 18, 1999, BDC increased the program to be financed due to the addition of a third biocell.[**80**](#Forward_fnref_fnr-80)

**257**  On November 29, 1999, the TD Bank sent Mr. Cuerrier a commitment for financing of $250,000.[**81**](#Forward_fnref_fnr-81)

**258**  After concluding various agreements relating to the shareholders, Westcoast went ahead with construction.

**259**  I am of the view that the pre-construction documents do not support Westcoast's claim that it decided to build because of statements made from September 13/14 1999 to December 1999.

**260**  In my opinion, the documentary evidence created before September 13, 1999 and the evidence as to what Mr. Cuerrier and Ms. Boucher said before September 13, 1999 leads to these conclusions:

1. In 1998 Ms. Boucher and Mr. Cuerrier decided to build a Herhof in-vessel composting facility on Southern Vancouver island;
2. Their original plan was to build in Langford (CRD);
3. In 1999 they decided to change the site of the facility from Langford (CRD) to Cobble Hill (CVRD);
4. They always intended to build only one facility to process feedstock from CRD, RDN and CVRD;
5. The decision to build a facility and the decision to build it in CVRD were both made before September 13, 1999.

**261**  The third consideration that leads me to reject Westcoast's claim in negligent misrepresentation is that, in my opinion, neither Mr. Cuerrier nor Ms. Boucher were reliable witnesses.

**262**  Mr. Cuerrier denied he had said at CRRC meetings that Westcoast would build with or without a RFP agreement. The minutes of two meetings record that he did say that. Mr. Dennison's contemporaneous notes also record Mr. Cuerrier saying that. The CRRC directors who were in attendance also testified that he Mr. Cuerrier said that.[**82**](#Forward_fnref_fnr-82) They remembered it because it was such a startling statement.

**263**  I find that Mr. Cuerrier did say that Westcoast would build with or without an RFP agreement. His denial that he did reflects poorly on his reliability as a witness.

**264**  In Westcoast's Reply to CVRD's RFP, Mr. Cuerrier claimed to have a Bachelor of Commerce degree from the University of Ottawa[**83**](#Forward_fnref_fnr-83). He admitted at trial that he did not.[**84**](#Forward_fnref_fnr-84) I do not accept the explanation for that false statement that Mr. Cuerrier gave at the trial.

**265**  Exhibit 62 is an agreement dated September 13, 1999 between 597427 BC INC and HUWS relating to the construction of the facility. It is a document that is of critical importance in this proceeding. Mr. Cuerrier testified at an examination for discovery that it was prepared in or about September 13, 1999.[**85**](#Forward_fnref_fnr-85) It was not. That numbered company was not incorporated until December 13, 1999. Exhibit 62 could not have been drawn and signed before incorporation because its name on the agreement is the incorporation number and the incorporation number was not known before December 13, 1999. On or about September 13, 1999 is when Mr. Cuerrier says he got the assurances from CVRD's representatives that made him decide to build. It is difficult to see how he could have been mistaken when asserting that the agreement to build was made at the same time. Both events-his receipt of the assurances that caused him to build, and his signing of the written agreement whereby Westcoast agreed to pay over three million dollars to build the facility-are not ones Mr. Cuerrier are likely to have forgotten. CVRD submits Exhibit 62 was created long after the fact to bolster a false assertion that Mr. Cuerrier had received important representations on September 13, 1999. It submits that when Mr. Cuerrier testified that the agreement was made on or about September 13, 1999 Mr. Cuerrier did not realize that it would become apparent that that couldn't be so.

**266**  I think it more probable than not that that is the reason why Mr. Cuerrier gave that incorrect evidence at the examination for discovery. I infer that this document was created after the fact to support a false claim.

**267**  Ms. Boucher devised an elaborate VCC scheme in order to improperly obtain provincial tax credits to partially fund the facility.[**86**](#Forward_fnref_fnr-86) The scheme involved attributing "soft cost" investments to Westcoast's "investors" and then having them claim tax credits on those "investments". Those "investors" did not in fact make those cash investments, and they were therefore not entitled to tax credits. Once received, the provincial tax credits were made available to Westcoast.

**268**  A provincial audit and review of the scheme found that Mr. Cuerrier had filed reports containing false and misleading information[**87**](#Forward_fnref_fnr-87). The scheme was Ms. Boucher's.

**269**  Ms. Boucher's evidence in respect of odour issues defied belief.

**270**  After listening to Mr. Cuerrier and Ms. Boucher testify at length over several days about a variety of matters, I conclude that neither of them was a reliable witness. I did not consider either of them to be trustworthy. I have, in fact, concluded that they fabricated their evidence in respect of having met with CVRD representatives in the fall of 1999 and on having decided to build the facility on representations they received in those meetings.

**271**  Furthermore, Westcoast did not disclose relevant documents.

**272**  Westcoast did not initially disclose an agreement dated March 27, 1999.

**273**  On the first day of this trial, CVRD applied to dismiss this proceeding for failure to produce documents.[**88**](#Forward_fnref_fnr-88)

**274**  Counsel for CVRD submitted that an examination of the documents that were then available led to the inference that Westcoast had entered into a written agreement to build the facility before entering into the agreement dated September 13, 1999, and that Westcoast had not disclosed the earlier agreement.

**275**  Counsel for Westcoast submitted: "So it's really not clear first of all that there is another agreement floating out there that hasn't been produced".[**89**](#Forward_fnref_fnr-89)

**276**  There could not be any documents more important to this proceeding than Westcoast's written agreements to have it built. Westcoast knew of the existence of the March 27, 1999 agreement.[**90**](#Forward_fnref_fnr-90) It was a party to it. It was signed by Mr. Cuerrier and Ms. Boucher. It was created early in 1999. That had to be so because Westcoast used it to apply to BDC for the Cobble Hill financing. It was provided to Westcoast's VCC solicitor in or about December of 1999. The agreement was produced during the trial by Westcoast's VCC solicitor but only after he was served with a subpoena.[**91**](#Forward_fnref_fnr-91) It was produced after Westcoast's counsel told the court it was not clear that it existed. Mr. Cuerrier and Ms. Boucher knew that it had existed, although they might not have realized that a copy of it was still available.

**277**  Westcoast did not disclose the document whereby it first ordered the biocells. The biocell order was never produced.

**278**  The number of documents that were disclosed by Westcoast during the trial numbered in the dozens.

**279**  I have concluded that Westcoast did not disclose relevant documents because the documents are adverse to its claims.

**280**  The conduct imputed to Mr. Hughes and Mr. Raimondo that they misrepresented that CVRD had already agreed to enact and enforce bans is most improbable.

**281**  Mr. Hughes and Mr. Raimondo both knew that the enactment and enforcement of bans was a board decision that was of concern to all of the directors and to the CVRD municipalities. These were political decisions.

**282**  Mr. Hughes, Mr. Raimondo, Mr. York, Mr. Dennison and the directors of CVRD who testified stated that CVRD never agreed to do anything to entice Westcoast to build its facility.

**283**  In my opinion there is no real air of realty to the misrepresentation evidence of Mr. Cuerrier and Ms. Boucher. They were knowledgeable and sophisticated investors. Mr. Cuerrier drafted Westcoast's proposal to the RFP. It was detailed and thorough. Ms. Boucher is a trained lawyer. Both of them had advised governments. I think it inconceivable that they would have embarked on a multi-million dollar venture on the strength of the verbal statements that they said were made to them. The documentation that Westcoast did create for the project in or about December of 1999, including the VCC documents[**92**](#Forward_fnref_fnr-92), was sophisticated and complicated. I do not accept that at that same time Mr. Cuerrier and Ms. Boucher did not think to even check to see if CVRD had in fact passed resolutions relating to their project, or that they did not consider that they needed anything from CVRD in writing before proceeding. I am satisfied that Ms. Boucher, in particular, would have insisted on obtaining written confirmation of CVRD's undertakings and agreements if the facility truly was being built in consideration of CVRD having represented or agreed that it would do certain things.

**284**  I conclude that Westcoast did not build its facility because of any representations made by Mr. Hughes or Mr. Raimondo or Mr. York or Mr. Dennison to Mr. Cuerrier or to Ms. Boucher. Westcoast decided to build a facility in 1998 and it decided to build that facility at Cobble Hill in 1999 because it purchased a suitable site there.

**285**  Westcoast decided to build its facility in CVRD long before the time that it submits that negligent misrepresentations were made to it. Westcoast did not build on the basis of any negligent misrepresentations.

**286**  I have concluded that the meetings that Mr. Cuerrier said took place between him and Director Hughes and Mr. Raimondo on or about September 13th or 14th 1999 at which Mr. Cuerrier said misrepresentations were made did not take place. I have concluded that Mr. Cuerrier's evidence that there were such meetings was fabricated.

**287**  I have concluded that Ms. Boucher's evidence that she met with Mr. Raimondo and Mr. Hughes in or about December of 1999 to confirm the representations that Mr. Cuerrier said had been made to him was fabricated. I have concluded that no such meetings took place.

**288**  I dismiss the plaintiff's claims in negligent misrepresentation.

***Negligence***

**289**  In its written submission Westcoast's ***negligence*** claim primarily deals with CVRD's failure to enforce bans in a timely and effective manner. Westcoast submits that CVRD promised before and during construction to implement both yard and garden waste bans and ICI organics bans. Westcoast submits that instead of creating a ban as promised, CVRD classified yard and garden waste as recyclable rather than prohibited and continued to receive yard and garden waste. Westcoast submits that after having prohibiting its receipt of ICI waste by bylaw and after enacting a policy of enforcement, CVRD ignored and/or negligently applied its policy of enforcement in respect of its ICI ban.[**93**](#Forward_fnref_fnr-93) Westcoast claims it suffered recoverable damages arising from its loss of potential feedstock that resulted from CVRD's negligent enforcement.

**290**  Paragraphs 80 and 81 of the Second Further Amended Statement of Claim contain particulars of Westcoast's ***negligence*** allegations.

**291**  Paragraph 80 alleges that CVRD owed a duty of care to Westcoast to ensure that their actions were reasonable in all cases and would not harm Westcoast's economic interests.

**292**  That pleading is not helpful. A duty of care is one recognized as such at law. CVRD did not have a duty of care to Westcoast not to do anything that might harm its economic interests. For example, Westcoast submits that CVRD was negligent in not enacting bylaws relating to bans. But waste bans themselves would have imposed costs on others, thereby harming their economic interests. Westcoast does not disagree that CVRD was entitled to enact bylaws that might harm the economic interests of others.

**293**  Paragraph 81 alleges CVRD is liable to it in ***negligence*** for having initiated a rezoning of Westcoast's land.

**294**  CVRD was entitled to reconsider its zoning decisions. It is not liable for damages for initiating a rezoning. If rezoning occurred, Westcoast was entitled to challenge its validity. Westcoast instead entered into an agreement with CVRD to avoid the proposed rezoning. Westcoast did not have to enter into the agreement with CVRD. It was not operating under duress. But having done so, it was bound by the agreement, and CVRD is not liable to Westcoast for Westcoast's costs of compliance with the agreement. In my opinion, CVRD is not liable to Westcoast in damages for having "initiated" a rezoning of Westcoast's land.

**295**  Paragraph 81 pleads other causes in ***negligence***. There was evidence at the trial relating to those pleadings, but they were not addressed by Westcoast in its written submissions.

**296**  In my opinion, Westcoast's claims in respect of those other causes were not proven at trial. CVRD was legally entitled to consider rezoning Westcoast's property, and it was Westcoast's choice to enter into an agreement with CVRD relating to zoning. Westcoast did not establish that the other grounds in ***negligence*** that it pleaded in paragraph 81 are actionable or that they caused it loss.

**297**  I have set out the reasons why I am of the view that Westcoast can not succeed in its claim that CVRD is liable for not enacting bylaws. For those same reasons I am of the view that CVRD can not be held liable to Westcoast in ***negligence*** for not enacting a bylaw prohibiting its receipt of yard and garden waste or for not enacting a bylaw prohibiting the deposit of waste anywhere other than at Westcoast's facility. In my opinion those claims are not actionable. See ***Pacific National.***

**298**  I am, in any event, of the opinion that CVRD acted reasonably and in good faith when enacting legislation relating to yard and garden waste. It appears to me to have been in the best interests of the public that yard and garden waste be classified as a recyclable material and not as a prohibited waste. It was not practical to expect the residents of CVRD to find a place other than CVRD's facilities to deposit their material, which in many cases would have been very small amounts. Requiring all of the residents to deliver their yard and garden waste to Westcoast was unreasonable. Residents of Ladysmith or Duncan, for example, should not be required to drive their lawn clippings to Cobble Hill. CVRD tendered its contracts for composting the yard and garden waste within its control. To do otherwise would have been unreasonable. Westcoast's competitors were entitled to compete for this material. The only exception to tendering that CVRD contemplated was allowing Westcoast to receive the yard and garden waste that was within CVRD's control at no tipping charge-an offer that, if accepted, would not likely have been the subject of complaint by others. It appears to me that CVRD's motive was to facilitate Westcoast in obtaining green material for the composting process. Westcoast did not have to accept that arrangement, and it did not accept it. In my opinion, the fact that the proposal was made does not demonstrate unreasonableness on the part of CVRD.

**299**  Westcoast submits that CVRD did not enforce or negligently enforced the ICI ban that it did implement.

**300**  A municipality can be held liable in ***negligence*** for a failure to enforce its bylaws. It is necessary to review the bylaw in question and its history.

**301**  The bylaw at issue is bylaw No. 2108.[**94**](#Forward_fnref_fnr-94) CVRD adopted Bylaw 2108 on September 13, 2000. It prohibited delivery of ICI waste to CVRD's facilities.

**302**  Some of the provisions of Bylaw No. 2108 that are relevant to this proceeding are set out below.

**303**  "Engineer" is defined as meaning "the Manager, Engineering Services Department of the CVRD or his/her authorized designate".

**304**  The bylaw's definition of "Prohibited waste" includes 36 kinds of waste. "Commercial organic waste" falls under the category of prohibited waste.

**305**  The bylaw provides that "Recyclable materials" means "Marketable, Source-separated waste". The definition includes 21 kinds of waste. "Yard and garden waste" is one of those types of recyclable materials.

**306**  The bylaw includes CVRD's Bings Creek complex and its Peerless Road and Meade Creek drop off depots in its definition of "Disposal facility".

**307**  Condition 3(e) of the bylaw provides that the recyclable materials would be accepted at the disposal facility for no charge unless such material was specified in Schedule B.

**308**  Schedule B provides that the charge for depositing yard and garden waste is $35.00/tonne.

**309**  Condition 3(f) of the bylaw provides that "No person shall deposit a Prohibited Waste" ... "at the Disposal facility".

**310**  Provision 5 of the bylaw is captioned "Violations and Penalties."

**311**  Provision 5(b) provides that:

Every person who contravenes this bylaw by doing any act which the bylaw forbids, or omits to do any act which the bylaw requires to be done, may be required at the discretion of the *Engineer* ... to pay double the applicable charge for Loads, ... to remove and properly dispose of *Contamination ...* bylaw, ... to pay for clean-up charges to remove and properly dispose of the *Contamination*, ... to pay for any damages or injury to personal property incurred by CVRD as a result of a contravention of this Bylaw, ... and to be prohibited from depositing Solid waste at the *Disposal facility*.

**312**  Westcoast submits that CVRD did not reasonably enforce bylaw 2108 and that Westcoast received less organic waste at its facility than it would have received had the bylaw been reasonably enforced. Accordingly, Westcoast submits that CVRD is liable to it in damages for its failure to reasonably enforce its legislated prohibition of receipt of commercial organics.

**313**  The enactment of Bylaw No. 2108 followed earlier board resolutions that the board adopted following its consideration of committee reports.

**314**  At a meeting held May 10, 1999, the ESC considered a staff report dated May 6, 1999, regarding disposal bans. At the meeting, Mr. York reviewed the staff report and explained that "zero" tolerance would gradually be phased in and discretion would be used.[**95**](#Forward_fnref_fnr-95)

**315**  Following that meeting of ESC, the ESC reported and recommended to the board that CVRD adopt a "zero" tolerance policy applied with discretion for contaminated loads of garbage, and double the regular tipping fee be charged for loads considered contaminated. Where practical, the ESC recommended CVRD "make provision" for an offending hauler to remove and dispose of contaminates in a rejected load, and for covering the actual costs of clean up for rejected loads.[**96**](#Forward_fnref_fnr-96)

**316**  Those recommendations of ESC were considered by CVRD's board at a regular meeting held May 12, 1999. It was at that meeting that the board approved those recommendations, and further approved the listing of the proposed bans, charges and penalties governing disposal of materials at CVRD waste management facilities. The approved recommendations were to be included in the new CVRD bylaw that was to be developed and presented to ESC at a later date.[**97**](#Forward_fnref_fnr-97)

**317**  At a regular CVRD meeting held on June 23, 1999, the CVRD board adopted a resolution that its tipping fee for yard and garden waste be set at $35 per tonne for large quantities, with a $5 minimum, and a charge of $10 for a pickup load.[**98**](#Forward_fnref_fnr-98) At the same meeting, the board resolved to consider a disposal ban on organics from the commercial waste stream.

**318**  It was a consistent recommendation of CVRD staff that materials not be banned from CVRD's disposal sites without there being an alternative for disposal.

**319**  On April 12, 2000, the CVRD Board, at a regular meeting, adopted a motion that CVRD implement a bylaw to ban residential yard and garden waste and commercial/institutional waste from the waste stream to coordinate with the opening of Westcoast's composting facility.[**99**](#Forward_fnref_fnr-99)

**320**  On May 12, 1999, ESC made a Committee Report to the board recommending a "zero" tolerance with discretion and proposed penalties.[**100**](#Forward_fnref_fnr-100)

**321**  On June 30, 2000, Mr. Bob McDonald, CVRD's Solid Waste Reduction Program Coordinator, issued a news release explaining the proposed bylaw 2108.[**101**](#Forward_fnref_fnr-101)

**322**  The release noted that CVRD would be taking a step additional to those introduced in CRD and in RDN. The additional step was the introduction of a disposal ban on commercial organic material. The release said that the ban was intended to divert items such as stale or expired food stocks from grocers and restaurants for composting. The news release noted that CVRD staff would be working with the public as well as with commercial and municipal garbage haulers during the phase-in period.

**323**  Mr. McDonald testified that the phase-in included verbal warnings, written warnings, and eventual fines or penalties.

**324**  A notice published by CVRD on July 24, 2000 explained the waste disposal ban being introduced.[**102**](#Forward_fnref_fnr-102)

**325**  The notice said that enforcement would be phased in over several months, with warnings being issued to haulers or those depositing contaminated loads. It said that enforcement would be based on a policy of "zero tolerance to be applied with discretion." If a CVRD attendant identified any notable amount of contamination in the load, the hauler would be subject to a penalty. Alternatively, if deemed appropriate by the attendant, the hauler would be permitted to remove contamination from a load - thereby avoiding the penalty.

**326**  Mr. McDonald testified that CVRD effected wide publicity of the commercial organic ban.[**103**](#Forward_fnref_fnr-103)

**327**  On or about December 1, 2000, CVRD published notice that as of January 1, 2001, Bylaw 2108 would be enforced.[**104**](#Forward_fnref_fnr-104)

**328**  On December 15, 2000, Mr. York, Manager, Engineering Services, issued a memorandum to staff at its three waste sites relating to the implementation of Bylaw 2108.[**105**](#Forward_fnref_fnr-105)

**329**  Mr. York advised that the phasing in of the bylaw was being done to ensure that everyone was well informed of the disposal restrictions so that financial penalties would not have to be used. He said the penalties were severe and only intended to be used as a last resort.

**330**  The policy outlined by Mr. York was that from January 1, 2001, all loads would be subject to a visual inspection, and warnings would be issued for loads reaching the "trigger points" but without penalties.

**331**  He wrote that full and meticulous implementation of the bylaw was scheduled to begin as of April 1, 2001. He said that if everyone was made aware of the bylaw restrictions, penalties would not be required.

**332**  In reference to "zero tolerance," Mr. York said it was at the CVRD's "discretion" as to how much, if any, contamination is permitted, and at what point penalties are applied. He said the key to the introduction of the bylaw was consistency. He wrote "[w]hen discretion is applied, it is being based on the policy of not allowing any 'notable' quantities that demonstrate a 'blatant disregard for compliance' of bylaw restrictions, and can be 'removed' with minimal effort." He made special note of commercial organic waste.

**333**  Mr. York wrote that the intent of the disposal restriction relating to commercial organic waste was to keep larger quantities of waste that could be composted from disposal. He said, "A notable amount would be boxes or bags of almost entirely organic waste (e.g. Lettuce cores from a restaurant, spoiled oranges from a grocer, coffee grounds and orange halves from a café, stale loaves of bread from a baker, etc.)". Mr. York concluded his detailed policy advisory with a suggestion that Mr. McDonald should be contacted for clarification or with concerns.

**334**  Ms. Moira Walker was qualified as an expert in waste composition analysis and waste diversion feasibility.[**106**](#Forward_fnref_fnr-106)

**335**  Ms. Walker testified that after a waste ban has been implemented, there is a long period of time before maximum compliance is achievable. She said that that time frame is one that is measured in years.[**107**](#Forward_fnref_fnr-107)

**336**  Mr. McDonald testified about limitations on the enforcement of Bylaw 2108. He said there were potential health risks in opening bags of garbage, and that the public objected to their bags of garbage being opened for display.[**108**](#Forward_fnref_fnr-108)

**337**  Mr. McDonald said that workers could not see organics in a truck before it was tipped, and that once a load was tipped there were practical limitations as to what could be done in respect of enforcement. There were time limitations and safety issues.

**338**  Mr. McDonald testified that CVRD hired summer students to assist with enforcement, and that CVRD did issue notices, letters and tickets by way of enforcement.

**339**  Mr. McDonald testified that CVRD's enforcement policy of bylaw 2108 has proven successful. Successes have been incremental over several years.

**340**  Westcoast advanced evidence of non-compliance with the bylaw in support of its position that CVRD was in breach of a duty to divert organics from its sites.

**341**  Westcoast submits that because CVRD issued relatively few warnings and levied relatively few fines to haulers for commercial organic waste contamination, that the inference to be drawn is that CVRD did not reasonably enforce bylaw 2108. CVRD submits that the low number of warnings and fines is evidence of the success of compliance and not of lack of enforcement.

**342**  CVRD submits that it did not owe Westcoast a private law duty of care to enforce Bylaw No. 2108. It submits that the creation and enforcement of the ICI ban did not create any private right that gave Westcoast a cause of action or the ability to enforce the underlying bylaw by private suit. It submits that no private action lies for bylaw enforcement.

**343**  In ***Orpen v. Roberts***, [*[1925] S.C.R. 364*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-F7ND-G1KR-00000-00&context=) the Supreme Court of Canada considers whether a bylaw prescribing building setbacks was enforceable by action brought by a neighbour. Duff J. (later C.J.) wrote for the majority of the court. He states at page 370 that to answer that question the object and provisions of a statute as a whole must be examined with a view to determining whether it is a part of the scheme of the legislation to create rights enforceable by action for the benefit of an individual, or whether the remedies provided by the statute are intended to be the sole remedies available.

**344**  He concludes that the sole remedy in respect of an infringement of that bylaw lay in proceedings for the enforcement of the penalties prescribed by the bylaw. He finds that it would be an unfortunate construction of the statute to conclude that the non-compliance of the bylaw vested a right in all who suffered loss and injury to recover damages in respect of the loss.

**345**  In ***Orpen v. Roberts,*** the plaintiff advanced a claim against the person who had erected a structure that was not in compliance with the bylaw. In this case, Westcoast claims against CVRD for non-enforcement. It does not claim damages against those who did not comply with the bylaw. I did not understand that Westcoast submits that the haulers of commercial organic waste had a duty of care to Westcoast to deliver to its facility. It does submit that CVRD had a duty to Westcoast to refuse receipt of commercial organic waste.

**346**  In ***Caldwell v. City of Saskatoon and Sisters of Presentation*** (1969), 71 W.W.R. 152, MacDonald J. of the Court of Queens Bench of Saskatchewan states that the law in respect of the right of a rate payer to apply for a restraining order where there has been an infraction of a zoning bylaw was settled by Duff J. in ***Orpen v. Roberts***. MacDonald J. concludes that the rights of the plaintiff were restricted to laying a charge of failure to comply with the bylaw (if such is the case) or appealing the decision of the city to issue a development permit (provided that the legislation allowed for the appeal). The plaintiff's rights were restricted to remedies set out in the statute.

**347**  The history of the implementation of Bylaw No. 2108 and its substantive content are not consistent with it having been created for the benefit of Westcoast.

**348**  CVRD's board resolved at its regular meeting of May 12, 1999 to accept an ESC recommendation made on May 10, 1999 to adopt a "zero" tolerance policy with discretion in respect of the enforcement of waste bans.

**349**  On June 23, 1999, CVRD's board at a regular meeting resolved to accept a June 14, 1999 ESC committee recommendation to implement a commercial organic ban. The recommendations that were adopted by the board arose from committee meetings held prior to Westcoast's first announcement that it would be building the facility.

**350**  An examination of the content of Bylaw No. 2108 leads to the conclusion that it was not enacted to benefit Westcoast. The bylaw applied to all of the residents of CVRD, including those in four municipalities. It was a measure to control many kinds of waste for the common good. The bylaw relates to many kinds of waste other than commercial organic waste. In my opinion, the bylaw could not have been enacted for Westcoast's benefit when it is clear that many parts of the bylaw and the inclusion of other wastes in the definition of prohibited waste were not for Westcoast's benefit.

**351**  Notwithstanding CVRD's implementation of the bylaw at a time approximately coincidental with the opening of Westcoast's facility, I find that the purpose of Bylaw No. 2108 was not to benefit Westcoast. The ban relating to commercial organics was put in place at that particular time because CVRD did not want to ban its receipt of commercial organic waste without being sure that there were places for its deposit, such as Westcoast, but it was not enacted for the purpose of benefiting Westcoast.

**352**  I am of the opinion that Westcoast has no private right of action arising from the non-enforcement of Bylaw No. 2108 nor does Westcoast have the ability to enforce the bylaw by private suit. I would, for that reason alone, dismiss its suit in ***negligence*** for non-enforcement of Bylaw No. 2108.

**353**  In my opinion, there are other reasons why this claim cannot succeed.

**354**  A government body, including a municipality or regional district, can only owe a duty of care when engaged in operational decision making. When making policy decisions, "a government agency will be exempt from the imposition of a duty of care" regardless of whether a relationship of proximity exists that would ground a duty of care in other situations. If a government body engages in operational decision making and a ***negligence*** suit ensues, a traditional torts analysis ought to follow, being that if sufficient proximity exists and a duty of care applies, then the courts must go on to inquire into the requisite standard of care in the given circumstances. See: ***Just v. British Columbia,*** (***Just****)* [*[1989] 2 S.C.R. 1228*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-652N-00000-00&context=) at paragraphs 28 to 30.

**355**  The first issue is whether CVRD's decisions surrounding the enforcement of the bylaw were operational or policy decisions.

**356**  The issue is complicated in that liability in ***negligence*** may arise if loss occurs as a result of the implementation of policy decisions on an operational level. See ***Kamloops v. Neilson,*** [*[1984] 2 S.C.R. 2*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2339-00000-00&context=) at 45.

**357**  At paragraph 19 of ***Just*** the court describes policy decisions as "those which involve or are dictated by financial, economic, social or political factors or constraints". One factor that differentiates policy from discretion is the amount of discretion enjoyed by the decision maker.

**358**  In ***Kamloops v. Neilson***, the Supreme Court of Canada finds that the city had negligently applied its building inspection laws. The building inspection decision was operational, and therefore subject to a duty of care. The bylaw at issue said that the building inspector "must" inspect. There was no discretion in the building inspector's decision making process.

**359**  ***Kamloops v. Nielson*** was distinguished in ***Dusevic v. Columbia Shuswap (Regional District)*** [*(1989), 44 M.P.L.R. 160*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-F81W-21G3-00000-00&context=) (B.C.S.C.) at 166, where Maczko J. states:

I conclude that the ***Kamloops*** decision is not of assistance, as it can be distinguished from the case at Bar ... in the ***Kamloops*** case, a provision of the building by-law ... stated "The building inspector shall enforce the provisions of this by-law" ... The by-law in the case at Bar is silent on the question of enforcement. In this statutory vacuum the existence of a duty to enforce must be determined according to the common law, which seems to dictate that the responsibility for by-law enforcement is in fact no more than a "power" and is therefore discretionary.

**360**  ***In Froese v. Hik*** [*(1993), 78 B.C.L.R. (2d) 389*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F06F-23C3-00000-00&context=), paragraph 28 Huddart J., (then of the Supreme Court of British Columbia,) said that "[t]he decision whether to use the enforcement provisions of a by-law to obtain compliance and to what extent to do so is a policy decision to be made in good faith in the public interest." She concludes that the defendant municipality

... was not under any duty to enforce its by-law, in a timely fashion or otherwise ... Municipalities ... do not even insure or guarantee compliance with by-laws, unless the by-law or the enactment authorizing that by-law creates a statutory duty to enforce some or all of its provisions.

**361**  The enforcement of Bylaw No. 2108 was at CVRD's discretion. Its enforcement was a matter of policy. CVRD enforced the bylaw in good faith and in the public interest. Its objective was to enforce in a manner that achieved the cooperation of the public and maximum compliance. I find that Westcoast has no cause of action against CVRD for its alleged failure to enforce the bylaw. CVRD owed Westcoast no duty of care in the enforcement of the bylaw

**362**  There is a final reason why Westcoast's claim in ***negligence*** for non-enforcement of this bylaw cannot succeed. In my opinion, CVRD's actions in the enforcement of its bylaws were discharged reasonably.

**363**  In ***Foley v. Shamess***, [*2008 ONCA 588*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF41-F016-S0C7-00000-00&context=), the Ontario Court of Appeal states at paragraph 29 (emphasis added):

... it is one thing to say a municipality has a duty to enforce its by-laws. The way it enforces them is quite another thing. As I read the case law, a municipality has a broad discretion in determining how it will enforce its by-laws, as long as it acts reasonably and in good faith. That makes common sense. The manner of enforcement ought not to be left to the whims or dictates of property owners.

**364**  The standard of care that is of application here was discussed by the Supreme Court of Canada in ***Ingles v. Tutkaluk***, [*[2000] 1 S.C.R. 298*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M44F-00000-00&context=) at paragraph 20. It is what would be expected of an ordinary, reasonable and prudent body in the same circumstances.

**365**  CVRD publicized the bylaw and it advised the public of its enforcement policy. It notified major waste haulers directly. Enforcement was phased in so as to promote compliance with the ban. CVRD warned offenders verbally. It also issued written warnings, wrote letters and levied fines.

**366**  Mr. Tom McDonald gave extensive evidence about the measures CVRD took in enforcement.[**109**](#Forward_fnref_fnr-109)

**367**  I find that CVRD acted reasonably and in good faith in its enforcement of Bylaw No. 2108.

**368**  CVRD submits that a critical causal link in Westcoast's ***negligence*** claim has not been made out. It submits that there is no evidence that increased enforcement would have increased the organics being delivered to Westcoast's facility. There were competing recipients for this material. The amount of material that would have been diverted with increased enforcement is a matter of speculation. The evidence at the trial did not provide any sound basis for assessing or measuring Westcoast's claimed loss.

**Interference with Economic Relations**

**369**  Westcoast claims that CVRD unlawfully interfered with Westcoast's economic relations by: (i) threatening to down zone Westcoast's land; (ii) contacting CRD and DNC to have them suspend business dealings with Westcoast; (iii) implementing and cancelling a pilot project with DNC; and (iv) engaging in acts of defamation.

**370**  The tort of unlawful interference with economic relations is an economic tort. To establish liability, the plaintiff must prove three elements.[**110**](#Forward_fnref_fnr-110)

1. The defendant intended to injure the plaintiff.
2. The defendant engaged in unlawful conduct when it interfered with the plaintiff's economic relations.
3. The plaintiff suffered economic loss or injury as the result of the defendant's intentional unlawful conduct.

**371**  The first element is that the defendant must have intended to injure the plaintiff.

**372**  In ***Correia v. Canac Kitchens*** [*(2008), 294 D.L.R. (4th) 525*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-JWBS-64JB-00000-00&context=), the Ontario Court of Appeal notes at paragraph 101 that the requirement for intentionality for this economic tort may be stricter than for the tort of intentional infliction of mental distress, where the foreseeability of the consequences of reckless conduct can amount to intent. The court finds the difference in approach to the two types of tort justified. Economic torts, such as unlawful interference with economic relations, are strictly limited in purpose and effect in the commercial world.

**373**  At paragraph 106 the court unanimously finds:

A similar analysis applies to the tort of intentional interference with economic relations. Neither (defendant) intended to cause harm to the appellant by conducting a negligent investigation. Their conduct was not intentional - at most it was negligent. To the extent that they were reckless as to the consequences of their negligent conduct, recklessness does not amount to an intention to cause harm sufficient to make out the tort.

**374**  Intentionality in this context requires that a defendant direct its action against the plaintiff. See ***R. v. Cheticamp Fisheries Co-operative Ltd***., [*[1995] 123 D.L.R. (4th) 121*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-XPW1-F1H1-2089-00000-00&context=). The defendant's conduct must be targeted at the particular plaintiff.

**375**  In ***O.B.G. Ltd. v. Allan*** (***O.B.G.***), [2007] 2 W.L.R. 920 (H.L.), the House of Lords refers to the intentionality requirement at paragraph 62 stating:

It is necessary to distinguish between ends, means and consequences. One intends to cause loss even though it is the means by which one achieves the end of enriching oneself. On the other hand, one is not liable for loss which is neither a desired end nor a means of attaining it, but merely a foreseeable consequence of one's actions.

**376**  Mere knowledge that one's actions are unlawful or recklessness as to whether or not they are unlawful is not sufficient evidence of intention to do harm. In ***Gerrard v. Manitoba*** [*(1992) 98 D.L.R. (4th) 167*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DH1-JCRC-B4K7-00000-00&context=) (Man. C. A.) the court held that in the absence of malice or deliberate conduct calculated to interfere with economic or trade relations to the detriment of the plaintiff, there can be no liability.

**377**  The second element of the tort requires that the defendant engaged in unlawful conduct when it interfered with the plaintiff's economic relations.

**378**  There are conflicting views as to the meaning of "lawfulness".

**379**  In ***O.B.G.*** the House of Lords adopted a narrow approach to the definition of unlawfulness. It considered a defendant's conduct unlawful only if the third party involved could bring an action against the defendant for its conduct.

**380**  At paragraph 51, the House of Lords states:

Unlawful means, therefore, consists of acts intended to cause loss to the claimant by interfering with the freedom of a third party in a way which is unlawful as against that third party and which is intended to cause losses to the claimant.

**381**  In ***O.B.G.*** the court explained the rationale in its narrow definition of unlawfulness by stating at paragraph 56:

The common law has traditionally been reluctant to become involved in devising rules of fair competition ... in my opinion, the courts should be similarly cautious in extending a tort which was designed only to enforce basic standards of civilized behaviour in economic competition.

**382**  By way of example, under the ***O.B.G.*** definition of unlawfulness, unless CRD could bring an action against CVRD for CVRD's conduct in contacting CRD and requesting CRD to suspend business dealings with Westcoast, Westcoast would not have a cause of action against CVRD for unlawful interference with economic relations.

**383**  In ***Correia*** the court said that what amounts to "unlawful means" is a question that has caused the most difficulty for judges and scholars. The court made reference to ***O.B.G.*** but also to Canadian authorities that define unlawfulness more broadly. It referred to acts that the tortfeasor was "not at liberty to commit" and to "unacceptable means" and to conduct that was "in breach of a legal or equitable obligation under civil or criminal law". It did not decide the unlawfulness issue but decided the case on other grounds.

**384**  In ***Reid v. British Columbia (Egg Marketing Board)***, [*2007 BCSC 155*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-620H-00000-00&context=), H. Holmes J. of this court states at paragraph 151 that a fairly broad approach is applied to the definition of unlawfulness. She accepts that unlawfulness refers to conduct that the defendant was "not at liberty to commit" or to behaviour "not authorized by law" or to an "act without lawful justification."

**385**  The third element of the tort requires that the intentional unlawful interference with economic relations caused the plaintiff economic loss or injury. The claim is pecuniary.

**386**  There is a further consideration. It arises from the following comments of the Ontario Court of Appeal at paragraph 107 of ***Correia***:

The contention of the appellant is that the negligent investigation conducted by Aston and Kohler constituted the unlawful means. As discussed above, although Aston may be held responsible in law for such ***negligence***, Kohler may not. Therefore, on any definition, Aston's conduct could amount to unlawful means if it was intended to cause harm to the appellant. The same conduct by Kohler could not. However, again as discussed above, Aston's alleged ***negligence*** is directly actionable by the appellant, based on duty of care and foreseeability principles. There is no need to interpose the tort of intentional interference to obtain redress against Aston. The intentional torts exist to fill a gap where no action could otherwise be brought for intentional conduct that caused harm through the instrumentality of a third party.

**387**  The tort of unlawfully interfering with economic relations is a distinct tort. The Ontario Court of Appeal suggested that it is not meant to address wrongs that are directly actionable. That would include the tort of defamation.

1. *The Threatened Downzoning of Westcoast's Land*

**388**  Because of CVRD's negative experience with Hydroxil, the septic processing plant in the Koksilah Industrial Park in Duncan that had caused compost odour complaints, CVRD was sensitive to the issue of odour caused by composting sewage sludge.

**389**  Westcoast received its approval under PUCR to operate its facility on July 7, 1999. That approval did not allow Westcoast to compost "sludge, septage, biosolids" without a permit under the WMA.[**111**](#Forward_fnref_fnr-111)

**390**  In November, 2000, Westcoast accepted biosolids from DNC for composting. It did this despite not yet having received a permit under the WMA allowing it to do so.[**112**](#Forward_fnref_fnr-112)

**391**  CVRD considered rezoning Westcoast's land. It was entitled to rezone. It was also entitled to enact bylaws to control pollution, nuisances and odour.

**392**  On December 13, 2000, CVRD and Westcoast agreed that CVRD would not rezone and Westcoast would not accept and process sewage sludge or septage at its facility for six months.[**113**](#Forward_fnref_fnr-113)

**393**  Westcoast's claim against CVRD for unlawful interference with its economic relations by threatening to rezone must fail for several reasons. In my opinion, none of the three required elements of this economic tort are present.

**394**  First, CVRD's intention was not to harm Westcoast but to ensure that Westcoast's operations did not permit the escape of unacceptable amounts of compost odour by composting sewage sludge or septage.

**395**  Second, CVRD did not act unlawfully. It was lawfully entitled to consider rezoning Westcoast's property.

**396**  Third, Westcoast did not suffer economic loss as a result of CVRD's actions. CVRD did not rezone. It considered rezoning but it did not rezone.

**397**  Westcoast agreed not to accept and process sewage sludge or septage for six months. Westcoast's submission is that the threatened rezoning caused it to enter into a six month suspension agreement. Westcoast did not operate under duress. It is bound by its agreement. It is not entitled to recover damages for its "loss" in not processing that material in that six month time period.

**398**  Westcoast was not permitted to process sewage sludge or septage without a MWLAP permit. MWLAP issued the permit on June 12, 2001.[**114**](#Forward_fnref_fnr-114) Westcoast was not lawfully entitled to process biosolids before the permit was issued. It suffered no recoverable loss because it could not have lawfully processed biosolids during the currency of the agreement.

**399**  Finally, I am not persuaded that this economic tort is of application at all. If Westcoast has a cause of action in respect of rezoning issues, surely it is one that should be advanced directly. Rezoning does not directly involve third parties. It cannot be said that when CVRD considered rezoning Westcoast's land that it was interfering with Westcoast's business relations.

*(II) The Contacting of CRD and DNC and having them Suspend Business Dealings with Westcoast and (iii) The Implementation and Cancellation of a Pilot Project with DNC.*

**400**  In early July, 2001, Westcoast accepted sewage sludge from CRD Salt Spring Island. The delivery caused odours. The CVRD began to haul sludge from its Salt Spring Island facility to Westcoast in 2001. The CRD did not have a contract with Westcoast. It delivered sludge on a load by load basis, paying Westcoast tipping fees.

**401**  The CRD received complaints from residents and neighbours of Westcoast about odour.

**402**  CRD's Manager of Operations, Local Services, was David McFarland. Mr. McFarland testified that after CRD began delivering de-watered sewage sludge and de-watered septage to Westcoast's facility in 2001, he received complaints from CVRD residents about compost odour. He thought he had received three calls.[**115**](#Forward_fnref_fnr-115)

**403**  Mr. McFarland said that the calls upset him because "we didn't want to send our problems somewhere else."

**404**  Mr. McFarland said that shortly after that, on August 9, 2001, he received a call from Mr. Derek York of the CVRD. Mr. McFarland testified that Mr. York told him that they were having major odour problems at Westcoast's facility and that Mr. York requested that CRD not haul any more sewage sludge to the facility. Mr. McFarland said he told Mr. York they would not.[**116**](#Forward_fnref_fnr-116)

**405**  Mr. McFarland said he had received a request not to ship sewage sludge to Westcoast, not a directive.

**406**  Mr. McFarland said he received a further call from Mr. York on September 7, 2001, and he was told by Mr. York that CRD could ship to Westcoast. Mr. McFarland said "I told him that we would be doing that and told the staff that the next load would go to Westcoast."

**407**  Mr. McFarland said that during the period of time between August 9, and September 7, there had been three loads of material shipped to an alternative location. If those loads had been shipped to Westcoast, Westcoast would have received about $1,500.[**117**](#Forward_fnref_fnr-117)

**408**  In my opinion, Mr. York's conduct in contacting Mr. McFarland and requesting that CVRD not send sludge to Westcoast was not unlawful. It was not an act Mr. York was "not at liberty to commit" nor was it an act "without lawful justification" nor was it "unacceptable". Mr. York's purpose was to reduce or eliminate compost odour problems that were causing discomfort to Westcoast's neighbouring residents.

**409**  I am of also the view that there was no intention to injure Westcoast. There is no evidence Mr. York was motivated by malice or that his intention was to harm Westcoast's business. CVRD's staff was supportive of Westcoast's venture. They were in favour of composting. It was the compost odour that was objectionable

**410**  Westcoast called evidence to show that CVRD's shipments did not resume until July 9, 2002. Mr. McFarland seemed surprised at trial when confronted with that evidence. Mr. McFarland testified that on September 18, 2001, he received a telephone call from Mr. Cuerrier in which Mr. Cuerrier told him that CVRD had no objection to Westcoast receiving further shipments.

**411**  I find that CVRD did nothing to keep CRD from shipping to Westcoast after September 7, 2001.

**412**  CVRD submits that Westcoast's claim arising from the non-delivery of approximately $1,500 of CRD material is $1,500 less the expenses it would have incurred in processing that material.

**413**  Westcoast also submits that CVRD interfered with Westcoast's relationship with DNC.

**414**  On May 30, 2001, Mr. McKay of DNC wrote to Director Hutchins asking if DNC could ship biosolids to Westcoast.

**415**  In 2001, ESC agreed that a pilot project for processing DNC biosolids, under supervision, would be appropriate.[**118**](#Forward_fnref_fnr-118) At a June 25, 2001 meeting, ESC recommended to the CVRD that DNC and Westcoast enter into a 90 day pilot project for sludge compost under the supervision of ESC staff.

**416**  That recommendation was never approved by the CVRD board, but on June 28, 2001, Mr. Dennison wrote to Mr. McKay advising him of ESC's recommendation.

**417**  On June 28, 2001, DNC received approval from MOE to ship biosolids from its Chemanius and Crofton Sewage and Treatment plants to Westcoast. It did not receive this approval until after MOE issued a permit to Westcoast to accept biosolids septic and sludge.[**119**](#Forward_fnref_fnr-119)

**418**  Following the difficulties relating to the July 6, 2001 receipt of Salt Spring Island sludge, the ESC recommended to the CVRD board in July 2001 that it suspend the 90 day pilot project. CVRD adopted that recommendation on July 25, 2001. The DNC was advised of the board's resolution.[**120**](#Forward_fnref_fnr-120)

**419**  At an in-camera ESC meeting on September 17, 2001, Mr. Raimondo said that the CVRD should not do or say anything to suggest that there is a bar to Westcoast's acceptance of stabilized sludge.[**121**](#Forward_fnref_fnr-121) On September 24, 2001, Mr. McKay wrote to Mr. Walker, Chair of CVRD, confirming that he had been advised by Westcoast that it was permitted to accept DNC's bio-solids.[**122**](#Forward_fnref_fnr-122)

**420**  On October 22, 2001, Mr. Raimondo responded to Mr. McKay to confirm that Westcoast would not contravene land use regulations or MOE's approval permit by accepting DNC's biosolids.[**123**](#Forward_fnref_fnr-123)

**421**  Following communications between DNC and Westcoast in November and December 2001, DNC commenced shipping biosolids to Westcoast on February 2, 2002, and continued shipping until Westcoast closed its facility.[**124**](#Forward_fnref_fnr-124)

**422**  In my opinion, CVRD's conduct in respect of its dealings with DNC was not unlawful. DNC was one of its member municipalities, and it was DNC's decision not to ship biosolids between June 28, 2001 to October 22, 2001. DNC was well aware of Westcoast's odour problems.

**423**  I am also of the view that Westcoast has not established an intention on the part of CVRD to harm Westcoast.

**424**  Westcoast's claim relating to DNC and the pilot project relates to a period of about three months.

**425**  From February 2, 2002 to September 23, 2005, a period of about 43 1/2 months, DNC paid Westcoast $89,087.34, or $2,034.48 a month to compost that kind of biosolids.[**125**](#Forward_fnref_fnr-125)

**426**  I assess the amount of gross revenue lost by Westcoast as a result of the actions of CVRD's staff in asking CRD and DNC not to ship septage or sludge to Westcoast at $10,000, that being about the worth of 3 shipments lost from CRD and of about four months of shipments lost from DNC.

**427**  I find that most, if not all, of Westcoast's costs in that period of time were fixed. I do not see that by processing this material Westcoast would have had any expenses of note extra to the ones it already had. If Westcoast was entitled to recover damages for its loss of these CRD and DNC shipments, and I am of the opinion that it is not, I would assess its damages at $10,000.

1. *Acts of Defamation*

**428**  When Westcoast first brought this suit on July 9, 2003, it claimed relief for defamation.[**126**](#Forward_fnref_fnr-126) It provided particulars of its allegations of libel in particulars dated August 8, 2003.[**127**](#Forward_fnref_fnr-127) At paragraph 9 of the particulars, it referred to a Pictorial article of October 6, 2002, a Pictorial article of January 6, 2002, and a Cowichan Valley Citizen article of April 10, 2002. It also referred to a public meeting of June 18, 2003.

**429**  In the Amended Statement of Claim filed July 9, 2003 Westcoast claimed for damages for defamation[**128**](#Forward_fnref_fnr-128). That claim was advanced against Mr. Hughes and other personal defendants as well as against CVRD.

**430**  In the Second Further Amended Statement of Claim filed July 14, 2006 Westcoast abandoned its suit in defamation, but claimed damages for unlawful interference with economic relations and in ***negligence*** based on its allegations of defamation.

**431**  Westcoast's claims in defamation are directly actionable by it. As noted by the Ontario Court of Appeal in ***Correia***, there is no need to interpose the tort of intentional interference with economic relations or the tort of ***negligence*** to obtain redress for defamation. The Ontario Court of Appeal wrote that the economic tort exists to fill a gap where no action could otherwise be brought for intentional conduct that caused harm through the instrumentality of a third party.

**432**  In my view there is good reason why the tort of unlawful interference with economic relations should not be interposed with a claim in defamation. The principles of law that are of application to the economic tort are different than those that apply to defamation. The pleadings are different. There are differences in the applicability of *Rules of Court*. The defences are different. The assessments of damages are different.

**433**  The economic tort of unlawful interference with economic relations is a vehicle ill-suited to assess the merits of a claim based on defamation.

**434**  It may be that Westcoast abandoned its direct cause of action in defamation, and recast that cause of action as a claim for unlawful interference with economic relations by acts of defamation because it considered that it had a better chance of success or that it could advance a claim for a larger amount of damages.

**435**  I do not accept that if Westcoast is not entitled to succeed in a direct claim in defamation that it is entitled to recover damages for the same acts by pleading that its cause of action is not that of defamation but that of unlawful interference with economic relations because of acts of defamation, nor do I accept that it might be entitled to recover more damages by claiming for unlawful interference with economic relations rather than for defamation.

**436**  The defences that are available to CVRD include the defences available to it in respect of a suit for unlawful interference with economic relations. That must be so because Westcoast claims for unlawful interference with economic relations. In my view, CVRD also has available to it the defences of application for a suit in defamation. That is of relevance in this case because Westcoast submits that the reason why the acts of defamation were unlawful (a required element for the tort of unlawful interference with economic relations) is because they were defamatory. They could not be defamatory if there was a defence available to CVRD in respect of a claim brought directly for defamation.

**437**  The Second Further Amended Statement of Claim does not particularize acts of defamation.

**438**  Westcoast submitted that the acts of defamation include these incidents:

1. The Pictorial, a community newspaper, published a news report on Sunday, July 29, 2001, in which director, Rob Hutchins of CVRD is reported to have said "we wouldn't be discussing this today if they had put in an enclosed receiving area". It is noted that Mr. Hutchins also said that the plant's drop off bay is the source of many spill complaints.[**129**](#Forward_fnref_fnr-129)
2. In an article published on July 29, 2001 in the Cowichan Valley Citizen, the newspaper reports that the board of CVRD had voted to immediately suspend a pilot project in which DNC was disposing of septic sludge in Westcoast's facilities. The article reports that the board vote was at Mr. Hughes instigation. Mr. Hughes said that he was left with no choice but to take action because of foul smells emanating from the compost facility that brought neighbours "to their knees". Mr. Hughes said that an agreement between WLDC and the CVRD to have a 90 day trial run with septic sludge monitored by CVRD's staff had been ignored by Westcoast. Mr. Hughes is quoted as saying "we were supposed to have a trial run then look at it long-term following a public process. That didn't happen, they didn't follow their agreement and if things don't straighten up quick we will find a way to deal with it". The newspaper report said that according to Mr. Hughes, Westcoast accepted a massive load of septic sludge from Salt Spring Island that stunk up the neighbourhood for several days and that it never should have accepted the load because it violated the pilot project agreement and that the stinky results prove the facility was not ready to process septic properly.[**130**](#Forward_fnref_fnr-130)
3. In an article published in the Cowichan Citizen on October 10, 2001, Mr. Hughes responded to accusations that he had acted in conflict of interest. He said he believed the conflict of interest allegation, made anonymously to CVRD's board, was a political move that resulted from Westcoast's facility difficulties. He is quoted as saying "Westcoast Landfill has been stinking the neighbourhood out and violating the bylaws. I have been standing up for the community's interest and I intend to keep doing that." Mr. Hughes is also quoted as saying "They are trying to cut me out of the play and they said they wouldn't meet if I were there. These are the things that are driving it but I am not going to back off."[**131**](#Forward_fnref_fnr-131)
4. Mr. Tom Anderson, CVRD's Development Services Department Manager, wrote MULAP on December 12, 2001, and December 21, 2001.[**132**](#Forward_fnref_fnr-132)

In the December 12, 2001 letter, Mr. Anderson particularized odour complaints and leachate concerns and referred to operational deficiencies. The letter concludes with this summary:

The regional district is concerned that the continuous undesirable odour emissions and leachate discharge from the operation may begin to impact upon the health of the surrounding residents and has requested that your office take immediate steps to enforce the provisions of the ***Waste Management Act*** and the conditions of approval of June 12, 2001.

Mr. Anderson's letter of December 21, refers to other leachate and odour issues. It concludes with this:

Under the circumstances, it is most urgent that steps now be taken to suspend the company's operation or in the very least have the company proceed to immediately construct the required curing pad with leachate collection.

1. In an article published in Pictorial on Sunday, January 6, 2002, Mr. Hughes is quoted as saying:

Under proper conditions it would be worth looking at Westcoast processing sludge. But we want some kind of track record first. Right now the community doesn't have any confidence. We want the Ministry of Environment to do its job, step in, intervene and enforce the permit.[**133**](#Forward_fnref_fnr-133)

1. In an article published in the Cowichan Valley Citizen on March 31, 2002, the newspaper reports that CVRD's board passed two motions relating to high fecal coliform counts at Westcoast's facility. Mr. Hughes is quoted as describing fecal coliform as:

an indicator of other pathogens that may be present like ecoli and salmonella.

And stating:

Obviously, we are very concerned about it. You can't help but think of Walkerton and it is crucial we move quickly and get absolute clarity in the integrity of the results.

In the same article, Mr. Brian Dennison, CVRD's Deputy Manager of Engineering Services is quoted as saying that the test results are cause for concern if they are accurate. Mr. Dennison is quoted as saying that the Ministry took seven different samples and then mixed them all together and that if a dog had pooped in one of those spots it would generate enormously high numbers.

The same article reports a ministry environmental protection officer as saying that the precision of this test is rather low and great caution must be exercised when interpreting the sanitary significance of coliform results.

In the same article, Ms. Boucher is quoted as saying that she believes the tests must have been flawed because the results indicate a higher fecal coliform count than was present in the composting material when it arrived at Westcoast's facility.[**134**](#Forward_fnref_fnr-134)

1. In an article published in the Cowichan Valley Citizen on April 10, 2002, Mr. Hughes is reported to have commented on test results showing high nitrates in Westcoast's well. Director Hughes is quoted as having said:

They are supposed to have a leachate collection system and it is supposed to be covered. Something is very wrong there.[**135**](#Forward_fnref_fnr-135)

1. In an article published in the Pictorial on Sunday October 6, 2002, Mr. Hughes comments about CVRD's decision to retain Mr. Spidel to address Westcoast's facility. Mr. Hughes is quoted as saying:

It is sort of a last gasp attempt to work as a mediator between the company, the province and the CVRD to come up with something, anything.

It has to be done in the absence of the province taking any action. It has done nothing but show callous disregard for the situation.

In the same article, a senior compliance officer with WLAP says complaints about odours have dropped off considerably.[**136**](#Forward_fnref_fnr-136)

1. On October 23, 2002, Mr. Hughes wrote a letter to the News Leader. It was published. In it Mr. Hughes alleges that Westcoast had been out of compliance with the ***Waste Management Act*** for well over a year, which has resulted in stinking odours throughout the area, a polluted well on the property, and the threat of polluting the aquifer that provides water to over 2,000 homes.

Mr. Hughes wrote that as the details and background information surrounding the tragic deaths surface from the Kamloops MWLAP office, it becomes increasingly clear that this could have happened anywhere.[**137**](#Forward_fnref_fnr-137)

1. On June 18, 2003, Mr. McDonald and Mr. Anderson spoke at a town hall meeting in Cobble Hill. Westcoast alleges that Mr. Anderson said that Westcoast's facility was causing odour and was a source of potential contamination of the water supply.
2. In an article published in the Cowichan Valley Citizen on June 25, 2003, Mr. McDonald as CVRD's Waste Reduction Coordinator, commented about facility licensing.[**138**](#Forward_fnref_fnr-138)

**439**  I conclude that Westcoast cannot succeed in a claim against CVRD for unlawfully interference with economic relations because of acts of defamation for a number of reasons.

**440**  First, I find that it was not the intention of any of the persons making those statements to harm Westcoast. As suggested by ***Correia,*** the intentionality threshold for the application of this economic tort is not the same as that required to establish liability for defamation. The directors and staff of CVRD were not in competition to Westcoast. They had no reason to harm Westcoast. CVRD and its directors and staff wanted Westcoast to succeed. Westcoast had created public concern by permitting the escape of unacceptable odour and by not constructing a curing pad to eliminate the potential of leachate contamination. CVRD's directors and staff were responding to public concern about the escape of odour and pollution. Even if their statements were defamatory, they did not speak in order to injure Westcoast.

**441**  Second, as discussed above, CVRD is not responsible for the statements and acts of its elected directors.

**442**  At least six of the allegations of defamation relate to statements and publications made by Director Hughes. One of them relates to statements imputed to Director Hutchins.

**443**  In my opinion, a reading of the publications at issue confirms that the directors who spoke were speaking for themselves as politicians and directors of CVRD and not for CVRD. CVRD had no control over what they said. CVRD is not vicariously responsible for the statements of its elected directors.

**444**  Third, in my opinion, Westcoast did not prove that it suffered economic loss or injury as a result of the statements. There was a good deal of evidence called at the trial explaining why prospective or past customers of Westcoast did not deal with it. The reasons they gave do not include acts of defamation.

**445**  Westcoast's claim is pecuniary. The assessment of damages for unlawful interference with economic relations permits damages to be assessed "at large." That means that damages can be assessed even though damages can not be definitively calculated. However, even an at large assessment must be based on a finding that there was loss or injury caused by CVRD, and this Westcoast did not prove.

**446**  In my opinion, the decisions of those who did not deal with Westcoast not to deal with Westcoast were based on economic and personal considerations and not because CVRD or its staff or directors made defamatory statements.

**447**  Fourth, Westcoast did not establish on a balance of probabilities that it has a remedy for defamation against CVRD. In my opinion, almost all of the statements have been shown to be true. Not all are defamatory. It was not proven that what Westcoast alleges was said at the public meeting was said. The defence of fair comment upon matters of public interest applies to some of the statements.

**448**  Some of the publications refer to board meetings of CVRD. What the directors said at those meetings is subject to qualified privilege. The directors were under a duty to participate in the meetings. There is no evidence that any of the directors spoke there out of malice. Furthermore, CVRD is not vicariously responsible for what its elected directors say at board meetings.

**449**  An examination of the publications at issue is helpful in considering these issues.

**450**  The article of July 29, 2001, quotes Director Hutchins as saying: "We wouldn't be discussing this today if they had put in an enclosed receiving area," and that he noted the plant's drop-off bay was the source of many smell complaints.

**451**  In my opinion, both of those statements were true. If the statements reflect an opinion, the opinion is fair comment.

**452**  Westcoast's proposal in response to the RFP was to receive waste in an enclosed structure. There was widespread publicity at about the time the facility was being constructed that Westcoast would be receiving the material in an enclosed structure. Westcoast was not obliged at law to build an enclosed receiving area, and it did not build one. Nevertheless, it was Westcoast's own representations that it would build an enclosed structure that led to Director Hutchins' comment.

**453**  In the same article, Director Joe Allan is quoted as saying "I think the Municipality is an unfortunate casualty, but the problem is that there is a mess out there," and "let's clean it up and get things going again." Those comments were true. They are also fair comment, to the extent they contain opinion. The statements demonstrate that Director Allan did not intend to injure Westcoast, butb that he wanted to get the project back on track.

**454**  The Cowichan Valley Citizen article of July 29, 2001, relates to an incident in which Westcoast received septic sludge from DNC that caused odour.

**455**  This article starts with this observation "An ongoing dispute between Cobble Hill Director, Richard Hughes and the president of the composting facility heated up this week ..."In this article Mr. Hughes is quoted as saying that he was left with no choice but to take action because of foul smells that brought neighbours "to their knees." He referred to measures to address the problem.

**456**  Mr. Cuerrier is quoted in the same article as saying there was a foul smell. He is quoted as saying "it was an ugly smell for sure but we had no control over the situation." The article notes that Mr. Cuerrier questioned CVRD's authority to regulate Westcoast's facility.

**457**  In my opinion, the statements attributed to Mr. Hughes in this article are true. Mr. Cuerrier himself admits in the article that there is a foul smell.

**458**  It is clear from the article that Mr. Hughes is not speaking for CVRD.

**459**  The article of October 10, 2001, relates to Mr. Hughes replying to allegations that he was in conflict of interest.

**460**  Mr. Hughes is speaking personally. He is responding to an issue that relates to him and not to CVRD. CVRD is not responsible for anything that Director Hughes said on that occasion.

**461**  Furthermore, what Mr. Hughes said was true. He insinuated that it was Westcoast that had anonymously advanced the allegation of conflict of interest. That has proven to be true. He alleged that Westcoast "has been stinking the neighbourhood out and violating the bylaws." The comment in respect of the odour was certainly true. This column was written after Westcoast was processing MSW to produce stabilite. CVRD maintains that Westcoast was in breach of its zoning bylaw in processing MSW. Ms. Boucher's testified that her interpretation of the bylaw was that processing of MSW was permissible. In my opinion, the zoning bylaw was intended to permit composting of organics. It was not intended to permit the processing of solid waste. I am of the opinion that Mr. Hughes' comment on that point was probably true, although I hasten to point out that this proceeding did not focus on the issue.

**462**  The article concluded with the observation that CVRD's chair is seeking advice about the issue. The issue was the allegation of conflict of interest.

**463**  The article of January 6, 2002, is a news report in which the reporter comments about ongoing "smell complaints" involving Westcoast. One of the by-lines of the article is "Hughes Unhappy." The article refers to him as being Cobble Hill Director, Richard Hughes. I do not see that anybody reading this article would perceive that the comments attributed to Mr. Hughes were those of CVRD. They were his personal views. In any event, in my opinion, the comments attributed to Mr. Hughes are true.

**464**  The March 31, Cowichan Valley Citizen sets out views of Mr. Hughes and Ms. Boucher and Mr. Dennison. It is necessary to read the whole of this article to understand it. Mr. Dennison, CVRD's Deputy Manager of Engineering Services, advances opinions and statements by which he makes it clear that he disagreed with the level of concern expressed by Mr. Hughes. It is obvious that Mr. Hughes was speaking for himself.

**465**  In the April 10 article Mr. Hughes is reported to have said that Westcoast is supposed to have a leachate collection system and its facility was supposed to be covered, and that something is very wrong there. Those comments are true, at least in the sense that "supposed to be" refers to representations or statements made by Westcoast before and during construction. The reference is to what Westcoast said it would do, and not to a legal obligation. The comments are those of Mr. Hughes and not CVRD.

**466**  Mr. Hughes' comments in the October 6, 2002, article are essentially critical of the MWLAP. Mr. Hughes' comments in the article are true. They are also fair comment for a Director of the Regional District.

**467**  The letter to the editor that Mr. Hughes wrote on October 23, 2002 is directed at MWLAP. Mr. Hughes wrote as a director of CVRD. CVRD is not responsible for what he wrote. Mr. Hughes testified that he believed what he wrote to be true. Mr. Hughes spoke for himself.

**468**  Mr. Bob McDonald, as CVRD's Waste Reduction Coordinator, made comments in June, 2003, that were published in the Cowichan Valley Citizen on June 25, 2003. Mr. McDonald spoke about a bylaw being drawn up by CVRD pursuant to then recent enabling legislation under the provincial WMA that gave local governments authority to regulate waste disposal facilities. He said Westcoast's composting plant could be required to make changes. He said that before CVRD required anything they would work with Westcoast to identify any problems and solutions.

**469**  I see nothing objectionable about Mr. McDonald's comments. In my opinion, they are not defamatory. The comments are true.

**470**  In the same article, Director John Middleton, who succeeded Mr. Hughes as Director of Cobble Hill said that Westcoast's original specifications called for a concrete pad and leachate collection system and that Westcoast had not done that nor covered the material in the rain for leachate control. Those comments are true.

**471**  In that article, Ms. Boucher is quoted as saying that the compost, as of that time, was being cured inside the cell, but that if a need to cure it outside the cells arose, Westcoast would put in a small pad of some kind.

**472**  Ms. Boucher's comments acknowledged the need for a pad for full-scale operations. That was a condition of the initial governmental permitting.

**473**  Westcoast did not install the pad when the facility was originally built, apparently because of a lack of finances. There was an initial requirement that the pad be installed, although MWLAP later waived that requirement for so long as curing was done within the cells.

**474**  In the article, Mr. McDonald is quoted as saying that Westcoast would be fully consulted as the CVRD bylaw was being finalized to make sure important issues are identified and addressed. He said the idea was to support the proper licensed facilities, and he made the observation that Westcoast conforming to the bylaw once it was passed should result in more public confidence in the facility and the likelihood that its business opportunities would increase. I find that nothing said there by Mr. McDonald was defamatory. It also demonstrates that Mr. McDonald did not intend to harm Westcoast.

**475**  Mr. Anderson, Manager of the Development Services Department, wrote two letters to MWLAP. The letters were written in December, 2001. He asked that MWLAP take steps to enforce the regulatory laws that he said were of application to Westcoast. Mr. Anderson's letter was copied by him to a number of individuals, and received wide publication.

**476**  In my opinion, the contents of those letters are true statements of fact and fair comment.

**477**  When those letters were written, Westcoast was maintaining that it was MWLAP and not CVRD that had jurisdiction over the odour issue. MWLAP was investigating the issue but had not taken steps that actually reduced the escape of compost odour. CVRD was receiving complaints and demands that something be done. These letters were those of the staff member of CVRD who was dealing with the issue. The public had an interest in knowing what was being done. The letters explained what CVRD was doing-CVRD was demanding that WLAP act. The letters were a direct response to Westcoast's release of odour and to how westcoast had constructed its facility. I find that Mr. Anderson did not write with the intention of harming the plaintiff, but he wrote with the intention of eliminating a source of odour that was of considerable distress to a number of residents of CVRD. In my view, the economic tort of unlawful interference with economic relations was never intended to deal with letters of that kind. Furthermore, there is no evidence that the letters affected Westcoast's operations. WLAP did not act in response to the letters, and there is no evidence that Westcoast's business was in any way affected by them.

**478**  Ms. Boucher and Mr. Brooks testified that Mr. Anderson made defamatory statements at the Town Hall meeting. Mr. Anderson denied saying anything defamatory. Mr. Nico Pfaffe[**139**](#Forward_fnref_fnr-139), a hauler of materials to Westcoast, Ms. Jennifer McLarty[**140**](#Forward_fnref_fnr-140), a reporter for the Cowichan News Leader, and Mr. York[**141**](#Forward_fnref_fnr-141) all testified that Mr. Anderson did not say anything about Westcoast that was defamatory. Westcoast has not proven that Mr. Anderson said anything defamatory.

**479**  For all of those reasons, I am of the view that Westcoast's claim for unlawful interference with economic relations based on its allegations of defamation has not been made out.

**480**  The evidence at the trial canvassed the issue as to why some dealt with Westcoast and why others chose not to deal with Westcoast or later chose to stop dealing with Westcoast. As I have noted, I am of the opinion that it has not been shown that the statements that Westcoast says were defamatory played any role in those decisions. I am of the view that Ms. Boucher's and Mr. Cuerrier's original assessment of Westcoast's economic prospects was correct. The facility would receive feedstock if it was financially advantageous to prospective customers to deal with it. The venture did not fail because CVRD's directors or staff made statements about odour or contaminants.

**481**  I am of the opinion that even if Westcoast was defamed, and I am of the opinion that Westcoast has not shown it was, the pecuniary loss to Westcoast was negligible or non-existent. Westcoast's claim of a loss of several million dollars arising from defamation is without factual foundation. Defamation was not a cause of the venture failing.

**482**  In summary, there are several reasons why this economic tort claim has not been established.

**483**  I have concluded that under either approach to the consideration of unlawfulness for the application of this tort, whether narrow or broad, CVRD's conduct does not qualify as unlawful.

**484**  CVRD's jurisdiction extended to the use of land. CVRD not only had the jurisdiction to deal with odour and to take appropriate steps to ensure that the use of a parcel of land within its boundaries did not cause a continuing nuisance to those using surrounding parcels, but there was a legitimate expectation on the part of its residents that it would do so. CVRD acted justifiably and well within its legal rights.

**485**  CVRD did not act arbitrarily or in bad faith or unsavourily or unfairly or immorally.

**486**  Furthermore, I am of the opinion that CVRD did not have the intention to harm the plaintiff, at least for the purposes of the application of this tort. CVRD acted in the public interest and to ensure the public good.

**Bad Faith**

**487**  Westcoast claims that CVRD or its representatives intended to cause it harm. It claims that CVRD's conduct was harsh, vindictive, reprehensible and malicious, and that its planned and deliberate conduct persisted over a lengthy period of time.

**488**  Westcoast's operations created odours that were an ongoing nuisance to Westcoast's neighbours. Westcoast's actions interfered with its neighbours' enjoyment of their property. The manner in which Westcoast built and operated its facility caused its neighbours to become concerned about the safety of their water supply and about environmental contamination.

**489**  For the reasons that I have already expressed, I find that CVRD had legitimate community and environmental concerns that were the result of Westcoast's actions.

**490**  CVRD's actions were not high-handed nor vindictive nor oppressive.

**491**  CVRD welcomed Westcoast to its area. It thought that Westcoast's facility would be of benefit to its residents. CVRD and its staff took steps to deal with pollution and odour concerns. In my opinion, CVRD's actions were measured and appropriate.

**492**  Westcoast has not established that CVRD acted unfairly.

**Conclusion**

**493**  I order that this action be dismissed.

**494**  CVRD has pleaded an entitlement to special costs that it intends to pursue against Westcoast and its principals personally. Formal notice ought to be given to those principals of the costs application.

**495**  The costs application will be heard at a time fixed by the trial scheduler.

S.J. SHABBITS J.

\* \* \* \* \*

APPENDIX A

ACRONYMS

|  |  |  |
| --- | --- | --- |
| **Acronym** | **Description** |  |
| BDC | Business Development Bank of Canada |  |
| CRD | Capital Regional District |  |
| CRRC | Composting/Recycling Review Committee |  |
| CVRD | Cowichan Valley Regional District |  |
| DNC | District of North Cowichan |  |
| ESC | Engineering Services Committee |  |
| EASC | Electoral Area Services Committee |  |
| Herhof | Herhof-Umwelttechnik GmbH |  |
| HUWS | Herhof Urban Waste Solution, Inc. |  |
| IBR | International Bio-Recovery Corporation |  |

|  |  |  |  |
| --- | --- | --- | --- |
| ICI/IC&I |  | Industrial, Commercial and Institutional waste |  |

|  |  |  |
| --- | --- | --- |
| MOE | Ministry of Environment |  |
| MSW | mixed solid waste |  |
| MWLAP | Ministry of Water, Lands and Parks |  |
| OMRR | *Organic Matter Recycling Regulation* |  |

|  |  |  |  |
| --- | --- | --- | --- |
| PUCR |  | *Production and Use of Compost Regulations* |  |

|  |  |  |
| --- | --- | --- |
| RFP | Request for Proposal |  |
| RDN | Regional District of Nanaimo |  |
| SWMP | Solid Waste Management Plan |  |
| TNRD | Thompson-Nicola Regional District |  |
| TR | Transcript of Proceedings at Trial |  |
| VCC | Westcoast Landfill Diversion (VCC) Inc. |  |
| WLDC | Westcoast Landfill Diversion Corp. |  |
| WMA | *Waste Management Act* |  |

[**1**](#Backward_fnref_fnr-1) R.S.B.C. 1999, c. 27.

[**2**](#Backward_fnref_fnr-2) *S.B.C. 2002, c. 57*.

[**3**](#Backward_fnref_fnr-3) The personal information relating to Mr. Cuerrier is taken from his evidence at trial. See TR August 1, 2007 pp. 13 to 33.

[**4**](#Backward_fnref_fnr-4) The personal information relating to Ms. Boucher is taken from her evidence at trial. See TR August 20, 2007, p. 10 on.

[**5**](#Backward_fnref_fnr-5) The personal information relating to Mr. Brooks is taken from his evidence at trial. See TR August 27, p 1 on.

[**6**](#Backward_fnref_fnr-6) *R.S.B.C. 1996, c. 323*.

[**7**](#Backward_fnref_fnr-7) Exhibit 504.

[**8**](#Backward_fnref_fnr-8) Ibidem.

[**9**](#Backward_fnref_fnr-9) Ibidem.

[**10**](#Backward_fnref_fnr-10) Exhibit 82.

[**11**](#Backward_fnref_fnr-11) Exhibit 84.

[**12**](#Backward_fnref_fnr-12) See Trial Record filed July 30, 2007.

[**13**](#Backward_fnref_fnr-13) See Trial Record filed July, 30, 2007.

[**14**](#Backward_fnref_fnr-14) TR August 10, 2007, p. 44.

[**15**](#Backward_fnref_fnr-15) TR August 21, 2007, p. 72.

[**16**](#Backward_fnref_fnr-16) TR September 25, 2007, p. 7 and p. 8, l.8.

[**17**](#Backward_fnref_fnr-17) The minutes of this meeting are at Exhibit 3, Tab 47.

[**18**](#Backward_fnref_fnr-18) Draft minutes notes relating to this meeting are at Exhibit 3, Tab 49.

[**19**](#Backward_fnref_fnr-19) Exhibit 3, Tab 66.

[**20**](#Backward_fnref_fnr-20) Second Further Amended Statement of Claim, Para. 55d.

[**21**](#Backward_fnref_fnr-21) Paras. 55-66.

[**22**](#Backward_fnref_fnr-22) Exhibit 10, p. 21.

[**23**](#Backward_fnref_fnr-23) Schedule "B" to Agreed Statements of Facts #5.

[**24**](#Backward_fnref_fnr-24) At p. 25.

[**25**](#Backward_fnref_fnr-25) Exhibit 10

[**26**](#Backward_fnref_fnr-26) Ibidem 3.5.

[**27**](#Backward_fnref_fnr-27) Para. 3.12.

[**28**](#Backward_fnref_fnr-28) Document Agreement No. 2 (Exhibit 505) is of application to these exhibits.

[**29**](#Backward_fnref_fnr-29) TR February 6, 2008 at p. 13

[**30**](#Backward_fnref_fnr-30) Exhibit 507, Tab 9, pp. 5 and 7.

[**31**](#Backward_fnref_fnr-31) Exhibit 569.

[**32**](#Backward_fnref_fnr-32) Exhibit 144.

[**33**](#Backward_fnref_fnr-33) Agreed Statements of Facts #5, Schedule "B", pp. 7 and 8.

[**34**](#Backward_fnref_fnr-34) These can be found at Schedule "A" of Agreed Statements of Facts #5.

[**35**](#Backward_fnref_fnr-35) At page 4.

[**36**](#Backward_fnref_fnr-36) Exhibit 506, Tab 58.

[**37**](#Backward_fnref_fnr-37) Ibidem, Tab 86.

[**38**](#Backward_fnref_fnr-38) Ibidem, Tab 90.

[**39**](#Backward_fnref_fnr-39) Exhibits 537 and 503.

[**40**](#Backward_fnref_fnr-40) Exhibit 585.

[**41**](#Backward_fnref_fnr-41) Exhibit 19, Tab 16.

[**42**](#Backward_fnref_fnr-42) Exhibit 506 refers to complaints from Ed Aiken, Anonymous, Catherine Baird, Mike Baird, Rob Erskine, Edward Gamboa, Richard Hughes, Catherine James, Ron Little, Brenda Lockhart, Doug Lockhart, Marlene Scheurkogel (Sheurkoyzl), Michael Vantreight and Loreen Vander Meulen. Exhibit 507 refers to complaints from Gunnell Borge, Home Hardware, Alvin Isaac, Larry Laban, Cindy Little, Margaret Pederson, Elizabeth Scott, and Joe Walsh. Some complainants are referred to on more than one occasion. Some complained to both agencies.

[**43**](#Backward_fnref_fnr-43) Exhibit 19, Tab 16, Adopted August 25, 2005.

[**44**](#Backward_fnref_fnr-44) Evidence of Robert McDonald TR October 26, 2007, pp. 44 to 49.

[**45**](#Backward_fnref_fnr-45) Exhibit 85 contains excerpts from CVRD's 2001 directory. Exhibit 411 contains excerpts from CVRD's 2005 Directory.

[**46**](#Backward_fnref_fnr-46) TR Jan. 29, 2008. p. 81.

[**47**](#Backward_fnref_fnr-47) TR Jan. 30, pp. 2, 3.

[**48**](#Backward_fnref_fnr-48) Ibidem p. 4.

[**49**](#Backward_fnref_fnr-49) TR Jan. 30, 2008, p. 5

[**50**](#Backward_fnref_fnr-50) Ibidem, p. 5.

[**51**](#Backward_fnref_fnr-51) At para. 30.

[**52**](#Backward_fnref_fnr-52) Exhibit 223.

[**53**](#Backward_fnref_fnr-53) Exhibit 29, p. 29.

[**54**](#Backward_fnref_fnr-54) Exhibit 379.

[**55**](#Backward_fnref_fnr-55) Exhibit 7.

[**56**](#Backward_fnref_fnr-56) Exhibit 29.

[**57**](#Backward_fnref_fnr-57) Exhibit 362.

[**58**](#Backward_fnref_fnr-58) Exhibit 220.

[**59**](#Backward_fnref_fnr-59) Exhibit 2, Tab 13.

[**60**](#Backward_fnref_fnr-60) Exhibit 382.

[**61**](#Backward_fnref_fnr-61) Exhibit 2, Tab 17.

[**62**](#Backward_fnref_fnr-62) Exhibit 2, Tab 18.

[**63**](#Backward_fnref_fnr-63) Exhibit 13.

[**64**](#Backward_fnref_fnr-64) Exhibit 38.4

[**65**](#Backward_fnref_fnr-65) Ibidem at p. 29.

[**66**](#Backward_fnref_fnr-66) Exhibit 380.

[**67**](#Backward_fnref_fnr-67) Exhibit 2, Tab 23.

[**68**](#Backward_fnref_fnr-68) Exhibit 108.

[**69**](#Backward_fnref_fnr-69) Exhibit 2, Tab 26.

[**70**](#Backward_fnref_fnr-70) Exhibit 3, Tab 43.

[**71**](#Backward_fnref_fnr-71) Exhibit 3, Tab 40.

[**72**](#Backward_fnref_fnr-72) Exhibit 51.

[**73**](#Backward_fnref_fnr-73) Exhibit 3, Tab 45.

[**74**](#Backward_fnref_fnr-74) Exhibit 53.

[**75**](#Backward_fnref_fnr-75) Exhibit 54.

[**76**](#Backward_fnref_fnr-76) Exhibit 55.

[**77**](#Backward_fnref_fnr-77) Exhibit 3, Tab 46.

[**78**](#Backward_fnref_fnr-78) Exhibit 364.

[**79**](#Backward_fnref_fnr-79) Exhibit 3, Tab 50 (and Exhibit 56).

[**80**](#Backward_fnref_fnr-80) Exhibit 388.

[**81**](#Backward_fnref_fnr-81) Exhibit 3, Tab 54.

[**82**](#Backward_fnref_fnr-82) Directors Clarkson, Marcotte, Hughes, Allen, and Johnson and Mr. Dennison testified Mr. Cuerrier made that statement. Recording secretary Johnson testified that the minute of the June 22, 1999 meeting was accurate.

[**83**](#Backward_fnref_fnr-83) Exhibit 10.

[**84**](#Backward_fnref_fnr-84) TR August 8, 2007, p. 83.

[**85**](#Backward_fnref_fnr-85) Tr August1 0, 2007, p. 67.

[**86**](#Backward_fnref_fnr-86) Exhibit 61.

[**87**](#Backward_fnref_fnr-87) Exhibit 235.

[**88**](#Backward_fnref_fnr-88) TR July 31, 2007.

[**89**](#Backward_fnref_fnr-89) Tr July 31, 2007 at p. 62.

[**90**](#Backward_fnref_fnr-90) The agreement is at Exhibit 227.

[**91**](#Backward_fnref_fnr-91) Tr August 20, 2007, p. 1 to p.4. Mr. J. Hall explains the process of document production.

[**92**](#Backward_fnref_fnr-92) See, for example, Exhibit 328.

[**93**](#Backward_fnref_fnr-93) This cause of action is set out in an amendment at trial in an order entered June 25, 2008.

[**94**](#Backward_fnref_fnr-94) Exhibit 19, Tab 1.

[**95**](#Backward_fnref_fnr-95) Exhibit 86.

[**96**](#Backward_fnref_fnr-96) Exhibit 2, Tab 20.

[**97**](#Backward_fnref_fnr-97) Exhibit 87.

[**98**](#Backward_fnref_fnr-98) Exhibit 2, Tab 30.

[**99**](#Backward_fnref_fnr-99) Exhibit 3, Tab 70.

[**100**](#Backward_fnref_fnr-100) Exhibit 2, Tab 20.

[**101**](#Backward_fnref_fnr-101) Exhibit 89.

[**102**](#Backward_fnref_fnr-102) Exhibit 2, Tab 20, pp. 6 and 7.

[**103**](#Backward_fnref_fnr-103) TR October 25, 2007, pp. 34 to 36; TR October 26, 2007, p. 18.

[**104**](#Backward_fnref_fnr-104) Exhibit 2, Tab 20, p. 9.

[**105**](#Backward_fnref_fnr-105) Exhibit 415.

[**106**](#Backward_fnref_fnr-106) Tr November 1, 2007, pp. 1-8

[**107**](#Backward_fnref_fnr-107) Tr November 2, 2007, p. 15

[**108**](#Backward_fnref_fnr-108) Tr October 26, 2007, pp. 5-6

[**109**](#Backward_fnref_fnr-109) Tr October 25 and 26 and November 7, 2007.

[**110**](#Backward_fnref_fnr-110)  ***Daishowa Inc. v. Friends of the Lubicon et al.*** [*(1998), 158 D.L.R. (4th) 699*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1H2-00000-00&context=) (Ont. Gen. Div.)

[**111**](#Backward_fnref_fnr-111) Exhibit 2, Tab 32.

[**112**](#Backward_fnref_fnr-112) See Mr. Cuerrier's evidence, Tr August 3, 2007, p. 36, l. 29 to p. 37, l. 10.

[**113**](#Backward_fnref_fnr-113) Exhibit 18.

[**114**](#Backward_fnref_fnr-114) Exhibit 122.

[**115**](#Backward_fnref_fnr-115) Transcript October 29, 2007, pp. 21 and 22.

[**116**](#Backward_fnref_fnr-116) Transcript, October 29, 2007, p. 22.

[**117**](#Backward_fnref_fnr-117)  *Ibidem* at p. 24.

[**118**](#Backward_fnref_fnr-118) Exhibit 441.

[**119**](#Backward_fnref_fnr-119) Exhibits 122, 123.

[**120**](#Backward_fnref_fnr-120) Agreed Statement of Facts #5 pars 10-13.

[**121**](#Backward_fnref_fnr-121) Exhibit 5, Tab 119.

[**122**](#Backward_fnref_fnr-122) Exhibit 5, Tab 118.

[**123**](#Backward_fnref_fnr-123) Exhibit 489.

[**124**](#Backward_fnref_fnr-124) Exhibit 27, pp. 57-62.

[**125**](#Backward_fnref_fnr-125) See Exhibit 27, pp. 47 to 52.

[**126**](#Backward_fnref_fnr-126) Exhibit 82.

[**127**](#Backward_fnref_fnr-127) Exhibit 84.

[**128**](#Backward_fnref_fnr-128) At paras. 134 to 136.

[**129**](#Backward_fnref_fnr-129) Exhibit 555.

[**130**](#Backward_fnref_fnr-130) Exhibit 566.

[**131**](#Backward_fnref_fnr-131) Exhibit 570.

[**132**](#Backward_fnref_fnr-132) Exhibits 537 and 503.

[**133**](#Backward_fnref_fnr-133) Exhibit 577.

[**134**](#Backward_fnref_fnr-134) Exhibit 188.

[**135**](#Backward_fnref_fnr-135) Exhibit 579.

[**136**](#Backward_fnref_fnr-136) Exhibit 580.

[**137**](#Backward_fnref_fnr-137) Exhibit 585.

[**138**](#Backward_fnref_fnr-138) Exhibit 496.

[**139**](#Backward_fnref_fnr-139) TR August 23, 2007, pp. 70 to 78.

[**140**](#Backward_fnref_fnr-140) Tr October 25, 2007, pp. 63 and 64.

[**141**](#Backward_fnref_fnr-141) Tr November 8, 2007, p. 26.

**End of Document**

[***Abdalle v. British Columbia (Minister of Public Safety and Solicitor General), [2012] B.C.J. No. 165***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1P5-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

C.J. Ross J.

Heard: November 21-24, 2011; written submissions, December 2

and 20, 2011 (Plaintiff) and December 15, 2011 (Defendants).

Judgment: January 27, 2012.

Docket: M074779

Registry: Vancouver

**[2012] B.C.J. No. 165** | 2012 BCSC 128

Between Ismail Abdalle, Plaintiff, and The Minister of Public Safety and Solicitor General of the Province of British Columbia, on Behalf of Her Majesty the Queen in Right of the Province of British Columbia, Defendants

(121 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Soft tissue — Head injuries — Concussion — Headaches — Action by Abdalle for damages for personal injuries sustained in a motor vehicle accident allowed in part — Abdalle's vehicle was struck by an on-duty RCMP vehicle — The defendant's liability was admitted — Abdalle sustained a concussion and soft tissue injury — He continued to suffer from occasional pain and headaches — However, Abdalle contributed to his injuries by 20 per cent by not wearing a seatbelt — He also failed to follow the recommendations of his physicians, leading to a further damage deduction — Abdalle was awarded lost wages, $27,500 in non-pecuniary damages and $220 in special damages.**

**Damages — Types of damages — General damages — For personal injuries — Retroactive loss of income — Special damages — Non-pecuniary loss — Action by Abdalle for damages for personal injuries sustained in a motor vehicle accident allowed in part — Abdalle's vehicle was struck by an on-duty RCMP vehicle — The defendant's liability was admitted — Abdalle sustained a concussion and soft tissue injury — He continued to suffer from occasional pain and headaches — However, Abdalle contributed to his injuries by 20 per cent by not wearing a seatbelt — He also failed to follow the recommendations of his physicians, leading to a further damage deduction — Abdalle was awarded lost wages, $27,500 in non-pecuniary damages and $220 in special damages.**

**Damages — Assessment of damages — Limiting factors — Contributory *negligence* — Duty to mitigate — Action by Abdalle for damages for personal injuries sustained in a motor vehicle accident allowed in part — Abdalle's vehicle was struck by an on-duty RCMP vehicle — The defendant's liability was admitted — Abdalle sustained a concussion and soft tissue injury — He continued to suffer from occasional pain and headaches — However, Abdalle contributed to his injuries by 20 per cent by not wearing a seatbelt — He also failed to follow the recommendations of his physicians, leading to a further damage deduction — Abdalle was awarded lost wages, $27,500 in non-pecuniary damages and $220 in special damages.**

|  |
| --- |
| Action by Abdalle for damages for personal injuries sustained in a motor vehicle accident. Abdalle was proceeding through an intersection when his vehicle was struck by a vehicle driven by an on-duty constable with the RCMP. Liability for the accident was admitted on behalf of the defendant. Abdalle struck his head on the windshield of his vehicle and sustained a significant laceration, a concussion and a soft tissue injury to his neck and back. As a result, he suffered from pain, dizziness and headaches. The accident occurred in May 2007 and Abdalle was off work until September 2007. He was bedridden for much of that time. Abdalle took the position that he was presently limited in everything he did by his headaches and pain. The Defence took the position that Abdalle's injuries would have been less severe if he had been wearing a seatbelt and that Abdalle failed to mitigate his damages.  HELD: Action allowed in part.  Abdalle continued to suffer from occasional headaches and neck and back pain. However, he was not wearing a seatbelt at the time of the accident. Had he been wearing a seatbelt, he likely would not have struck his head on the windshield and his injuries would have been less serious. Therefore, his award of non-pecuniary damages was to be reduced by 20 per cent for his contributory ***negligence***. Abdalle also failed to follow the recommendations of his physicians regarding physiotherapy, physical activity and medications. He therefore breached his duty to mitigate, resulting in a reduction of his non-pecuniary damages by 25 per cent. As Abdalle was able to perform all the requirements of his present job and as there was no evidence that he would follow the recommendations of his physicians in the future, he was not awarded any damages for loss of earning capacity or the cost of future care. After deductions, Abdalle was awarded $27,500 in non-pecuniary damages and $220 in special damages. His past wage loss was to be calculated on the basis of 74 days' lost wages discounted by 22.5 per cent. |

**Statutes, Regulations and Rules Cited:**

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

Motor Vehicle Act, [*RSBC 1996, CHAPTER 318, s. 220*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-F361-M0M6-00000-00&context=)

***Negligence*** Act, [*RSBC 1996, CHAPTER 333, s. 4*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JBDT-B069-00000-00&context=)

**Counsel**

Counsel for the Plaintiff: David S. Klein.

Counsel for the Defendants: Sarah Stanton, Liliane Bantourakis.

**Reasons for Judgment**

|  |
| --- |
| **C.J. ROSS J.** |

**Introduction**

**1**  This action is for damages for injuries the plaintiff Ismail Abdalle received in a motor vehicle accident that occurred on May 8, 2007. His vehicle was struck while proceeding through the intersection of Westminster Highway and Garden City Road in Richmond by the vehicle driven by Constable Claudio Maurizio, a member of the Royal Canadian Mounted Police. Constable Maurizio was on duty at the time of the collision.

**2**  Mr. Abdalle struck his head on the windshield of his vehicle and suffered a significant laceration, concussion, headaches and neck and back pain as a result of the collision. Liability for the accident has been admitted on behalf of the defendant. The issues for determination are:

1. the severity and duration of Mr. Abdalle's injuries;
2. the quantum of damages;
3. contributory ***negligence***; and
4. mitigation.

**Facts**

**Prior to the Accident**

**3**  Mr. Abdalle was born in Somalia on December 25, 1969. He immigrated to Canada in 1990. Mr. Abdalle speaks English, Arabic and Somali. He completed two years of post-secondary education in Somalia prior to immigrating to Canada.

**4**  Mr. Abdalle has been employed by Hertz Canada Limited as a vehicle service attendant since 1995. His duties include cleaning and detailing the cars after they are returned by the customers and driving the vehicles to a rental outlet. In addition, he has engaged in farm work, sales and acted as a personal trainer for a time.

**5**  Prior to the accident, Mr. Abdalle was exceptionally fit and active. He was a skilled and avid soccer player. He would play about three times a week. He played in different leagues and also sometimes in pick-up games at community centres. He did long distance runs about five times a week as well as the Grouse Grind several times a week. He enjoyed hiking and basketball. He had suffered some previous minor injuries, but they had resolved without any lingering sequelea.

**6**  Mr. Abdalle was married at the time of the accident, but his wife had not yet joined him in Canada. He was sharing accommodation in an apartment owned by his landlady Teresa McLennan. He enjoyed cooking and looked after household chores such as cleaning and laundry.

**The Accident**

**7**  The accident occurred on May 8, 2007 in the early morning hours. Mr. Abdalle was driving his vehicle, a Mazda 323, eastbound on Westminster Highway on his way to religious services. He was passing through the intersection of Garden City Road on a green light when his vehicle was struck by the vehicle driven by Constable Maurizio. The vehicle driven by Constable Maurizio did not have its siren or flashing lights activated at the time. Mr. Abdalle was travelling at about 50 kilometers per hour when his vehicle was hit.

**8**  Mr. Abdalle was thrown forward in the collision, hitting his head on the front windshield and possibly on the rear view mirror as well. He sustained a significant cut on his forehead.

**9**  It was Mr. Abdalle's testimony that he was wearing his seat belt. He stated that he always wears a seat belt. He stated that he reported at the hospital that he was wearing his seat belt; however, this is inconsistent with what is recorded in the hospital record.

**After the Accident**

**10**  An ambulance was called to the scene and Mr. Abdalle was treated at the scene by ambulance attendants. Kristina Jones was one of the paramedics who treated Mr. Abdalle at the scene. It was her evidence that she asked Mr. Abdalle more than once at the scene whether he had been wearing his seat belt at the time of the accident and that he had replied that he was not. She recorded that he was unrestrained in the Crew Report prepared at the scene.

**11**  Mr. Abdalle was taken by ambulance to the hospital where he received treatment for the large wound on his forehead and smaller cuts on his cheek. Small pieces of glass were removed from these wounds. In addition, he had suffered some damage to his knees and right finger.

**12**  In the immediate aftermath of the accident, Mr. Abdalle suffered significant pain in his neck and back, severe headaches, dizziness and nausea. Dr. Yong, his family physician, concluded that Mr. Abdalle had suffered a concussion and soft tissue injuries. Dr. Yong observed that Mr. Abdalle had restricted range of motion, tenderness in the neck and back, and muscle spasms. Dr. Yong recommended that Mr. Abdalle take time off work due to his injuries.

**13**  Dr. Yong prescribed medications for pain, inflammation and to improve Mr. Abdalle's sleep. He also prescribed physiotherapy, which Mr. Abdalle attended in the summer following the accident.

**14**  Mr. Abdalle was off work until September 2007 and bedridden for much of that time. He stated that during this period he felt dizzy if he tried to walk or move. He was unable to care for himself or attend work. He relied upon his roommate to pick up groceries and medications for him. He was not able to cook for himself and relied upon friends to assist him.

**15**  Dr. Yong later recommended that Mr. Abdalle attend a further course of physiotherapy and that he do stretching and attend massage therapy. Mr. Abdalle testified that he did do the stretching that he had been taught at physiotherapy. He did not follow the recommendation to undertake a further course of physiotherapy.

**16**  Mr. Abdalle was married in 2007, before the accident. It was a marriage by proxy and he did not meet his wife until 2008. She moved to Canada in 2010. Before the accident he had been sending her $500 per month in support. One of the consequences of the collision was that he was not able to continue to send her the support for a period of time.

**17**  Mr. Abdalle did not provide much detail at trial about the progression of his recovery. He stated that after six months he continued to experience considerable pain. He was worried that he would not recover. He continued to have dizziness and headaches. Mr. Abdalle stated that during this period he could not walk for more than 500 meters without stopping.

**18**  Mr. Abdalle gave evidence at his examination for discovery that was conducted on October 14, 2009. At that time he gave the following evidence:

1. And how often do you get headaches now?
2. Right now I don't get as often I used to get, but sometimes maybe twice a month I get headache, comes and goes.

...

1. And you get these times of neck pain how many times per month?
2. Sometimes I don't get two months.
3. And that sometimes not for two months, is that now or in the months after the accident?
4. No, but the months after the accident I was -- it was more often.
5. How often?
6. I would say it was actually weekly basis.

...

1. And you said now you feel pain in your neck once every couple of months?
2. Yes, sometimes -- I cannot say when, but sometimes I get some pain in my neck.

...

1. And how long did the dizzy spells last?
2. Dizziness I -- I think it last up to year and plus. I was -- was getting often, you know. So there was so many times I had to lean on something to just hold on something to -- some weeks they were better than the other weeks.
3. And how many times a week would you say you got dizziness in that year?
4. I would say the dizziness, it wasn't something like daily basis, but once a week, something comes and goes.

**19**  In cross-examination Mr. Abdalle agreed that as at October 2009 his headaches were intermittent and resolved with Advil.

**20**  In 2010, Dr. Yong referred Mr. Abdalle to Dr. Pankaj Dhawan, a specialist in physical medicine and rehabilitation; however, Mr. Abdalle did not attend the appointment. His explanation was that he had forgotten the appointment since there was a lengthy interval between the referral and the appointment. In addition, he stated that he had misplaced the calendar on which he recorded his appointments.

**21**  Mr. Abdalle was referred again to Dr. Dhawan in 2011, and attended an appointment on April 28, 2011. Dr. Dhawan's notes described the history given by Mr. Abdalle at the time as follows:

He improved with time and with therapy but his symptoms of headache remained and it bothered him off and on. He was somewhat vague about the onset of the symptoms, the frequency of symptoms, the severity of the symptoms and the impact on his life. I asked him in various ways and it looked like he had variable headaches which usually seemed to start from the head and stayed in the head region. The frequency was unknown. He also described some neck stiffness and low back pain and again the aggravating or relieving factors, frequency, and duration was unknown. He denied any presence of loss of sensation, loss of strength in the arms or legs, or any bowel or bladder disturbance. His sleep was interrupted. He did not feel rested and his mood was somewhat irritable but not depress.

**22**  Dr. Dhawan recommended that Mr. Abdalle "claim some of his fitness back" by resuming the activities he had enjoyed prior to the accident. He advised Mr. Abdalle to continue walking as well. He prescribed Nortriptyline to improve sleep, modulate pain and reduce Mr. Abdalle's headaches. He recommended that Mr. Abdalle consider cervical and lumbar facet block injections in small doses.

**23**  Dr. Dhawan saw Mr. Abdalle again on August 17, 2011. At that time Mr. Abdalle declined to have the injections done. The explanation he provided to Dr. Dhawan was that "he did not feel comfortable with that". Dr. Dhawan reported that Mr. Abdalle said that he was learning to live with the pain. He reported that he still had low back pain and some upper neck pain and headaches. He reported that he was also feeling somewhat sleepless and that he felt his mood had declined compared to prior to the accident. Mr. Abdalle told Dr. Dhawan that he did not take the Nortriptyline that he had prescribed. He did not state a reason. Mr. Abdalle reported that he was trying to walk. He told Dr. Dhawan that he was working at the Hertz car rental agency. His job was to clean the cars and do detailing. He stated that he was currently not on any fitness program and overall he had remained unchanged.

**24**  Mr. Abdalle testified that at present he is limited in everything he does by the headaches and pain resulting from the accident. He said that he is not the same person. He said that he gets headaches three to four times a week and most nights. He stated that he does not sleep a full night because of the headaches and some nights cannot sleep at all. It was his testimony that sometimes the headaches last a whole day. He said that when he gets the headaches he is in great pain and cannot think clearly.

**25**  He stated that he still suffers from dizziness when he moves a lot. The dizziness lasts 10 to 15 minutes and then it passes. In addition, he still suffers from nausea, anxiety and fear of driving. He stated that he suffers from neck pain a lot of the time, that he was stiff and could not move freely. He is troubled by the scar on his forehead, believing that people recoil from it.

**26**  When asked in cross-examination about his evidence on discovery with respect to the frequency of his headaches, he stated that sometimes the headaches were better, sometimes bad. He added that he never kept track of how frequently he suffered from his headaches. His answer was to the same effect with respect to the timing of his neck and back pain and dizziness - some times were better than others, and he did not keep a calendar recording how often he suffered.

**27**  Mr. Abdalle stated that he continues to suffer from anxiety, worrying about the headaches, dizziness and pain, and whether he will ever recover.

**28**  It was his testimony that he is unable to assist his wife with household chores such as laundry and cooking. He is not able to pick up his nine month old baby. He stated that it is a challenge to perform the functions of his job because of his back pain.

**29**  He stated that he continues to do the stretching that he learned at physiotherapy; however, he is sometimes forced to stop part way through because of the pain. He stated that he walks on the track for 15 minutes to improve his conditioning. It was his testimony that he has tried to return to play soccer as recently as a month ago, but was not able to. He stated that playing for as little as five minutes brings on a headache that forces him to stop playing. He is not able to hike as this also brings on headaches and dizziness. He has gained weight.

**30**  Mr. Abdalle testified that he declined to take the injections recommended by Dr. Dhawan because his religious beliefs forbid him to take any strong medications that dull the senses, like alcohol.

**31**  It was Mr. Abdalle's evidence that since the collision, he is not able to change his work situation. He can only just manage to do his work and is not able to do anything after work. He is not able to take on the challenge of doing other things.

**32**  Mr. Abdalle's wife, Ayan Hashi, testified that Mr. Abdalle is not able to help out at home because his head is always hurting. She said that he was not able to go for hikes or to take walks with her. He cannot pick up the baby. Noises bother him.

**33**  Abdirhman Osman is a close friend of Mr. Abdalle. They work together at Hertz and used to play soccer together before the accident. It was his testimony that Mr. Abdalle does his job at work perhaps a bit more slowly. He has not returned to soccer since the accident. He stated that he did see Mr. Abdalle play a couple of times, but he could not finish. It was his testimony that Mr. Abdalle played probably about half the game and then left. He stated that since the accident Mr. Abdalle is quieter and less outgoing than before the accident.

**34**  Theresa McLennan used to be Mr. Abdalle's landlord. He rented a bedroom in her apartment between 2000 and 2008. She described Mr. Abdalle's high level of energy and activity prior to the accident. It was her evidence that in the aftermath of the accident Mr. Abdalle was off work. He was fatigued, spending much of his time in bed. He suffered from headaches. She bought his groceries for him and refilled his prescriptions. She stated that after the accident he had a very bad scar for a time. She stated that prior to the accident Mr. Abdalle was more reliable and helpful. After the accident he seemed drained of energy.

**Expert Evidence**

**35**  There were two expert reports filed. Dr. Peter Yong is a family physician who has been Mr. Abdalle's physician since 2003. He provided the following opinion:

In summary, Mr. Abdalle was involved in an accident on May 08, 2007, in which he suffered head injuries and extensive lacerations of the head which were stitched and stapled. Because of his head injuries and concussion, he continued to suffer posttraumatic headaches and is still symptomatic now. He is being assessed by Dr. Dhawan regarding his injuries as well as his posttraumatic headaches. A CT scan done on September 29, 2008 showed no evidence of any neurological problems. A MRI scan of the head may be more useful in finding any structural changes in the brain as a result of his head injuries. He continues to suffer from neck and back pain since the accident. When he was assessed on April 13, 2011, he was still symptomatic. There was still tenderness and stiffness of the neck, shoulderblade, and back. However, there was no evidence of any fractured bones or clinical evidence of any impingement of the cervical or lumbar nerve roots. Mr. Abdalle will suffer permanent scar on his head due to the laceration on his head. As far as the posttraumatic headaches are concerned, his prognosis is guarded at this point.

He will continue to be assessed in the office and if necessary, an MRI scan will be ordered. He will continue to see Dr. Dhawan for his posttraumatic headaches and his soft tissue injuries of moderate severity involving his neck and back. As far as neck, shoulderblade, and back pain is concerned, there was no evidence of any fractures or dislocations. There was no evidence of any neurological problems. It is unlikely for him to suffer permanent disability or sequelae as a result of the injuries to his neck, back, and interscapular area. However, his condition will be followed up and if there is worsening of his condition, he will be assessed by a specialist such as an orthopedic surgeon or specialist in physical medicine.

**36**  Dr. Pankaj Dhawan is a specialist in physical medicine and rehabilitation. Dr. Dhawan provided the following opinion:

It appears that this man suffered soft tissue injuries to the cervical and lumbar spine and concussion in the motor vehicle accident described. He has settled into chronic pain. He has not benefited from the passage of time or physiotherapy. He has declined further treatments of local anesthetic and steroid injections to the cervical and lumbar facets as well as the use of medications to improve sleep and mood. There seemed to be emotional sequelae to his personal injury as well with some decline in sleep and mood.

It would be helpful to improve his sleep and mood through antidepressant medications and to get a personal trainer and fitness pass for him to improve his overall fitness to get back to his previously active, fit lifestyle. Concussions like this usually heal in about two years' time and soft tissue injuries go on to heal as well. In the absence of any bony discogenic or neurological injury, eventually full recovery is expected and I do not suspect any long term sequelae, development of arthritis or need for surgery. Given the chronicity of his symptoms and their impact on his sleep and mood, I suspect some subjective pain may remain on a longer term basis which would not be disabling for vocational or recreational activities.

**Credibility and Reliability of Evidence**

**37**  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 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.); *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).

**38**  In the present case, it is clear that Mr. Abdalle struck his head against the windshield in the collision. As a result, he suffered a significant laceration which left him with a prominent scar on his forehead that was disfiguring and disturbing to him. It also appears from the testimony of Ms. McLennan that the scar has faded and is now less prominent.

**39**  Mr. Abdalle also suffered a concussion and soft tissue injury to his neck and back as a result of the collision. He suffered from headaches, dizziness, nausea, pain and stiffness. These injuries were disabling in the immediate aftermath of the accident. From the time of the accident until September, he was unable to work or to take part in the sporting activities that he loved. He needed assistance with tasks such as getting groceries. He was not able to perform housekeeping activities or to cook for himself.

**40**  What is not clear is the progress of his recovery from September 2007 to the date of trial and his present condition. As noted earlier, Mr. Abdalle gave little evidence at trial with respect to the progress of his recovery. Moreover, his testimony at trial concerning his present condition is in stark contrast with his evidence given on discovery, in particular, with respect to the frequency that he experiences headaches, dizziness and pain. His testimony in chief was that he experiences headaches virtually daily, pain at least several times a week and dizziness if he attempts any physical activity. However, as of October 2009, it was his evidence that the dizziness lasted a year after the accident, that he experienced headaches about twice a month and neck pain every couple of months.

**41**  Mr. Abdalle's account of what activity he can manage is not consistent with that given by Mr. Osman. Mr. Abdalle stated that he was forced to stop playing soccer after only five minutes; however Mr. Osman observed Mr. Abdalle play soccer until half time. Moreover, it was Dr. Dhawan's opinion that Mr. Abdalle is not disabled from any activity, either vocational or recreational.

**42**  I have concluded that Mr. Abdalle's testimony concerning the progress of his injuries given in his discovery was accurate and reliable. I accept that Mr. Abdalle continues to suffer on occasion from neck and back pain and headaches, but find that his account of the present frequency and degree of debilitation associated with these conditions is not reliable. I find, consistent with his discovery evidence, that the dizziness Mr. Abdalle experienced was essentially resolved a year after the accident.

**Contributory *Negligence***

**43**  Pursuant to s. 4 of the ***Negligence*** *Act*, *R.S.B.C. 1996, c. 333*, when a plaintiff contributes negligently to causing his or her own injury, the court must determine relative degrees of fault. The correct inquiry is whether the plaintiff failed to take reasonable care for his or her own safety and whether that failure was one of the causes of the accident, see *Bradley v. Bath*, [*2010 BCCA 10*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-251K-00000-00&context=), at para. 27.

**44**  The court's task is to assess the respective blameworthiness of the parties, rather than the extent to which the loss may be said to have been caused by the conduct of each. Fault or blameworthiness evaluates the party's conduct in the circumstances and the extent or degree to which it may be said to depart from the standard of reasonable care, see *Alberta Wheat Pool v. Northwest Pile Driving Ltd.*, [*2000 BCCA 505*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B136-00000-00&context=), at paras. 45-46.

**45**  The defendant submits that it is well recognized that all occupants of the motor vehicle have a duty to wear their seat belts. Failure to do so will often result in an assessment of contributory ***negligence*** against that person, see *Galaske v. O'Donnell*, [*[1994] 1 S.C.R. 670*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3CR-00000-00&context=) at p. 680. Further, s. 220 of the *Motor Vehicle Act*, *R.S.B.C. 1996, c. 318*, requires that a person in a motor vehicle being driven on a highway in British Columbia wear a seat belt.

**46**  In order to make the case of contributory ***negligence*** based on the plaintiff's failure to wear a seat belt, the defendant bears the burden of establishing, on a balance of probabilities, that the plaintiff's injuries would have been reduced or eliminated had he been wearing a properly functioning seat belt, see *Claiter v. Rose et al*, [*2004 BCSC 50*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-618R-00000-00&context=) at para. 178.

**47**  In the present case, the defendant submits that there is strong evidence available to support the conclusion that Mr. Abdalle was not wearing his seat belt at the time of the accident:

1. The evidence of Kristina Jones, the ambulance attendant who attended the scene of the collision, is that she recalls the accident in question, and specifically recalls Mr. Abdalle telling her he was not wearing his seat belt. The defendant submits that significant weight ought to be given to Ms. Jones' evidence on this point given that she is an independent witness who gave her testimony in a frank and forthright manner.
2. In addition, the Ambulance crew report contains the notation "unrestrained" in the history section, under the heading "mechanism of injury/history of illness". In her testimony, Ms. Jones emphasized the importance of accurately recording such information.
3. Mr. Abdalle has admitted that he can't recall whether he was wearing his seat belt at the time of the accident.
4. Mr. Abdalle testified that he always wears his seat belt but admitted, in cross-examination that he was twice cited for driving while unbelted.
5. Mr. Abdalle's own evidence is that his head hit the front windshield. As a matter of common sense, the defendant submits that this is not physically possible if he was wearing his seat belt.

**48**  Mr. Abdalle submitted that the Court should conclude that Ms. Jones is mistaken in her recollection that Mr. Abdalle told her that he was unrestrained. Counsel noted that Ms. Jones has helped thousands of individuals since treating Mr. Abdalle. Moreover, she was unable to recall the specifics about his appearance at the time.

**49**  I found Ms. Jones to be both a credible and reliable witness. Her evidence is consistent with the notation in the crew report. I accept her evidence that Mr. Abdalle told her that he was unrestrained. In addition, I find that the fact that Mr. Abdalle's head struck the windshield is more consistent with him being unrestrained.

**50**  I am satisfied, having considered all the evidence, that Mr. Abdalle was not wearing his seat belt at the time of the accident.

**51**  The next question is whether Mr. Abdalle's injuries would have been reduced had he been wearing a seat belt. The defendant submits that both the medical evidence and common sense support the conclusion that given the nature of the injuries sustained by Mr. Abdalle in the accident, it is likely these injuries would have been reduced had he been wearing his seat belt. Counsel notes that, by his own admission his head struck the windshield as a result of the collision.

**52**  The defendant submits that common sense establishes that his injuries would not have been as severe if the seat belt had been used citing Chief Justice McEachern in *Lakhani (Guardian ad litem of) v. Samson*, [*[1982] B.C.J. No. 397*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-JP9P-G0X8-00000-00&context=) (S.C.) at para. 3:

I reject the suggestion that engineering evidence is required in these cases. The court is not required to leave its common sense in the hall outside the courtroom, and the evidence is clear that upon impact in both cases the Plaintiff's upper body was flung or thrown forward striking the dashboard or the steering wheel. And common sense tells me that the restraint of a shoulder harness would have prevented that, and therefore some of the injury from having occurred.

**53**  In addition, the defendant submits that the expert evidence in the present case also supports the conclusion that the plaintiff's injuries would have been less severe had he been belted. Dr. Dhawan agreed with the proposition that the head injuries sustained would be greater where an individual's head hits the windshield. He indicated that a head hitting a windshield results in a blunt force being applied to the head.

**54**  Dr. Dhawan stated that in the absence of blunt force, such as a head hitting the windshield, there would be less compressive force to the cervical spine. Dr. Dhawan stated that headaches can be caused by a direct trauma or by a soft tissue injury to the cervical spine. He stated that in the absence of blunt force trauma, headaches of either type would be less serious.

**55**  In addition, the defendant relies upon the evidence of Ms. Jones that it is important to determine whether a patient was wearing a seat belt at the time of any motor vehicle accident because, in her experience, seat belt use reduces the severity of injuries.

**56**  The defendant submits that the evidence provided by Dr. Dhawan and Ms. Jones establishes, on a balance of probabilities, that the plaintiff's injuries would have been reduced or eliminated had he not hit his head on the windshield. Further, that as this court held in *Lakhani*, even in the absence of this evidence, this court is nevertheless entitled to conclude as a matter of common sense, based on the plaintiff's injuries, that the restraint of a shoulder harness would have prevented the plaintiff's head from moving forward several feet and striking the windshield, thereby preventing some of the plaintiff's injuries such as the head laceration and concussion.

**57**  Counsel submitted on behalf of Mr. Abdalle that it was Dr. Dhawan's opinion that Mr. Abdalle's ongoing headaches were likely cervicogenic in nature and not originating from the head injury and that his evidence concerning neck and back injuries was, "not as clear-cut". Further, counsel submits that no evidence was adduced concerning neck injuries and physical forces in automobile crashes, nor has the defendant adduced evidence to establish that Mr. Abdalle would not have hit the windshield had he been wearing a seat belt. Accordingly, counsel submits that the defendant has not met its burden of proof to establish that his failure to wear a seat belt worsened his injuries from the collision.

**58**  I conclude that it is more likely than not that Mr. Abdalle would not have hit his head on the windshield had he been wearing his seat belt. It was Dr. Yong's opinion that Mr. Abdalle suffered from a concussion. Dr. Dhawan's opinion was that both headaches and injuries to the cervical spine would be less serious in the absence of blunt force trauma. Considering the evidence as a whole, I am satisfied that the defendant has met the burden of proof in this regard.

**59**  The defendants cited the following decisions with respect to the appropriate amount of reduction:

1. *Konken v. Krulic*, [*[1993] B.C.J. No. 104*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JG02-S1D3-00000-00&context=) (S.C.) (15% apportionment to plaintiff);
2. *Lakhani*, *supra*, (25% apportionment to plaintiff); and
3. *Greenall v. Watson*, [*[1995] B.C.J. No. 2326*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JNJT-B248-00000-00&context=) (S.C.) (30% apportionment to plaintiff).

**60**  I conclude that the appropriate reduction to reflect Mr. Abdalle's degree of blameworthiness in the present case is 20%.

**Damages**

**Failure to Mitigate**

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

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

**63**  The defendant bears the onus of proving that the plaintiff could thereby have avoided some part of the loss, see *Janiak v. Ippolito*, [*[1985] 1 S.C.R. 146*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2361-00000-00&context=) [*Janiak*]. In the context of an allegation that the plaintiff failed to mitigate his losses because he failed to seek or follow specific medical care, the question of whether the plaintiff was reasonable in refusing treatment is a finding to be made taking into account the degree of risk from the treatment, the gravity of the consequences for refusing it and the potential benefit to be derived from the treatment, see *Janiak* at pp. 162-163.

**64**  In the present case, the defendant submits that Mr. Abdalle failed to mitigate its damages by:

1. failing to swim more than a few times despite the recommendation of his physiotherapist made prior to October 2007;
2. failing to attend physiotherapy or massage therapy recommended to him by Dr. Yong after October 2007;
3. failing to take Nortriptyline as prescribed by Dr. Dhawan;
4. failing to take the facet block injections recommended by Dr. Dhawan; and
5. failing to follow the exercise regime recommended by Dr. Dhawan.

**65**  Counsel notes that with respect to the failure to attend physiotherapy and massage, Dr. Yong agreed that he recommended these treatments to Mr. Abdalle and that he did so because in his opinion, such treatments are effective in the treatment of the kind of injuries sustained by Mr. Abdalle and carry no risks. It was Dr. Yong's opinion that it was very possible the physiotherapy and massage therapy would have resulted in a reduction in the severity or length of symptoms. He agreed that failure to undergo the treatment would result in the patient not experiencing any associated reduction with respect to the length and severity of the symptoms.

**66**  Mr. Abdalle agreed that his physiotherapist had recommended that he do swimming in treatment of his injuries. He agreed further that he went swimming while attending physiotherapy, but only a few times after it ended. It was Dr. Dhawan's evidence that swimming was a good exercise for Mr. Abdalle to be doing, that swimming and other exercises would help him strengthen and speed his recovery. He stated that such exercises have little risk and he was not aware of any contraindications in Mr. Abdalle's case.

**67**  Dr. Dhawan stated that he prescribed Nortriptyline in a low-dose, for treatment of Mr. Abdalle's mood, sleep, pain and headaches. Dr. Dhawan stated that in his opinion, it was more likely than not that the medication would have assisted Mr. Abdalle. He stated that this is one of the most commonly prescribed headache prevention drugs. It is not a pain relieving drug; rather, the goal of the drug is to reduce the incidence and intensity of headaches. He stated that the drug functions to block the re-uptake of naturally occurring neurochemicals, thereby increasing their levels in the brain resulting in the benefits indicated. He stated that this is not a mood altering drug and that it is prescribed in such low doses that there is no mood blunting effect. He stated that the drug is generally well tolerated and that there was little risk to Mr. Abdalle. He stated that the consequence of Mr. Abdalle's failure to take the drug was that the opportunity to improve his sleep, mood, pain and headaches was lost.

**68**  With respect to the facet block injections, Dr. Dhawan stated that they were to serve both a diagnostic and therapeutic purpose. Dr. Dhawan stated that he discussed the benefits of the treatment with Mr. Abdalle. It was his opinion that it was more likely than not that Mr. Abdalle would have benefited from these treatments. It was his opinion that in Mr. Abdalle's case, the benefits far outweighed the risks associated with the treatment, which he stated could include dizziness for a few minutes, an increase in pain for two to four days and the risk of bleeding and pain from the injection itself.

**69**  Dr. Dhawan advised Mr. Abdalle in April 2011 to increase his fitness with an active program and to continue walking. He noted that in his follow-up visit in August, Mr. Abdalle told him he was not in any fitness program other than walking. Mr. Abdalle admitted that he had not undertaken a physical fitness program in response to the recommendation.

**70**  Mr. Abdalle's position was that he did not fail to mitigate his damages. Counsel submits that Mr. Abdalle would have attended further sessions of physiotherapy, but that he struggled with financial and transportation issues that he submitted were largely caused by the actions of the defendant. While he declined medication recommended to him by Dr. Dhawan, that treatment might not have been successful.

**71**  In addition, counsel submits that Mr. Abdalle has spiritual and religious objections to drug use. Counsel submits that adherence to a sincerely held religious belief should not be considered a failure to mitigate damages. In counsel's submission this should be an application of the principle of tort law that the tortfeasor takes the victim as he finds him.

**72**  The medical evidence establishes that the recommended treatments would likely have assisted Mr. Abdalle, that there were no contraindications in his case and that the risks were minimal. Accordingly, unless Mr. Abdalle's spiritual objections provide a reason to refuse treatment, I conclude that Mr. Abdalle's refusal to follow the recommendations of his physicians was unreasonable.

**73**  While counsel for Mr. Abdalle submitted that the issue of the plaintiff's beliefs are an aspect of the application of the thin skull principle, the Supreme Court of Canada in *Janiak* concluded that not every pre-existing subjective characteristic will be taken into account in determining the question of reasonableness and mitigation, only those that can be said to affect the plaintiff's capacity to mitigate. Madam Justice Wilson, speaking for the Court stated at para. 159:

The other element that has to be considered in determining whether the objective test of reasonableness applies to the decision made by the alleged thin skulled plaintiff is the nature of the pre-existing psychological infirmity. It is evident that not every pre-existing state of mind can be said to amount to a psychological thin skull. It seems to me that the line must be drawn between those plaintiffs who are capable of making a rational decision regarding their own care and those who, due to some pre-existing psychological condition, are not capable of making such a decision. As pointed out by Professor Fleming, a plaintiff cannot by making an unreasonable decision in regard to his own medical treatment "unload upon the defendant the consequences of his own stupidity or irrational scruples": Fleming, The Law of Torts (6th ed. 1983), p. 226. Accordingly, non-pathological but distinctive subjective attributes of the plaintiff's personality and mental composition are ignored in favour of an objective assessment of the reasonableness of his choice. So long as he is capable of choice the assumption of tort damages theory must be that he himself assumes the cost of any unreasonable decision. On the other hand, if due to some pre-existing psychological condition he is incapable of making a choice at all, then he should be treated as falling within the thin skull category and should not be made to bear the cost once it is established that he has been wrongfully injured.

**74**  In the recent decision *Cassells v. Ladolcetta*, [*2012 BCCA 27*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1J8-00000-00&context=), Mr. Justice Lowry, speaking for the court, emphasized the objective nature of the relevant test at para. 26:

I agree that if, by virtue of the injury sustained in an accident, a plaintiff is unable to make a reasonable decision about treatment, the plaintiff is in no different position with respect to mitigating the loss suffered than would be the case if, for other reasons unrelated to the accident, the plaintiff's capacity to make reasonable decisions about treatment was lacking. But I cannot accept that means the law prescribes a subjective test, modified or otherwise. *Janiak* is clear; the test is objective. I consider that if a plaintiff had the capacity to make the decision about treatment it is said ought to have been made, and the advice was sound, the mitigation question in each instance must be what would be expected of a reasonable person in the circumstances having regard for the plaintiff's medical condition at the material time and the advice given concerning treatment. If, through no fault of his own, the plaintiff did not have the capacity to make the decision, or the advice was not sound, the question would not arise.

**75**  It appears that the particular question of whether pre-existing religious beliefs would constitute a reasonable basis for a refusal of medical treatment has not been addressed in this jurisdiction. Jamie Cassels and Elizabeth Adjin-Tettey wrote in *Remedies: The Law of Damages*, at pp. 292 and 393 that "there is little authority on this issue", and cite two American decisions as guidance. Neither of these cases have been cited in Canadian jurisprudence. Moreover, from *Janiak* it is clear that the American position on this issue takes subjective attributes into consideration to a greater degree than in Canada (*Janiak*, p. 160). Cassels and Adjin-Tettey opine at p. 392 that:

According to the Janiak test, where a medical treatment is otherwise obviously required, religious or ethical objections would not provide an excuse from mitigating unless those objections rendered the plaintiff incapable of choice or could be assimilated to 'pathological' conditions.

**76**  Ken Cooper-Stephenson also explored this topic in *Personal Injury Damages in Canada* and expressed a different view. He stated at p. 876 that:

[l]f a pre-existing religious belief or cultural practice inhibits or prevents the plaintiff's capacity to choose a certain form of treatment ... then it is almost certain that the plaintiff will not be adjudged unreasonable in the refusal ... Defendants take their plaintiffs as they find them with respect to their religion, their culture, and their socio-economic setting.

He does not, however, provide any Canadian authority in support of this proposition.

**77**  Professor Cooper-Stephenson also argues that there is a move towards subjectivism, with one approach including religious belief and cultural practice within the notion of "capacity" from *Janiak*. He says, at p. 879, that as for religious belief and cultural practice:

... their recognition as fundamental constitutionally-protected interests in the *Canadian Charter of Rights and Freedoms* almost certainly requires that they be respected in post-action choices for the purposes of the duty to mitigate.

**78**  There are two questions to be addressed in relation to this issue. The first is whether, to what extent, and under what circumstances a religious or cultural belief will be taken into consideration in addressing the plaintiff's duty to mitigate. As noted above, it appears that the answer to this question may not be settled in Canadian jurisprudence. The second question is whether in the particular case, the plaintiff's failure to follow a recommended course of treatment is the result of adherence of a religious or cultural belief or practice.

**79**  In my view, this is not the case to make a determination with respect to the first question because I have concluded that the factual foundation is simply not made out for the Court to conclude that the reason for the refusal of treatment was a sincerely held religious or spiritual objection on the part of Mr. Abdalle. I have reached this conclusion for the following reasons:

1. Mr. Abdalle did not follow the recommendations with respect to swimming, physiotherapy, massage therapy and improving his level of activity. These had nothing to do with spiritual or religious objections to treatment;
2. counsel's submission went beyond Mr. Abdalle's evidence. Mr. Abdalle testified that he has spiritual objections to alcohol and certain drugs. He said that alcohol is forbidden as well as drugs that stimulate the mind. He stated that he has spiritual objections to drugs that dull his senses or put him "like half asleep". It was his evidence that he did not agree to the facet block injections because he understood that the medication numbs the area around the injection and he did not want to numb the back of his head. He did not testify that he declined to take Nortriptyline because of spiritual or religious objections;
3. there is no evidence that he discussed any spiritual or religious objections to the medication or injections with Dr. Dhawan, and indeed the doctor's report suggests that he did not;
4. Dr. Dhawan's description of the effects of Nortriptyline does not seem to fall within the scope of drugs to which Mr. Abdalle claims to have a religious objection. In my view, a reasonable plaintiff with religious objections to medications having certain effects on the body would discuss his concerns with his physician and ascertain if the medication actually fell within the scope of the prohibition; and
5. Mr. Abdalle took, without apparent concern, medications for pain relief and improvement of sleep prescribed by Dr. Yong. This strongly suggests to me that there was no religious objection to taking Nortriptyline.

**80**  In addition, I note that there was no evidence about whether these religious and spiritual objections were part of the formal tenets of Mr. Abdalle's faith, or personal to him. There was no evidence of the source of what counsel characterized as a prohibition, for example, in religious texts. There is no evidence that Mr. Abdalle discussed these matters with his spiritual advisors. There was no evidence of how widespread this particular conviction was among members of his faith.

**81**  In the result, I am satisfied that Mr. Abdalle's refusal to take the Nortriptyline prescribed by Dr. Dhawan and his failure to follow the recommendation to take facet block injections was not the product of a religious or spiritual objection. In addition, I find Mr. Abdalle's failure to continue with swimming, to become more active, to attend a further course of physiotherapy, to take the Nortriptyline as prescribed and the facet block injections as recommended was unreasonable in all the circumstances and in breach of his duty to mitigate.

**82**  Mr. Abdalle submitted that the reduction for failure to mitigate should be minimal because the treatment recommended by Dr. Dhawan was only recently recommended to Mr. Abdalle. The defendant submits that the failure to mitigate with respect to the swimming recommended by the plaintiff's physiotherapist in the months leading up to October 2007, and with respect to Dr. Yong's recommendations in October 2007, goes back to 2007.

**83**  With respect to Dr. Dhawan's recommendations, the defendant notes that the plaintiff missed his previously scheduled visit with Dr. Dhawan in May 2010 through the plaintiff's own forgetfulness. Accordingly, the defendant submits that the consequences with respect to the plaintiff's failure to follow the treatment options recommended by Dr. Dhawan ought to be assessed to May 2010. I agree with the defendant's submission in this regard.

**84**  The defendant relied upon a number of cases in which the court reduced the damage award to take into account the plaintiff's failure to follow an exercise or other treatment regime recommended by the plaintiff's medical team, citing *Harris v. Zabaras*, [*2010 BCSC 97*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DXWW-201V-00000-00&context=) at paras. 87-88 (10% reduction); *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=) at paras. 77, 78 and 83 (15% reduction); *Salzmann (Litigation Guardian of) v. Bohmer*, [*2009 BCSC 1586*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B2DW-00000-00&context=) at paras. 19 and 24 (20% reduction); *Qiao v. Buckley*, [*2008 BCSC 1782*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B0PH-00000-00&context=) at paras. 60 and 68 (30% reduction); and *Latuszek v. Bel-Air Taxi (1992) Ltd.*, [*2009 BCSC 798*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S05H-00000-00&context=) at para. 85-86 (40% reduction).

**85**  I find that the recommendations for treatment and rehabilitation in the present case would likely have reduced the effect of Mr. Abdalle's injuries. I find further that a reasonable plaintiff in his circumstances would have followed the recommendations and that Mr. Abdalle's failure to follow the program is unreasonable. In all of the circumstances, I think that it is reasonable to conclude that Mr. Abdalle's symptoms would have been improved by at least 25% if he had followed the advice, and accordingly, I will reduce his award of non-pecuniary damages by that amount.

**Non-Pecuniary Damages**

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

**87**  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* [*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=)).

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

**89**  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. In referring to an earlier decision, he stated at p. 399:

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.

**90**  Counsel for Mr. Abdalle seeks an award of $100,000 for non-pecuniary damages. Counsel submitted that the appropriate range of damages for non-pecuniary loss is $90,000 to $100,000, citing the following cases:

1. *Foran v. Nguyen et al*, [*2006 BCSC 605*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B20P-00000-00&context=). In this case, three years after the collision, the plaintiff continued to suffer chronic headaches, neck and back pain. She was left at significantly higher risk for re-injury to her neck ligaments and soft tissue. She suffered from chronic fatigue and loss of self-esteem and could no longer participate in many of the activities she had enjoyed prior to the collision. Moreover, the quality of her participation in many activities had been reduced. She was awarded $90,000 non-pecuniary damages.
2. *Thiessen v. Bissenden*, [*2007 BCSC 1809*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JPP5-2227-00000-00&context=). In this case, the plaintiff was left with ongoing symptoms of headaches, blurred vision, shoulder pain, neck and back pain. Mr. Justice Williamson concluded that she suffered from fibromyalgia caused by the motor vehicle accident and that her condition had plateaued sometime in 2006. She was awarded $95,000 non-pecuniary damages.
3. *Gosselin v. Neal*, [*2010 BCSC 456*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-62NV-00000-00&context=). In this case, the plaintiff suffered injuries to her neck, right shoulder and back, had frequent headaches, had difficulties with her right arm and difficulty sleeping. The plaintiff was found to have been highly motivated to return to a physically active lifestyle. Mr. Justice Silverman concluded that she will never be able to return to her pre-accident self. Moreover, as a result of her injuries, she lost the ability to follow a career path and job that she loved, which greatly affected the quality of her life. She was awarded $100,000 for non-pecuniary damages.

**91**  Counsel for the defendant submitted that the appropriate award for non-pecuniary damages, before consideration of contributory ***negligence*** and mitigation, is $40,000. Counsel relied upon the following cases to establish a range of $15,000 to $50,000:

1. *Dhillon v. Ashton*, [*2009 BCSC 1109*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-624S-00000-00&context=). In this case, the court made a non-pecuniary damage award in the amount of $15,000. The plaintiff was a 37 year old father of two young children who had previously enjoyed leisure activities such as walking, playing games and going to the gym. He testified that his ability to play with his two young children was limited by his injuries. The plaintiff was found to have suffered mild to moderate soft tissue injuries to the neck, right shoulder and low back. The plaintiff also suffered from headaches. The plaintiff's symptoms had been most significant in the first three months following the injury, with some ongoing problems for the next five months and intermittent pain thereafter.
2. *Grewal-Cheema v. Tassone*, [*2010 BCSC 1182*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JWXF-213Y-00000-00&context=). In this case non-pecuniary damages were fixed in the amount of $25,000. The plaintiff was five months pregnant at the time of the accident, which Mr. Justice Stewart found resulted in her opportunity to enjoy being pregnant with her first child being "ruined" by the effect of the accident. The plaintiff's symptoms included soft tissue damage which resulted in pain in her cheek bones, jaw, wrists, neck, upper back, mid-back, low back, groin and abdomen as well as excruciating and debilitating headaches. Stewart J. described the plaintiff as basically an invalid, who would simply lie in bed. Her injuries were substantially recovered in 18 months.
3. *Bradley v. Groves*, [*2009 BCSC 1882*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JWXF-20YP-00000-00&context=). In this case an award of $30,000 was made. The plaintiff had sustained moderate soft tissue injuries to the neck and upper back and experienced headaches. Her symptoms had persisted for three years by the time of trial, though there was a prognosis for recovery in the future. The injuries had prevented the 29 year old plaintiff from engaging in her social and recreational pursuits to the extent and with the frequency she would have liked and also affected her intimate relationship.
4. *Wilby v. Hyatt*, [*2008 BCSC 1019*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M31G-00000-00&context=) involved an award of non-pecuniary damages in the amount of $48,500. The plaintiff was 32 years old, and was described by Mr. Justice Josephson as, in many respects the ideal plaintiff; fit, athletic, intelligent, successful, with positive life goals and who was powerfully motivated to recover as much of her former active and healthy lifestyle as possible. She complained of symptoms from the accident including headaches, a stiff neck, stiff shoulders, insomnia, anxiety and pain in areas including her upper back, thoracic area, lower back, buttocks and hips. She also suffered numbness and parasthesia in her arms and legs. The ongoing pain resulted in a temporary depression affecting her mood and causing difficulties with sleep patterns. Based on the medical evidence, the prognosis for recovery was "uncertain", and Josephson J. concluded there appeared to be little prospect for a complete recovery.
5. *Chalmers v. Russell*, [*2010 BCSC 1662*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JNY7-X4CM-00000-00&context=). In this case a 40 year old plaintiff was awarded $50,000 in non-pecuniary damages for symptoms including immense pain in her neck as well as headaches. The plaintiff described continuous throbbing pain in her neck and shoulders as well as frequent headaches. She did not sleep well, and had a sore right ankle. The previously very active plaintiff was found by Madam Justice Griffin to be suffering from ongoing pain which affected her enjoyment of her children and work and would continue to do so for at least some time, but noted that the medical evidence did not suggest the plaintiff would not recover.

**92**  In this case I have concluded as noted above that Mr. Abdalle suffered a serious laceration, concussion and soft tissue injury to his neck and back in the accident. He was left with a significant scar on his forehead. He suffered from nausea, dizziness, headache pain and stiffness in his neck and back as a result of his injuries. He was significantly disabled and largely bedridden from the time of the accident until September 2007, when he was able to return to work. He was not able to attend to functions of daily living such as cooking and household chores at this time and was unable to engage in the many activities that he had enjoyed before the accident. His sleep and mood were affected.

**93**  With the passage of time his symptoms improved. As he conceded in his examination for discovery, the dizziness was essentially resolved after a year. By October 2009 he was experiencing headaches perhaps twice a month and flare ups of neck pain every couple of months. I accept that he continues to experience periodic flare ups of neck and back pain and headache.

**94**  He was able to return to work in September 2007 and has been able to function at the workplace since that time. While he has not returned to his pre-accident level of activity, I find that the injuries he suffered in the accident do not and will not prevent him from taking part in any vocational or recreational activities. Upon a review of the cases cited by counsel and having regard to my findings concerning Mr. Abdalle's injuries and their impact on his activities and the quality of his life, I assess non-pecuniary damages prior to reduction for mitigation and contributory fault at $50,000.

**Loss of Housekeeping Capacity**

**95**  Mr. Abdalle seeks an award of $10,000 for loss of housekeeping capacity. Counsel submits that Mr. Abdalle has lost the ability to perform many duties around the house. He has relied on friends and family to provide him with assistance. However, this is not a situation that should continue in perpetuity.

**96**  The position of the defendant is that no award should be made for future loss of homemaking capacity because, according to Dr. Dhawan, Mr. Abdalle is not expected to be disabled in the future. Dr. Dhawan's prognosis is for a full recovery and his opinion is that any ongoing subjective pain will not be disabling for either Mr. Abdalle's vocational or recreational activities.

**97**  I agree with the position of the defendant with respect to this issue. I accept Dr. Dhawan's medical opinion that Mr. Abdalle will not be disabled from engaging in any activities in the future. While I accept that Mr. Abdalle continues to experience headaches and pain in his neck and back, this impact on the quality of life has been addressed as a component of his non-pecuniary loss. Accordingly, I make no award for loss of housekeeping capacity.

**Past Wage Loss**

**98**  Compensation for past wage loss is to be based on what the plaintiff would have, not could have, earned, but for the injury that was sustained, see *Rowe v. Bobell Express Ltd.*, [*2005 BCCA 141*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M463-00000-00&context=); *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=). Pursuant to s. 98 of the *Insurance (Vehicle) Act*, *R.S.B.C. 1996, c. 231*, a plaintiff is entitled to recover damages for only his or her past net income loss. This means that in the ordinary course the court must deduct the amount of income tax payable from lost gross earnings, see *Hudniuk v. Warkentin*, [*2003 BCSC 62*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G4YK-00000-00&context=).

**99**  Mr. Abdalle submits that taking into account holidays and bank days, his total number of missed days until the time of return to work was 74. In addition, Mr. Abdalle submits that he missed an additional two days on a graduated return to work. However, there is no evidence adduced with respect to these additional two days.

**100**  Mr. Abdalle also claims past wage loss for foregoing income during the period that he was on strike this year for approximately 20 weeks. It was submitted that but for his injuries, he could have been able to pursue alternative employment during that period. Counsel submits that, assuming he would have found a part-time job for approximately $15 an hour, he would have earned an additional $4,800 during this period, in addition to the strike pay he earned during that period.

**101**  The defendant's position is that Mr. Abdalle has not given sufficient evidence to make out a claim for past wage loss because of failure to adduce evidence with respect to his rate of pay at the time of the accident and failure to tender his income tax returns or to lead evidence with respect to the number of hours worked before the accident and the number of hours lost during the period he alleges he was off work.

**102**  With respect to the claim for wage loss during the time when the plaintiff's union was on strike, the defendant's submission is that the evidence is insufficient to establish a causal connection between the strike and the motor vehicle accident at issue. Any wage loss by Mr. Abdalle from his employment at Hertz during the strike was due to the job action not injuries sustained in the motor vehicle accident. Mr. Abdalle's evidence was that he did not look for any work during the strike, including work at locations similar to the work he agrees to have done for Hertz.

**103**  I find that Mr. Abdalle suffered wage loss with respect to 74 days of employment as a result of the motor vehicle accident. I agree with the submission of the defendants that the appropriate discount rate to apply to the gross wage loss award is 22.5%.

**104**  The documents necessary to quantify the past wage loss are not in evidence. It may be that given my findings, counsel will be able to agree upon the award for this head. Failing that there will be a direction pursuant to Rule 18-1 for a hearing before the registrar to determine the quantum.

**105**  With respect to the claim for wage loss during the strike, it was Mr. Abdalle's evidence that he was not able to seek out alternate employment during the strike because of his injuries and fatigue resulting from the accident. However, since he returned to work in 2007, Mr. Abdalle has been able to perform the duties required of his job at Hertz. He was required to be on the picket line for only part of his normal work day. Accordingly, I am not satisfied that his injuries precluded him from seeking alternative work during the strike, and accordingly, decline to make an award with respect to income loss during the strike.

**Loss of Future Earning Capacity**

**106**  Mr. Abdalle seeks an award of $1,920,000 for loss of capacity to earn income in the future. He submits that he continues to suffer from ongoing symptoms arising from the motor vehicle accident. These flare up when he engages in intense physical activity. Mr. Abdalle notes that he has turned down the job offered by a friend to do roadwork because of his physical condition.

**107**  He submitted that while he is able to perform the duties of his present job, he is unable to do more physically demanding labour, and as a result, is unable to pursue greater opportunities. There have been layoffs at his current employment and he may need to seek alternate employment in the future. He will be limited in the forms of employment he can pursue in the job market.

**108**  The award sought is based on the estimated difference between his current wages and what counsel estimated that Mr. Abdalle would earn if he would have been able to fulfill his dreams of owning his own business. This difference was estimated by counsel to be $60,000 a year. It was submitted that the losses would last for the rest of Mr. Abdalle's working life, estimated to be 32 years.

**109**  The defendant's position is that Mr. Abdalle has not established that there is a real and substantial possibility of a future event leading to an income loss, and accordingly, he has not established an entitlement to an award for loss of future income earning capacity. Counsel notes that there is no medical opinion supporting the proposition that Mr. Abdalle will continue to suffer the effects of his injuries in any way that is disabling in the future. Dr. Dhawan's opinion was that full recovery was to be expected and that while subjective pain may remain on a longer-term basis, it would not be disabling for vocational activities. Further, while Dr. Yong gave the opinion that Mr. Abdalle's prognosis was guarded with respect to post traumatic headaches, he did not offer the opinion that the post-traumatic headaches would be disabling for vocational activities. Further, it was his opinion that Mr. Abdalle was unlikely to suffer permanent disability or sequela as a result of the injuries to his neck, back and interscapular area.

**110**  In addition, counsel notes that Mr. Abdalle has worked at Hertz as a vehicle service attendant since shortly after he started work there in 1995 and continues to work in the position. While Mr. Abdalle provided some evidence with respect to his hope someday to start a trucking or restaurant business, in counsel's submission the evidence provided falls well short of establishing either substantial possibility of Mr. Abdalle choosing such work in the future, or that he is incapable of doing such work as a result of his injuries, should he so choose.

**111**  In *Perren v. Lalari*, [*2010 BCCA 140*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X168-00000-00&context=), Madam Justice Garson, speaking for the court, at para. 32, set out the requirements for such an award as follows:

A plaintiff must always prove, as was noted by Donald J.A. in *Steward*, [*[2007] B.C.J. No. 499*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S475-00000-00&context=), by Bauman J. in *Chang*, [*[2008] B.C.J. No. 48*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-FCYK-207V-00000-00&context=), and by Tysoe J.A. in *Romanchych*, [*[2010] B.C.J. No. 168*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X0R5-00000-00&context=), that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok,* [*[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* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa*, [*[1999] B.C.J. No. 270*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-21RK-00000-00&context=). But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.

**112**  In the present case I have concluded that Mr. Abdalle has not established that there is a real and substantial possibility of a future event leading to an income loss. Mr. Abdalle is able to perform all of the requirements of his present position. The medical evidence does not support Mr. Abdalle's assertion that he is or will be disabled from pursuit of any vocational activities.

**113**  In addition, I note that an assessment of damages for loss of future capacity to earn income must be based on the evidence. In the present case, there is absolutely no evidence to support counsel's proposition that but for the accident, Mr. Abdalle would be earning an additional $60,000 per year. In addition, it is well settled that if the award is to be based upon lost future wages, is to be treated as a present value, with appropriate deduction for contingencies, neither of which were present in the submissions of plaintiff's counsel, see for example *Pallos v. Insurance Corp. of British Columbia* [*(1995), 100 B.C.L.R. (2d) 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0K2-00000-00&context=) (C.A.); *Gilbert v. Bottle*, at para. 233.

**114**  In the result, I make no award for loss of future income earning capacity.

**Costs of Future Care**

**115**  Mr. Abdalle seeks an award of $5,000 for the cost of future care. His counsel submits that this care would consist of a combination of gym passes, physiotherapy, personal training sessions, massage therapy and over-the-counter painkillers. Counsel notes that the plaintiff's doctors have recommended a variety of these treatments.

**116**  The defendant acknowledges that the plaintiff's physicians have recommended such treatments in the past. However, counsel notes that Mr. Abdalle has refused to take the medication prescribed by Dr. Dhawan for the treatment of his sleep, mood, pain and headaches. Other than walking he had done previously, Mr. Abdalle did not engage in any additional physical activity in response to Dr. Dhawan's recommendation that he become more active. He did not continue with the swimming recommended by his physiotherapist. Further, as a former personal trainer, Mr. Abdalle is in a good position to implement such an exercise program, even without the assistance of a personal trainer. Further, Dr. Yong recommended that Mr. Abdalle take another round of physiotherapy and massage therapy; however, Mr. Abdalle declined to follow that recommendation.

**117**  Accordingly, the defendant submits that since Mr. Abdalle has consistently failed to follow the treatments recommended to him, it would be unreasonable to grant him an award for future care costs based upon speculation that he might change his mind in the future. The defendant submits that the best evidence of the likelihood of Mr. Abdalle following these recommendations in the future is whether he has done so in the past, and that accordingly, no award for future care costs should be made in the circumstances.

**118**  Future care costs must be justified both because they are medically necessary and they are likely to be incurred by the plaintiff. 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=), Mr. Justice Masuhara stated at para. 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*, [*[2002] 1 S.C.R. 205*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4BC-00000-00&context=)). 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 [paragraph] 35), or for items or services that it is unlikely he will use in the future.

**119**  In the present case it is quite clear that Mr. Abdalle has not followed the recommendations of his physicians with respect to the medication, physiotherapy, massage therapy, personal training sessions or increasing his level of physical activity. There is no evidence that he is likely to do so in the future. Accordingly, I agree with the submission of the defendant that no award for future care costs should be made in the present case.

**Special Damages**

**120**  Special damages were agreed to in the amount of $220.00.

**Summary**

**121**  In summary, damages are awarded as follows:

1. non-pecuniary loss $50,000 less a 20% deduction for contributory ***negligence*** ($10,000) and a 25% deduction for failure to mitigate ($12,500) for a total of $27,500;
2. past wage loss calculated on the basis of 74 days lost wages discounted by 22.5%; and
3. special damages $220.

C.J. ROSS J.

**End of Document**

[***Atwater v. Reese, [2009] B.C.J. No. 537***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S410-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

M.D. Macaulay J.

Heard: February 4-6, 2009.

Judgment: March 19, 2009.

Docket: 08 1377

Registry: Victoria

**[2009] B.C.J. No. 537** | 2009 BCSC 370 | 176 A.C.W.S. (3d) 894

Between Jennifer Atwater, Plaintiff, and Lillian Laverne Reese, Defendant

(63 paras.)

**Case Summary**

**Tort law — *Negligence* — Motor vehicles — Pedestrians — Contributory *negligence* — Action by the plaintiff for personal injury damages allowed — The plaintiff was injured when she was struck by the defendant's vehicle while walking — The defendant was attempting to exit a parking lot to the roadway — She contended that the plaintiff failed to have sufficient regard for her own safety — The court held the defendant wholly responsible for the accident — Although the defendant looked in the direction of the plaintiff, it was apparent that her attention was focused on traffic — The plaintiff could not have avoided the impact.**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Pelvis — Fibromyalgia or chronic pain — Action by the plaintiff for personal injury damages allowed — The plaintiff, age 24, was struck by the defendant's vehicle while walking — The lay and medical evidence corroborated that the plaintiff sustained a moderate soft tissue injury to her hip that two years later, produced chronic pain and mild anxiety — She was awarded $50,000 for general damages, $374 for past wage loss, $475 for special damages, $5,000 for future care and $7,500 for impairment of earning capacity.**

**Damages — Types of damages — General damages — For personal injuries — Cost of future care — Loss of earning capacity — Non-pecuniary loss — Pain and suffering — Action by the plaintiff for personal injury damages allowed — The plaintiff, age 24, was struck by the defendant's vehicle while walking — The lay and medical evidence corroborated that the plaintiff sustained a moderate soft tissue injury to her hip that two years later, produced chronic pain and mild anxiety — She was awarded $50,000 for general damages, $374 for past wage loss, $475 for special damages, $5,000 for future care and $7,500 for impairment of earning capacity.**

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| Action by the plaintiff, Atwater, against the defendant, Reese, for personal injury damages. The plaintiff, age 24, was injured when she was struck by the defendant's vehicle while walking. The accident occurred when the defendant attempted to turn right from a restaurant parking lot to the roadway. A vehicle to the defendant's left was turning left and stopped traffic allowing her to proceed. The defendant admitted that she did not look to the right before accelerating. She did not see the defendant's boyfriend pass by her vehicle prior to accelerating. The defendant accelerated and struck the plaintiff and her sister. The sister testified that they saw the defendant look in their direction and assumed that she saw them. The plaintiff gave a similar account of the collision. Although the defendant formally admitted liability for the accident, her defence of contributory ***negligence*** was not withdrawn and was permitted by the court to be advanced. The defendant contended that the plaintiff failed to have sufficient regard for her own safety. Prior to the accident, the plaintiff was healthy and physically active. She missed minimal time from her work as a waitress. The plaintiff suffered a soft tissue injury that caused continuing pain in her left hip and thigh throughout the ensuing two years. The pain occasionally radiated down to her left foot and into her lower back. Work activities and lengthy sitting aggravated the discomfort. Her sleep was often interrupted. She felt a sense of loss in her life due to an inability to perform pre-accident levels of activity. Various medical professionals opined that the plaintiff's condition was amenable to improvement, but also involved elements of chronic pain.  HELD: Action allowed.  The plaintiff was not negligent in failing to watch the vehicle as she walked in front of it. Although the defendant looked in the direction of the plaintiff, it was apparent that her attention was focused on traffic. The defendant's lack of awareness of the boyfriend's passing suggested that she saw only oncoming traffic in spite of the presence of pedestrians within her sight lines. The defendant was wholly responsible for the collision. The lay and medical evidence corroborated that the plaintiff sustained a moderate soft tissue injury that resulted in chronic pain and mild anxiety. The plaintiff's pain experience was real and not otherwise subject to conscious psychological control. She was awarded $50,000 for general damages, $374 for past wage loss, $475 for special damages, $5,000 for future care and $7,500 for impairment of earning capacity. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 37B

**Counsel**

Counsel for Plaintiff: C.J. Bing.

Counsel for Defendant: M.J. Lawless.

**Reasons for Judgment**

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| **M.D. MACAULAY J.** |

**1**   The plaintiff is 24 years old. On June 3, 2006, the defendant's car struck the plaintiff as she walked in front of it. The plaintiff sustained injuries and claims non-pecuniary and pecuniary damages as a result. By letter just before trial, the defendant admitted liability and, as a result, the trial proceeded mainly as an assessment of damages.

**2**  The defendant admitted liability; it appears, however, that neither her counsel nor counsel for the plaintiff considered the implications of the admission on the defendant's allegation in the Statement of Defence that the plaintiff was contributorily negligent. The plaintiff was a pedestrian at the material time. She walked in front of the defendant's stopped vehicle apparently believing that the defendant saw her. The defendant pled a number of bases for a finding that the plaintiff negligently caused her own injuries either in whole, or in part, including by failing to maintain an adequate lookout or to take precaution.

**3**  This state of affairs led to an issue at the beginning of the trial respecting the defendant's entitlement to pursue the question of contributory ***negligence*** in face of the admission of liability. I declined to rule on the issue at that time and directed that the parties lead any evidence relevant to a determination of the alleged contributory ***negligence***.

**4**  I am persuaded that it would be unjust to refuse to allow the defendant to rely on the allegation of contributory ***negligence*** based solely on the admission of liability in the letter. While the admission might be taken to include a withdrawal of the contributory ***negligence*** allegation, the defendant did not do so expressly. The defendant never formally withdrew her allegation of contributory ***negligence***. Given the circumstances of the accident, it was not reasonable for the plaintiff to assume, without first confirming, that the defendant also intended to withdraw the allegation.

**5**  I also note that the plaintiff was not prejudiced in preparing for trial. At the time of the collision, the plaintiff's boyfriend and her sister were with her. Both were available and testified at trial. Plaintiff's counsel also relied on the defendant's examination for discovery addressing the circumstances of the collision. The defendant elected not to call any evidence. In any event, as I will set out in my reasons below, I am not persuaded that the plaintiff was, in any way, contributorily negligent.

**6**  Immediately before the collision, the plaintiff and her two companions were walking on a sidewalk. Directly ahead, in their path of travel, was an entry-exit point for restaurant parking. The parking lot was to the left of the walkers. Sooke Road runs parallel to the sidewalk to the immediate right of the walkers. From the left side of the walkers, the defendant approached the entry-exit point and stopped her car. She intended to turn right onto Sooke Road from the parking lot. The defendant admitted that pedestrian traffic was common in the area.

**7**  The defendant further admitted that traffic on Sooke Road was busy at the time and that she saw a car approaching from her left side with its left turn signal on. According to her discovery evidence, this gave her an "opportunity to turn right before the other traffic caught up". The defendant also admitted that she did not look to her right before commencing her turn. She admitted accelerating before the collision.

**8**  It is evident from the uncontradicted evidence of the plaintiff and her witnesses that the boyfriend had already walked past the front of the defendant's car before the defendant commenced her turn. The defendant admitted that she did not see him do so. It is also evident from the other evidence that the defendant struck both the plaintiff and her sister as they walked in front of the defendant's car. The defendant assumed that she struck only one person.

**9**  It is apparent from the defendant's admissions, coupled with the uncontradicted evidence of the plaintiff and her witnesses, that the defendant was focused entirely on the oncoming car and other traffic to her left before and during her attempted right hand turn. On her own evidence, she did not see anything to her right or directly ahead before putting her car into motion until after the collision.

**10**  It is significant that the defendant did not see the boyfriend who passed directly in front of her while her car was stopped and that he then stood to her left at or near the continuation of the sidewalk. The defendant's lack of awareness strongly suggests that she saw only oncoming traffic in spite of the presence of pedestrians within her sight lines.

**11**  According to the boyfriend, he observed the defendant looking in his direction before he walked in front of the car. The plaintiff and her sister were about five feet behind him at the time. After walking in front of the car, he looked back and observed the defendant looking to her left. He then saw the car move forward and strike the plaintiff and her sister. The point of impact for the plaintiff was her left thigh and hip. She did not fall but placed a hand on the hood of the car. The defendant stopped her car only after the boyfriend yelled at her.

**12**  According to the sister, she and the plaintiff stopped before walking in front of the car. The sister saw the defendant look in their direction so assumed that she saw them. As the two walked in front of the car, the sister did not continue to look at it. She felt the impact with the car and ended up on the hood. She heard the plaintiff's boyfriend yelling at the defendant.

**13**  The plaintiff's evidence was consistent with the above. According to her, her boyfriend passed in front of the path of the car. She and her sister stopped and waited until the defendant appeared to look in their direction before proceeding in front of the car. The plaintiff did not look towards the car again as she walked. She confirmed the impact to her left hip and thigh, that she did not fall and, finally, that the defendant did not come to a stop after the impact until the plaintiff's boyfriend yelled.

**14**  The defendant contends that the plaintiff failed to have sufficient regard for her own safety because she did not watch the car as she walked in front of it. If the plaintiff had been looking, she would have seen the movement of the car in sufficient time to avoid the impact. The defendant further submits that the plaintiff's evidence about eye contact with the defendant was uncertain.

**15**  I disagree. I find no uncertainty in the evidence of the plaintiff regarding eye contact. Both she and her sister testified that the defendant looked in their direction before they walked in front of the car. I accept that the defendant looked directly in the direction of the two pedestrians before they stepped in front of the car. It is apparent, however, that the defendant looked but did not see because her attention was focused on the traffic to her left.

**16**  I do not accept that the plaintiff was negligent in failing to watch the car as she walked in front of it. Nor do I accept that she could have avoided the accelerating car if she had been watching. Once in front of the car, the pedestrians were within a foot or so of the car. There is no evidence to support the contention that the plaintiff, who was walking ahead of her sister, could have avoided the impact in the circumstances.

**17**  The impact occurred because the defendant was going through the motions of driving without actually paying any attention to what was there by way of pedestrian hazard. I find that the defendant is entirely responsible for the accident.

**18**  I turn next to the assessment of damages. Following the impact, the plaintiff and her sister exchanged information with the defendant. The plaintiff, her boyfriend and sister then walked to the police station, about 15 minutes away, to report the accident. Before the accident, the plaintiff was in good health and physically active without any restrictions on her ability to work or participate in recreational activities and sports.

**19**  While at the police station, the plaintiff declined medical attention as she was not then experiencing any pain. The pain in the left hip and thigh at the point of impact developed about an hour later.

**20**  The plaintiff went to work the next day but experienced sufficient soreness to interfere with her work as a waitress. She attended a drop-in clinic after work and received advice to see her family doctor if the pain did not resolve within a couple of days. The plaintiff saw her family doctor later in the week and received a referral for physiotherapy, typical of the treatment regimes for soft tissue injuries.

**21**  Over the course of the next 18 months, the plaintiff attended physiotherapy treatments two to four times per week. She also received acupuncture and massage therapy treatments. In addition, she attended rehabilitative gym workouts. Although the treatments benefited the plaintiff, she testified that the pain did not stop.

**22**  In the fall 2008, the plaintiff gave up on her gym program because, according to her, it caused too much pain. She continues, however, with a home stretching program.

**23**  According to the plaintiff, there has been little improvement in her condition over the two and three-quarters years since the accident. She reported continuing pain in the left hip and thigh; the pain now sometimes radiates down to her left foot resulting in numbness and into her lower back. Work activities and lengthy sitting in a car aggravate the discomfort.

**24**  The plaintiff's sleep is often interrupted. She sometimes wakes up with sharp pain in the hip and thigh or with numbness down to the toe. Currently, this happens two or three times per week. The pain occurs with similar frequency and lasts up to two or three hours at a time.

**25**  Increased physical activity brings on the pain and the plaintiff has restricted her activities in a number of areas. These include mowing the lawn, housecleaning, gardening, going on long car trips and playing softball. In the spring 2008, the plaintiff changed jobs to a workplace nearer her home in Sooke so that she would not have to drive into Victoria and because the workload was lighter. The plaintiff's discomfort also impedes her enjoyment of sexual activity with her boyfriend.

**26**  In addition, the plaintiff is emotionally labile and stressed, no longer happy and upbeat as she was before the accident. She gets very nervous in a car and frequently overreacts to perceived threats on the road.

**27**  In spite of receiving some counselling, the plaintiff continues to experience a sense of loss in her life and is frustrated by her apparent inability to do the same activities or level of activity as before the accident.

**28**  In cross-examination, the plaintiff frequently appeared confused and somewhat suggestible. Counsel for the defendant maintains that there were material inconsistencies between her evidence in chief and earlier examination for discovery or between no evidence and what the doctors recorded as her statements from time to time. For the most part, I did not find the differences material. Others are explainable by her nervousness and lack of sophistication as a witness. While I have some concerns about the historical reliability of her accounts of the course of events since the accident, I am satisfied that she was being truthful.

**29**  It is important in the circumstances to consider whether the lay and medical evidence corroborates or contradicts the general tenor of the plaintiff's evidence. The lay evidence was, in my view, corroborative. It demonstrates a young, active, happy woman before the accident who has since changed into a relatively inactive, sad person who leads a more guarded lifestyle. The question whether these changes are properly attributable to the plaintiff's injury pattern as opposed to a potentially controllable psychological condition is best answered by considering the expert medical evidence.

**30**  Dr. MacKean is a specialist in physical medicine and rehabilitation. She assessed the plaintiff in December 2007 and again in October 2008. On the first occasion, the doctor concluded, based largely on the plaintiff's subjective complaints and history, that she sustained a contusion to the left iliac crest and a sprain injury involving the left sacroiliac joint and lumbosacral spine. She opined that the pain in the left anterior thigh region and lower extremity was likely referred from the sprain injury. The doctor did not find any magnetic resonating imaging evidence of specific nerve root impingement or abnormality of the iliac crest.

**31**  At the time of the first assessment, the doctor anticipated improvement over the ensuing one to two years and commented that it is not unusual for such an injury pattern "to take two to three years for recovery to occur". She further opined that the plaintiff's then work as a waitress was aggravating her pain and recommended a position that avoided as much standing and repetitive bending, lifting and carrying activities.

**32**  Upon reassessment not quite one year later, the doctor confirmed her earlier diagnosis and also suggested that the plaintiff's complaints of numbness going up into the back could be related to tightness of the muscle groups in the left lower lumbar spine. The doctor attributed the persistent pain along the iliac crest in the area of impact to hypersensitivity of the superficial nerves in the area.

**33**  Dr. MacKean recommended continuing a regular gym program and exercise regime coupled with physiotherapy up to twelve times per year as needed for pain management. Finally, she recommended a referral for possible injections into the left sacroiliac joint to help reduce discomfort. In light of the time that had passed, the doctor considered the prognosis for future improvement poor. In my view, cross-examination did not expose any weaknesses in the doctor's evidence.

**34**  Dr. Gershman is a general practitioner with a diploma in Sport Medicine. He has extensive experience but is less qualified than Dr. MacKean. Dr. Gershman examined the plaintiff at the request of the Insurance Corporation of British Columbia. He saw the plaintiff in October 2006 and again in January 2008. At the time of the initial assessment, the doctor concluded that the plaintiff presented with "an almost resolved" left hip contusion to the iliac crest that he described as a painful type of injury. His prognosis was "that she will recover fully over the next few months" and recommended that the plaintiff cease physiotherapy and return to full sports activities. In his view, the plaintiff was at a "medical plateau".

**35**  By the time of the second assessment more than one year later, the doctor felt that the plaintiff had unconscious heightened pain perception amounting to a pain disorder. He opined that her symptoms "were not in her head" which I took to mean that the disorder was beyond the ability of the plaintiff to consciously control. The doctor suggested working with a personal trainer without additional medication or passive therapy. He further opined that he expected full recovery.

**36**  As the doctor's initial prognosis was unrealistically optimistic, it is difficult to accept his more recent one at face value. It was my impression of the doctor during his evidence at trial that he would be reluctant to ever give a patient a gloomy prognosis because that, by itself, might impede possible recovery. In cross-examination, the doctor conceded that the plaintiff met the criteria for a chronic pain diagnosis and that he had no doubt that the plaintiff was subjectively experiencing pain. Dr. Gershman also agreed, in cross-examination, that chronic pain patients are susceptible to minor depression even though he did not observe any symptoms.

**37**  Dr. Boissevain is a psychologist. He assessed the plaintiff in February 2008, not long after Dr. Gershman's second assessment. According to Dr. Boissevain, the plaintiff has recovered reasonably well from a psychological perspective but she continues to suffer from mild anxiety and "a fear of movement/re-injury". He counselled her over a few sessions to improve her skills managing pain and anxiety. He also encouraged the plaintiff to increase her recreational activity level and to develop an appropriate exercise program. Unfortunately, the plaintiff has not yet followed through on those recommendations.

**38**  I am satisfied that the plaintiff suffers from chronic pain but I share the view of the various professionals that her condition is still amenable to improvement provided she increases her tolerance for recreational activity. She gave up too easily and must try harder so that she can avoid the physical and emotional downward spiral associated with inactivity. I am also, however, satisfied that the plaintiff's pain experience is real and not otherwise subject to conscious psychological control.

**39**  There is, accordingly, a risk that the pain will continue albeit, hopefully, at a lesser level with appropriate rehabilitation. I do not expect her general pain level to increase nor is the plaintiff at risk of harming herself by increasing her activity level.

**40**  To the plaintiff's credit, she missed minimal time from work after the accident. This may have unwittingly contributed to her slow recovery and certainly affected her ability to participate in non-work activities. She now has moved to more sedentary office work and is not waitressing as much. The continuing waitressing she does now is of a lighter variety than before. These changes should help over time, as well.

**41**  In my view, the plaintiff sustained a lower moderate soft tissue injury that has resulted in chronic pain and mild anxiety. She is capable of achieving greater recovery than she has to date in spite of the time that has passed since the accident.

**42**  Counsel for the plaintiff submits that an appropriate award for pain and suffering is $60,000. He relied on similar awards in *Shearsmith v. Houdek,* [*2008 BCSC 997*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M30J-00000-00&context=), and *Love v. Lowden,* [*2007 BCSC 1007*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21XK-00000-00&context=). In the former, the court awarded $60,000 for non-pecuniary damages to a plaintiff who had continuing symptoms associated with chronic pain four years after the accident. In the latter, the plaintiff had chronic pain in the lower back and sacroiliac joint three and one-half years after the accident. The court described the ongoing level of pain as noticeable but not moderately severe and not debilitating (para. 61). The award for pain and suffering was $60,000.

**43**  The court also awarded $60,000 in *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=). There the plaintiff sought damages for continuing symptoms associated with soft tissue injuries at trial three years after an accident. The plaintiff also suffered from anxiety attributable to the accident.

**44**  Counsel for the defendant submits that the appropriate range is $6,500 to $15,000, but that very significantly undervalues the plaintiff's legitimate claim. Instead it reflects the defendant's submission that the plaintiff's reports to her doctors and her evidence at trial is largely unreliable. I have already rejected that submission. This is not a case of pain originating solely from a psychological source. Instead, the origin of the pain is the contusion to the left iliac crest, which is, as Dr. Gershman acknowledged, "a painful type of injury" with referred pain to the lower extremity and into the back. In the circumstances, no useful purpose would be served by setting out the detail of the cases relied on by the defendant. I have considered them but all are distinguishable on the basis that they represent much less serious injury and recovery patterns.

**45**  I have already expressed my view that the plaintiff can reasonably anticipate some further improvement in future. In all the circumstances, a fit award for pain and suffering is $50,000. I award that amount for non-pecuniary damages.

**46**  The parties agreed on the awards for past wage loss and special damages. Accordingly, I award $374 for past wage loss and $475.12 for past special damages, together with court order interest if applicable.

**47**  The plaintiff seeks an award of $10,000 to cover the anticipated costs of a personal trainer, injections and up to twelve physiotherapy visits for pain relief as needed. There is no evidence as to the potential costs associated with any of these, although I accept that there is a demonstrable need for the services of a personal trainer skilled in rehabilitative exercise and for some palliative relief through physiotherapy. It is possible that the Medical Services Plan will cover some care costs, including injections if ordered by a doctor.

**48**  The defendant contends that the plaintiff did not establish any medical necessity for any of the costs but, as I have stated, there is a demonstrable need. Dr. MacKean and Dr. Gershman both recommended continuing with an exercise program. Dr. Gershman specifically recommended a dozen sessions with a personal trainer experienced in dealing with chronic pain.

**49**  Dr. MacKean specifically recommended palliative physiotherapy treatments as needed to address the plaintiff's ongoing pain along with advice from a physiotherapist regarding exercises. Dr. Gershman disagreed with the recommendation for palliative treatment but agreed that the plaintiff suffers from ongoing pain. I accept Dr. MacKean's recommendations.

**50**  The defendant also contends that there is no evidence of projected costs. I agree but that does not disentitle the plaintiff to any award.

**51**  A global award is necessary in the circumstances but I am not persuaded that $10,000 is an appropriate amount. I award $5,000 for future care costs.

**52**  The plaintiff also seeks an award of $20,000 for loss of opportunity to earn income in future. She contends, based on Dr. MacKean's opinion, that she needed to change to lighter work from her original waitressing job and that she would be better off in a job that did not require her to be on her feet all day or bending, carrying and lifting on a regular basis.

**53**  The defendant contends that the claim for loss of opportunity is speculative and that there is no evidence of any real and substantial possibility that the plaintiff will suffer any future loss.

**54**  Apart from time off for treatment purposes, the plaintiff continued working almost full-time as a waitress and hostess after the accident. For the period August 2006 to January 2007, she missed a total of about 44 hours of work due to treatment or leaving early because of her level of discomfort.

**55**  In July 2008, the plaintiff took a new position closer to home that involved shorter shifts and less strenuous waitressing duties. She now just carries drink trays and no longer needs to carry heavy food trays. The plaintiff has since further reduced her physical workload even further. She now works four to eight hours per week doing lighter office work for her employer rather than waitressing.

**56**  It appears that the plaintiff was earning about $10 per hour at the time of the accident plus tips. Her income tax records and present income are not in evidence but she likely now earns minimum or close to minimum wage.

**57**  The plaintiff continues to be employable as a waitress and even if she needs to shift to more sedentary work than she is doing at present, her loss will be relatively nominal. Given that the plaintiff's earnings are at the bottom of the scale, most sedentary positions will pay as much or more than she presently earns.

**58**  The plaintiff is only less valuable to herself as an income producer in that she cannot work as a waitress in circumstances more likely to generate large tips. Given the plaintiff's work history before and after the accident, coupled with her lack of occupational training, there is a real and substantial possibility that she will not earn as much waitressing in future as she was able to before becoming injured. I accept that converts to a loss but it is difficult to quantify on the limited evidence available.

**59**  Counsel for the plaintiff relies on the court's conclusion in *Shearsmith,* at para. 40, that the plaintiff was entitled to $20,000 for loss of earning capacity. Ms. Shearsmith worked as a cleaner before the accident and continued to do so after the accident albeit with difficulty. The trial judge referred to the award for impairment of earning capacity as modest. I am not persuaded that I should apply the result in *Shearsmith* to the present case.

**60**  There was evidence that Ms. Shearsmith under-reported her income on her income tax returns. In the final result, the court was not satisfied that she proved her past income loss on a balance of probabilities. I cannot discern the basis for the award of $20,000 other than the court's view that it was modest in the circumstances. I am most reluctant to extrapolate the award in that case to the present circumstances.

**61**  A modest award for impairment of earning capacity in the present circumstances is $7,500. I award that amount to the plaintiff.

**62**  In summary, the plaintiff is entitled to awards as follows:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Description of Award | Amount |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Pain and suffering: | $50,000.00 |  |
|  | Past wage loss: | 374.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Past special damages: | 475.12 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Future care: | 5,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Impairment of earning capacity: | 7,500.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | TOTAL | $63,349.12 |  |

The plaintiff is further entitled to court order interest on her past pecuniary loss if applicable.

**63**  Subject to there not being any issue respecting an offer to settle under Rule 37B, the plaintiff is also entitled to costs on Scale B. Counsel may speak to the effect of any offer to settle if they cannot agree.

M.D. MACAULAY J.

**End of Document**

[***Callan v. Cooke, [2012] B.C.J. No. 2220***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JWR6-S2FW-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

E.A. Arnold-Bailey J.

Heard: July 25 and 27, 2012.

Judgment: October 29, 2012.

Docket: S114724

Registry: Vancouver

**[2012] B.C.J. No. 2220** | [*2012 BCSC 1589*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81N1-JN14-G21Y-00000-00&context=)

Between Robert Callan, Plaintiff, and Donald Cooke, The Attorney General of Canada for and behalf of Her Majesty the Queen in Right of Canada, The Royal Canadian Mounted Police, and the Abbotsford Hockey Association, Defendants

(105 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Pleadings — Striking out pleadings or allegations — Grounds — Failure to disclose a cause of action or defence — Application by Attorney General to strike out portions of plaintiff's notice of civil claim allowed — Plaintiff alleged he was sexually assaulted by Cooke, his hockey coach and an RCMP officer — Claims of negligent investigation of Cooke by RCMP with respect to "other" complaints it received about Cooke struck, as plaintiff not sufficiently proximate to RCMP and not reasonably foreseeable that RCMP's negligent investigation of other complaints against Cooke would have caused plaintiff harm — Claims of breach of fiduciary duty struck, as relationship of vulnerability existed primarily between plaintiff and Cooke, not between plaintiff and RCMP. Tort law — *Negligence* — Duty and standard of care — Duty of care — Fiduciary duty — Causation — Foreseeability and remoteness — Application by Attorney General to strike out portions of plaintiff's notice of civil claim allowed — Plaintiff alleged he was sexually assaulted by Cooke, his hockey coach and an RCMP officer — Claims of negligent investigation of Cooke by RCMP with respect to "other" complaints it received about Cooke struck, as plaintiff not sufficiently proximate to RCMP and not reasonably foreseeable that RCMP's negligent investigation of other complaints against Cooke would have caused plaintiff harm — Claims of breach of fiduciary duty struck, as relationship of vulnerability existed primarily between plaintiff and Cooke, not between plaintiff and RCMP.**

**Tort law — Practice and procedure — Pleadings — Amendment — Adding or striking out claim — Application by Attorney General to strike out portions of plaintiff's notice of civil claim allowed — Plaintiff alleged he was sexually assaulted by Cooke, his hockey coach and an RCMP officer — Claims of negligent investigation of Cooke by RCMP with respect to "other" complaints it received about Cooke struck, as plaintiff not sufficiently proximate to RCMP and not reasonably foreseeable that RCMP's negligent investigation of other complaints against Cooke would have caused plaintiff harm — Claims of breach of fiduciary duty struck, as relationship of vulnerability existed primarily between plaintiff and Cooke, not between plaintiff and RCMP.**

|  |
| --- |
| Application by the Attorney General of Canada to strike out certain portions of the plaintiff's notice of civil claim. The plaintiff alleged that he was sexually assaulted by the defendant Cooke on numerous occasions between 1982 and 1984 when the plaintiff was between the ages of 14 and 16 years old. Cooke was the assistant coach of the plaintiff's hockey team and was also an RCMP officer. The plaintiff alleged that the acts of sexual assault occurred both while Cooke was acting in his capacity as an assistant coach as well as while Cooke was on duty, in uniform and/or acting in his capacity as an officer or constable of the RCMP. The plaintiff had not reported the alleged incidents to the police until 1994. The portions of the notice that the Attorney General sought to strike related to the plaintiff's claim of negligent investigation of Cooke by the RCMP with respect to other complaints it had received against Cooke and breach of fiduciary duty owed by the RCMP to the plaintiff.  HELD: Application allowed.  The Court found the plaintiff was not sufficiently proximate in relation to the RCMP to give rise to a private law duty owed to him by the RCMP in negligent investigation. It was not reasonably foreseeable that the RCMP's negligent investigation of other complaints against Cooke would have caused the type of harm alleged by the plaintiff. Without facts pleaded as to the nature of those other complaints, there was no basis upon which to find that a proximate relationship existed, especially given that the plaintiff had not made any complaint to the RCMP until 10 years after the alleged sexual assaults against him had ceased. Thus, the plaintiff's claim against Cooke was not known to the RCMP at the time. Therefore, during the most relevant time period, the plaintiff was not within a discrete class of individuals reasonably known to be affected by the alleged failure to investigate by the RCMP. Not falling within the failure to warn exception, the Court found that as an alleged victim of crime, the RCMP did not owe a private law duty of care to the plaintiff. Further, the plaintiff's claim of negligent investigation was too speculative. There was nothing in the pleadings to support a finding that, but for a negligent investigation, the plaintiff would not have been harmed. Likewise, the plaintiff's claim that the negligent investigation of Cooke aggravated or perpetuated the harm to the plaintiff was too speculative. With respect to the alleged breach of fiduciary duty, the plaintiff's pleadings did not disclose the requisite elements of this duty. The plaintiff's relationship of vulnerability existed primarily with Cooke and not with the RCMP. There was no allegation that the RCMP had undertaken to act in the best interest of the plaintiff. While the RCMP had a duty to act in the public interest it could not be held to have had a private law fiduciary duty to the plaintiff. Further, the RCMP did not have any discretionary power over the plaintiff. Thus, the impugned portions of the plaintiff's claim were struck. |

**Statutes, Regulations and Rules Cited:**

Crown Liability and Proceeding Act, [*R.S.C. 1985, c. C-50, s. 23*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-B7W1-JTGH-B01X-00000-00&context=)(1), s. 36

Royal Canadian Mounted Police Act, [*R.S.C. 1985, c. R-10, s. 18*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-BBP1-JNY7-X0J2-00000-00&context=), s. 18(a)

Rules of Court, Rule 9-5(1), Rule 9-5(1)(a)

**Counsel**

Counsel for the Plaintiff: Robert W. Mostar, Lara McOuatt, Articling Student.

Counsel for the Defendant, Attorney General of Canada: Sean Stynes, Melody Robens-Paradise.

Counsel for the defendant, The Abbotsford Hockey Association: Eric Regehr.

**Reasons for Judgment**

|  |
| --- |
| **E.A. ARNOLD-BAILEY J.** |

**Introduction**

**1**  This is an application on behalf of the Attorney General of Canada ("the Attorney General") to strike out certain portions of the Notice of Civil Claim ("Notice") of Robert Callen ("the plaintiff").

**2**  The plaintiff claims that he was sexually assaulted by the defendant Donald Cooke ("Mr. Cooke") on numerous occasions during the years 1982 through 1984. During that time the plaintiff was 14 to 16 years old and Mr. Cooke was the assistant hockey coach of the Abbotsford "AAA" Midget Hockey Club where the plaintiff played hockey. Mr. Cooke was also an officer of the Royal Canadian Mounted Police ("RCMP") stationed in Abbotsford, BC. The plaintiff is currently 43 years old. No reports of any alleged wrong-doing by Mr. Cooke in relation to the plaintiff were reported to the police prior to 1994. The plaintiff alleges that many of these acts of sexual assault occurred while Mr. Cooke was acting in his capacity as an assistant hockey coach, hence his claim against the defendant, the Abbotsford Minor Hockey Association, a non-profit society incorporated in British Columbia ("the Hockey Association"). The plaintiff also alleges that many of these acts of sexual assault occurred while Mr. Cooke was on duty, in uniform, and/or acting in his capacity as an officer or constable of the RCMP. As a result of the sexual assaults that the plaintiff alleges were committed upon him by Mr. Cooke, the plaintiff claims psychological, physical, and economic harm giving rise to his claims for general, special, aggravated and punitive damages, costs, and special costs.

**3**  The portions of the Notice that the Attorney General seeks to strike out pursuant to Rule 9-5(1)(a) of the *Rules of Court* relate to the plaintiff's claim of negligent investigation of Mr. Cooke by the RCMP, and breach of fiduciary duty owed by the RCMP to the plaintiff.

**4**  Specifically, the plaintiff claims that the RCMP was negligent in investigating complaints by others against Mr. Cooke and that this exacerbated the effect and impact of the alleged assaults on the plaintiff (Notice, Part 1, paras. 18 and 19, and Part 3, paras. 7-11 and 14).

**5**  The plaintiff also claims that a fiduciary relationship existed between the plaintiff and the RCMP, and that the RCMP breached their alleged fiduciary duty (Notice, Part 3, paras. 6 and 15).

**6**  At the hearing, the counsel for the plaintiff consented to those portions of the Notice referring to the civil tort of conspiracy (Notice, Part 1 para. 17, Part 3 para. 13) be struck and I so order.

**7**  Counsel for the plaintiff also consented to the RCMP being removed from the style of cause. The Attorney General (of Canada) is the proper party to name as the Attorney General provided police services through the Ministry of the Solicitor General for Canada (until 2005 when the Ministry of Public Safety Canada was given that responsibility), via a police force created by statute of Canada (the *Royal Canadian Mounted Police Act,* R.S.C., 1985, c. R-10). For the purposes of determining liability in proceedings against the Crown, a person who was at any time a member of RCMP shall be deemed to have been at that time a servant of the Crown (*Crown Liability and Proceeding Act*, R.S.C., 1985, c. C-50, s. 36).

**8**  Reference to "Her Majesty the Queen" in the style of cause is not necessary and is also to be deleted as pursuant to section 23(1) of the *Crown Liability and Proceedings Act*. Proceedings against the Crown may be taken in the name of the Attorney General of Canada.

**9**  Counsel for the Hockey Association attended the application. He took no position on behalf of the relief sought by the Attorney General. He did however point out that in relation to the plaintiff's claim of breach of fiduciary duty, the plaintiff has pleaded two independent fiduciary duties, one with regards to the RCMP and one in relation to Mr. Cooke's role as an assistant coach with the Hockey Association.

**10**  Counsel for Mr. Cooke, although served with this application, did not attend at the hearing. He did, however, attend on the morning of the second day of hearing to speak briefly to a related application.

**11**  In the event that the Attorney General is successful with its application the plaintiff's claim will focus on the sexual assaults alleged to have been committed upon him by Mr. Cooke, the vicarious liability of the Attorney General arising out of the fact that Mr. Cooke was an RCMP officer, and the liability of the Hockey Association said to arise by virtue of Mr. Cooke being employed as an assistant hockey coach.

**Issues to be Decided**

**12**  There are two issues to be decided on this application, namely:

1. Do those portions of the Notice relating to negligent investigation of Mr. Cooke by the RCMP disclose a reasonable cause of action, insofar as the RCMP owed a duty of care to a victim of crime in the circumstances raised in the plaintiff's claim, or are they to be struck out?
2. Do those portions of the Notice relating to a breach of fiduciary duty owed by the RCMP to the plaintiff disclose a reasonable cause of action, or are they to be struck out?

**Analysis and Findings**

***The Test for Striking out a Claim***

**13**  Rule 9-5(1)(a) of the *Rules of Court* allows the Court to strike or amend a pleading if the pleading discloses no reasonable claim.

**14**  The law with regards to when it is appropriate to strike out a claim is not at issue. It is succinctly set out in Part 3 of the submissions on behalf of the Attorney General as follows:

1. The question at issue on a motion to strike is, assuming the facts pleaded to be true, is it plain and obvious that the pleading discloses no reasonable cause of action? *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=); *Hunt v. Carey Canada Inc.,* *[1990] 2 S.C.R. 959*.
2. Evidence is not admissible on an application to strike or amend pleadings under Rule 9-5(1). Therefore, such an application proceeds on the basis that the facts pleaded are true, unless "they are manifestly incapable of being proven". The claimant must clearly plead the facts making its claim. *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=).
3. The Chief Justice has stated that the power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case. *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 paras. 19 and 20.

**15**  In the case of *Hunt v. Carey Canada Inc.,* *[1990] 2 S.C.R. 959* [*Hunt*], Justice Wilson sets out the test for when it is appropriate to strike out a statement of claim at 980:

[A]ssuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat." Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case.

**16**  In *Hunt*, Justice Wilson found that the complexity and novelty of the conspiracy claim alleged should not constitute a bar to it moving forward to trial. The law surrounding conspiracy at the time was somewhat unsettled and a claim for conspiracy was best evaluated in light of the evidence. Justice Wilson found that allowing this action to proceed would not amount to an abuse of process. As long as the plaintiff has some chance of success, however remote, the claim should be allowed to proceed to trial.

**17**  The test from *Hunt* has been maintained in Rule 9-5(1) motions to strike in the recent case of *Woolsey v. Dawson Creek (City)* [*2011 BCSC 751*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JJK6-S23T-00000-00&context=), at para. 29.

**18**  In *R. v. Imperial Tobacco Canada Ltd.,* [*2011 SCC 42*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X1XK-00000-00&context=) [*Imperial Tobacco*], Chief Justice McLachlin cautions against striking a claim that proposes a novel claim:

[21] Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging ... The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson*, [1932] A.C. 562. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial. (Emphasis added.)

**19**  However, even a complex and novel legal claim may properly be struck from a pleading if on a proper analysis of the law it is plain and obvious that the claim cannot succeed: *Greater Vancouver (Regional District) v. British Columbia*, [*2009 BCSC 577*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M26W-00000-00&context=) at para. 31, aff'd [*2011 BCCA 345*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22WC-00000-00&context=).

**20**  Accepting facts as true when they are not clearly or specifically pleaded presents some difficulty in a motion to strike. However, it is incumbent on the Court to accept whatever facts are pled unless it is impossible for the facts to be proven. In *Imperial Tobacco* the Supreme Court addressed the issue of accepting facts that had not yet been pled but may arise as the case progresses, McLachlin C.J. states that on a motion to strike:

[22] ... It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

**21**  On a motion to strike, a judge cannot "consider what evidence adduced in the future might or might not show" (*Imperial Tobacco* at para. 23).

**22**  In this case the plaintiff pleads that there were other complaints and reports of inappropriate conduct and/or sexual assaults upon others by Mr. Cooke and/or another member of the RCMP at times material to the claims of the plaintiff. The plaintiff further pleads that insufficient investigations were made into these complaints.

**23**  I note that the claims in this case are vague and do not disclose details as to who made complaints, the nature of the complaints, and what investigations were conducted into these complaints. Nor does the claim provide details as to when these complaints were made beyond that they were made at the material time.

**24**  However, in assessing whether the plaintiff's negligent investigation claim may proceed, I will assume that these bare facts are true.

**Issue No. 1: Do those portions of the Notice relating to negligent investigation of Mr. Cooke by the RCMP disclose a reasonable cause of action?**

***Portions of the Notice Relevant to Negligent Investigation***

**25**  In Part 1, paras. 18 and 19, the Notice sets out a claim against the RCMP for negligent investigation:

1. The Plaintiff says that the complaints and reports of inappropriate conduct and/or sexual assaults upon others by Donald Cooke and/or another member of the R.C.M.P. at times material to the claims of the Plaintiff herein, were not investigated or, alternatively, not investigated appropriately or thoroughly and the Plaintiff says that such failure to investigate or follow-up on findings of investigations or cause the individual defendant, Donald Cooke to cease the assaults that were being committed upon him or seek information to identify him and offer counseling and assistance, constituted a continuation or aggravation of the assaults of the Defendant, Donald Cooke.
2. The Plaintiff says that the R.C.M.P. through its failure to investigate and/or follow-up upon findings in an investigation of Donald Cooke which was in fact conducted, aggravated and/or perpetuated and/or magnified the physical and psychological impact of the assaults committed upon the Plaintiff by Donald Cooke.

**26**  In Part 3, paras. 7-11 the plaintiff claims that complaints and reports of inappropriate conduct and/or assaults were not properly investigated.

1. The Plaintiff says that complaints and reports of inappropriate conduct and/or sexual assaults upon other persons by the Defendant, Donald Cooke and another/or others, made to the R.C.M.P., were not investigated or, alternatively, not investigated appropriately or thoroughly.
2. The Plaintiff says that the failure of the R.C.M.P. to investigate thoroughly or act upon information available to it, enabled the Defendant, Donald Cooke, to continue assaults that were being committed upon the Plaintiff or, alternatively, impeded or prevented the R.C.M.P. from identifying the Plaintiff as a victim of Donald Cooke and thereby taking steps to prevent the assaults, acknowledge the assaults, offer therapy, counselling and assistance. The Plaintiff says that the failure of the R.C.M.P. to act on information available to it or information that ought to have been available to it in the circumstances, constitutes an aggravation or perpetuation or magnification of the physical and psychological injuries caused by the assaults of the defendant, Donald Cooke upon the Plaintiff.
3. In particular, the Plaintiff says that the R.C.M.P. enabled and/or facilitated, aggravated and/or perpetuated the physical and psychological impact of the assaults of the Defendant, Donald Cooke upon the Plaintiff through:
4. Failing to interview or otherwise obtain particulars or details of the complaints of other individuals who had come forward with information about Donald Cooke and assaults asserted to have been committed by him;
5. Failing to review or interrogate or otherwise query Donald Cooke and others associated with him as to whereabouts, activities, proclivities, record and/or other complaints or peripheral information by way of follow-up to allegations made by others about him, thereby missing an opportunity to offer assistance and comfort to the Plaintiff;
6. Intentionally dismissing or suppressing complaints made by other individuals about Donald Cooke as unwarranted or unfounded, when in fact, information existed sufficient to justify further investigations and enquiries of the activities of Donald Cooke, his whereabouts, activities, proclivities, contacts while on duty (inclusive of "ride-a-longs") with young persons including the Plaintiff, his record and/or other complaints or peripheral information;
7. Failing to investigate and/or corroborate assertions made by others about the Defendant, Donald Cooke, and other individuals who were members of the R.C.M.P. presently unknown to the Plaintiff herein, through interviews and interviews or collateral witnesses, parties or the review of records;
8. Failing to prosecute or complete disciplinary action against Donald Cooke through the internal protocols available to it.
9. Such further and other particulars as counsel may advise.
10. The Plaintiff says that the actions or omissions of the R.C.M.P. as particularized above contributed to and/or encouraged the continuation of assaults by the Defendant, Donald Cooke upon the Plaintiff and led to the failure of the R.C.M.P. to identify the Plaintiff as one of the victims of Donald Cooke thereby preventing the R.C.M.P. from offering assistance and counselling.
11. The Plaintiff says that the actions or omissions of the R.C.M.P. as particularized herein exacerbated the effect and impact of the assaults committed by the Defendant, Donald Cooke upon the Plaintiff.

***Position of the Attorney General***

**27**  It is the position of counsel for the Attorney General that the plaintiff's pleadings (Notice, Part 1, paras. 18 and 19, and Part 3, paras. 7-11 and 14) disclose no reasonable cause of action and should be struck out. The Attorney General maintains that no duty of care is owed in an investigation by the police to a victim of crime in the circumstances raised in the plaintiff's claim: *Wellington v. Ontario*, [*2011 ONCA 274*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJY1-JPGX-S4GN-00000-00&context=) [*Wellington*].

**28**  Specifically, counsel submits that with limited exceptions that do not arise on the facts of this case, police do not owe victims of crime or their families a private law duty of care in relation to the investigation of alleged crimes: *Wellington,* at para. 20.

**29**  Furthermore, individual citizens are not entitled to compensation in the absence of a thorough investigation or if the desired outcome fails to materialize: *Odhavji Estate v. Woodhouse,* [*2003 SCC 69*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B0YX-00000-00&context=) [*Odhavji*], at para. 40.

**30**  Counsel submits that public authorities ought to be free to make decisions in the general public interest without being subjected to a private law duty of care to specific members within the general public: *Wellington,* at para. 45; and that the primary relationship in a criminal investigation is between the authority of the police and the individual under investigation: *Burnett v. Moir,* [*2011 BCSC 1469*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JPP5-229X-00000-00&context=) [*Burnett*], at paras. 425-426.

**31**  While counsel admits there are limited circumstances where a police service may be liable for negligent investigation, for example, in a claim by the suspect under investigation as in *Hill v. Hamilton-Wentworth Regional Police,* [*2007 SCC 41*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B19N-00000-00&context=) [*Hill*], or to a specific group of victims for failure to warn of an imminent threat as in *Mooney v. BC (Attorney General),* [*2004 BCCA 402*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JXG3-X083-00000-00&context=) [*Mooney*], he submits that the plaintiff's claim in this case does not disclose a cause of action for negligent investigation and should be struck as it was in *Wellington*.

***The Position of the Plaintiff***

**32**  Counsel for the plaintiff agrees that the facts as asserted in Part 2 of the Notice of Application of the Attorney General are accurate. In addition, he submits by implication the plaintiff asserts at Part 1, para. 18 that others, not presently known to the plaintiff, made complaints to the RCMP. The plaintiff is not able to identify these other individuals, when they made their complaints and the nature of these complaints. The plaintiff requires the release of records and documents in the possession of the Abbotsford Police Department and/or the RCMP to ascertain the identity of these individuals. An application to the Court for the release of investigation files from the Abbotsford Police Department has been filed and is scheduled for hearing.

**33**  Where the plaintiff asserts at Part 1, paras. 18 and 19 of the Notice that the failure to investigate and/or follow-up upon findings "aggravated and/or perpetuated and/or magnified the physical and psychological impact of the assaults committed upon the plaintiff by Donald Cooke" by implication, the plaintiff is asserting that the failure to investigate and/or follow-up on such complaints constitutes a continuation of the assaults committed by Mr. Cooke, and constitutes a form of misconduct or improper conduct magnifying and/or perpetuating the original physical assault committed by Mr. Cooke. The plaintiff is asserting that the failure by the RCMP to investigate or follow-up on complaints of others constitutes a separate instance of tortious conduct.

**34**  Further, the plaintiff claims that the failure to investigate by the RCMP as particularized in the Notice is a fundamental component of the original assault, as Mr. Cooke, the perpetrator of the assaults, is employed by the same organization as the entity charged with investigating his conduct.

**35**  Therefore, the plaintiff submits that the present case falls under a novel exception (that a duty of care exists) to what is conceded to be a general rule, that the police do not owe victims of crime and their families a private law duty of care in relation to the investigation of alleged crimes. On that basis the Court ought to permit his claim for negligent investigation to proceed.

**36**  The plaintiff asserts that the RCMP were aware of the existence of other complainants, and were aware that the plaintiff, as a member of this group of complainants, was part of a narrow and distinct group of victims of historic sexual abuse, such that this knowledge and this unique status is sufficient to support a special relationship of proximity: *Jane Doe v. Board of Commissioners of Police for the Municipality of Metropolitan Toronto* *(1990), 72 D.L.R. (4th) 580* [*Jane Doe*], at paras. 16-22; *Thompson v. Webber,* [*2010 BCCA 308*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-22BK-00000-00&context=) [*Thompson*]; *Mooney v. British Columbia (Attorney General),* [*2004 BCCA 402*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JXG3-X083-00000-00&context=) [*Mooney*]; *Wellington; O'Rourke et al. v. Schacht*, [*[1976] 1 S.C.R. 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B0F5-00000-00&context=) [*O'Rourke*]; and *Beutler v. Beutler*, [*[1983] O.J. No. 505*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCJ1-F27X-60HG-00000-00&context=) (High Ct. Just.) [*Beutler*].

**37**  According to the plaintiff, the special relationship between the Mr. Cooke and the plaintiff, coupled with the unique circumstance that the RCMP was charged with the responsibility of investigating circumstances involving the misdeeds of its members establishes the relationship of proximity.

**38**  The plaintiff submits that Mr. Cooke's actions were an instance of police misconduct and therefore bear further on the tortious liability for a failure to investigate or investigate appropriately or thoroughly. In this regard the plaintiff relies upon *Odhavji*, at para. 57:

A second factor that strengthens the nexus between the Chief and the Odhavjis is the fact that members of the public reasonably expect a chief of police to be mindful of the injuries that might arise as a consequence of police misconduct. Although the vast majority of police officers in our country exercise their powers responsibly, members of the force have a significant capacity to affect members of the public adversely through improper conduct in the exercise of police functions. It is only reasonable that members of the public vulnerable to the consequences of police misconduct would expect that a chief of police would take reasonable care to prevent, or at least to discourage, members of the force from injuring members of the public through improper conduct in the exercise of police functions.

**39**  In *Odhavji* the claim was that a failure of the police chief to adequately investigate a shooting incident resulted in harmful psychiatric consequences to the family of the victim of the shooting. Evaluating the application of defendants to strike the portions of the claim relating to inadequate investigation, Mr. Justice Iacobucci, for the Supreme Court explained that while the police did not have a recognized duty of care toward the family of the victim, it is reasonably foreseeable that a negligent investigation in these circumstances would harm the family. The plaintiff family should therefore not be deprived of their opportunity to argue that the complained harm was a reasonably foreseeable consequence of the inadequate investigation of the police shooting.

**40**  Iacobucci J. scrutinizes the question of whether there is sufficient proximity between the parties that a duty of care might rightly be imposed upon the police chief in charge of the investigation of misconduct. At para. 56, Iacobucci J. finds that because police misconduct is internally regulated, those injured by this misconduct and any subsequent inadequacy of investigation into this misconduct have a close causal connection with the Chief of Police responsible for ensuring members of the force carry out their duties lawfully.

**41**  The plaintiff submits that the Supreme Court of Canada decision in *Hill* concludes, as a matter of law, that police do have a duty of care to persons accused of crime. The case provides a discussion and analysis of how that duty is established. While *Hill* concerned the analysis of a relationship between police and an accused, Chief Justice McLachlin at para. 27 suggested:

If a new relationship is alleged to attract liability of the police in ***negligence*** in a future case, it will be necessary to engage in a fresh *Anns* analysis, sensitive to the different considerations which might obtain when police interact with persons other than suspects that they are investigating. Such an approach will also ensure that the law of tort is developed in a manner that is sensitive to the benefits of recognizing liability in novel situations where appropriate, but at the same time, sufficiently incremental and gradual to maintain a reasonable degree of certainty in the law.

**42**  Thus, *Hill* contemplates the liability of police to victims of crime in certain instances, and ought to encompass the circumstances of the present case, in which the failure of the RCMP to investigate or follow-up on complaints constitute a continuation of the physical assaults perpetrated by Mr. Cooke (Notice: Part 1, paras. 18-19, and Part 3, paras. 8-11).

**43**  I note that *Hill* was applied by the British Columbia Court of Appeal in *Thompson* (paras. 25-28). In *Thompson*, the Court of Appeal struck the claim of the plaintiff as disclosing no cause of action. The assertion was that the police negligently investigated his complaints that his wife was assaulting their children. The court held that the plaintiff, Mr. Thompson, father of the children who had been assaulted, was "not within the circle of people the police would reasonably have in mind as a person potentially harmed by their actions (para. 27)." Hence, by reasonable implication, the plaintiff submits there is a circle of people the police would reasonably have in mind as persons potentially harmed by police actions, namely the direct victims of the crimes being negligently investigated as in *Odhavji*, as opposed to those "once removed" as was the plaintiff in *Thompson*.

***Analysis and Findings Regarding the Plaintiff's Claim Regarding Negligent Investigation by the RCMP***

**44**  The RCMP is a public body that governed by Royal Canadian Mounted Police Act (R.S.C., 1985, c. R-10)("*Act*"). The *Act* stipulates:

18 It is the duty of members who are peace officers, subject to the orders of the Commissioner,

18(a) to perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime and of offences against the laws of Canada and the laws in force in any province in which they may be employed, and the apprehension of criminals and offenders and others who may be lawfully taken into custody.

**45**  The RCMP owes a duty to the public to conduct investigations. This duty should be discharged impartially with a view of the public good.

**46**  In certain limited circumstances police have been also found to owe a private law duty to individuals.

**47**  I will briefly consider the latter situation first.

**48**  In *Hill*, Mr. Hill was wrongfully convicted of robbery and ultimately acquitted after serving more than 20 months in jail. Mr. Hill alleged the police had been negligent in their investigation of him. The police were not found to be negligent with regards to their investigation of Mr. Hill as a robbery suspect, as their conduct was found to meet the standard of a reasonable officer in similar circumstances. However, Chief Justice McLachlin, for the majority, stated:

[3] I conclude that police are not immune from liability under the Canadian law of ***negligence***, that the police owe a duty of care in ***negligence*** to suspects being investigated, and that their conduct during the course of an investigation should be measured against the standard of how a reasonable officer in like circumstances would have acted. The tort of negligent investigation exists in Canada, and the trial court and Court of Appeal were correct to consider the appellant's action of this basis. The law of ***negligence*** does not demand a perfect investigation. It requires only that police conducting an investigation act reasonably. When police fail to meet the standard of reasonableness, they may be accountable through ***negligence*** law for harm resulting to a suspect.

**49**  Thus, police have been held to owe a private law duty of care to the suspects of their criminal investigations.

**50**  Furthermore, in *Jane Doe v. Board of Commissioners of Police for the Municipality of Metropolitan Toronto,* *(1990), 72 D.L.R. (4th) 580* ("*Jane Doe*"), Justice Moldaver, writing for the Ontario Court of Appeal, found that the police owed a private law duty to warn to victims of a serial rapist:

[18] The plaintiff alleges that the defendants knew of the existence of a serial rapist. It was eminently foreseeable that he would strike again and cause harm to yet another victim. The allegations therefore support foreseeability of risk.

[19] The plaintiff further alleges that by the time she was raped, the defendants knew or ought to have known that she had become part of a narrow and distinct group of potential victims, sufficient to support a special relationship of proximity ...

[20] Accepting as I must the facts as pleaded, I agree with Henry J. that they do support the requisite knowledge on the part of police sufficient to establish a private law duty of care. The harm was foreseeable and a special relationship of proximity existed.

**51**  *Jane Doe* is often cited as authority for the proposition that where police know or ought to know that there is a foreseeable risk of harm to a narrow and distinct group of potential victims, they owe a private law duty of care to those potential victims. However, I note that in *Hill*, Chief Justice McLachlin casts some doubt on the breadth of applicability of *Jane Doe*:

[27] ... I note *Jane Doe* is a lower court decision and that debate continues over the content and scope of the ratio in that case.

**52**  These cases stand in contrast to a number of appellate decisions including *Wellington*, leave to appeal dismissed at [*[2011] S.C.C.A. No. 258*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SJ1-JBDT-B461-00000-00&context=).

**53**  In *Wellington,* Justice Sharpe (with Moldaver J.A. and Armstrong J.A. concurring) discussed the distinction between public and private interests:

[44] There is now a well-established line of cases standing for the general proposition that public authorities charged with making decisions in the general public interest, ought to be free to make those decisions without being subjected to a private law duty of care to specific members of the general public. Discretionary public duties of this nature are "not aimed at or geared to the protection of private interests of specific individuals" and do "not give rise to a private law duty sufficient to ground an action in ***negligence***"

...

[45] In my view, the SIU does not and should not conduct criminal investigations to advance the private interests of any individual citizen. I agree with the submission ... that there is an inherent tension between the public interest in an impartial and competent investigation and a private individual's interest in a desired outcome of the same investigation which includes seeking to ground a civil action against the alleged perpetrator. To introduce a private law duty of care would in my view introduce an element seriously at odds with the fundamental role of the SIU to investigate allegations of criminal misconduct in the public interest.

**54**  *Wellington* involved a fatal shooting by a police officer that was allegedly improperly investigated by a Special Investigations Unit (SIU), a statutory body in Ontario charged with investigating the circumstances of serious injuries and deaths that may have resulted from the actions of police officers. The plaintiffs, the family of the deceased and his estate, were alleging that the police owed them a private law duty to conduct a proper investigation into the actions of the two officers involved in the incident.

**55**  In *Wellington* Justice Sharpe also commented on the case law in the area of police owing a duty of care to victims:

[52] In my view, this is not a case where a trial is required to resolve the duty of care issue. A duty of care has been excluded by prior decision of this court, the British Columbia Court of Appeal and numerous trial courts. As stated in *Williams,* at para. 39, it has been repeatedly held "that it is appropriate to analyze claims alleging ***negligence*** against public authorities based on the exercise of discretionary statutory duties at the pleading stage to determine whether there is any possibility that a duty of care court be found to exist".

**56**  According to Sharpe J.A. unlike novel tortious claims where it is unclear whether the courts will find a new duty of care, a private law duty owed to victims of crime by a public body including the police, namely the duty to conduct reasonable investigations, has been addressed by the higher courts and has not been found to be a cause of action at law. Sharpe J.A. distinguishes *Odhavji* on the basis that the claim against the police officers in that case was for misfeasance in public office, "a tort that requires an element of deliberate unlawful conduct as well as awareness that the conduct is unlawful and likely to harm the plaintiff" (*Wellington*, at paras. 25-28).

**57**  Similarly, Justice Saunders in *Thompson* also discussed the proximity issue in a case where a husband had told the police that his ex-wife was abusing their children. The police, allegedly, did not conduct a sufficient investigation. The court, however, struck the husband's claim for negligent investigation. Saunders J. A. held that while police have a duty to investigate, this duty is not owed to private parties. She further stated:

[27] In my view, the relationship of Mr. Thompson to the police officers, even on his full pleadings, is not sufficiently proximate to find a duty of care. Mr. Thompson was not the subject of the information provided to the police, either as a person said to be wronged - who were his children, or the person thought to be the wrongdoer - Ms. Thompson. He was, although the father of the children, one party removed from the complaint. I consider it is plain and obvious, on the pleadings, that Mr. Thompson was not within the circle of people the police would reasonably have in mind as a person potentially harmed by their actions.

**58**  In a recent trial decision of this Court, *Burnett v. Moir,* [*2011 BCSC 1469*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JPP5-229X-00000-00&context=) [*Burnett*], the plaintiff was assaulted by an unknown assailant at a night club and sustained a moderately severe brain injury. He alleged that the police did not do enough in the immediate aftermath of the assault to identify witnesses and obtain information that may have assisted in determining who the assailant was. The plaintiff sought to establish that the members of the Delta Police Force who investigated the incident owed him a private law duty of care for acts or omissions committed in the exercise of their public responsibility to preserve the peace and prevent the commission of offences.

**59**  Mr. Justice Cullen (as he then was) drew a distinction between cases where a private law duty of care is owed by police and those where it is not:

[405] The cases in which police failure to act, or negligent actions in connection with a potential victim have engaged a duty of care, in *Mooney, Jane Doe* and *Schacht* either involve specific ascertainable threats to specific ascertainable victims or specific ascertainable threats to a particular class of victim ... As noted by Sharpe J.A. in *Wellington v. Ontario*, in connection with the *Jane Doe* case, the victims were part of a "narrow and distinct group" facing "a specific threat."

**60**  Cullen J. further held it would be speculative whether the failure to investigate would cause the harm alleged:

[436] ... [T]he relationship between an investigator and a victim, at least where the substantive harm has already been caused by a third party, is removed and indirect. Moreover, the asserted foundation for finding proximity - the negligent failure to facilitate a civil action against the perpetrator of the substantial harm - runs directly counter to the public interest in ensuring that public officials do not perform their duties and functions to serve private interests.

[437] In this case, it is alleged that not enough was done in the immediate aftermath of the offence to identify witnesses and obtain information which may assist in determining who the assailant was. That assertion is somewhat speculative, as is the inference that a more comprehensive initial investigation would lead to a successful action or result in the recovery of damages.

...

[443] As I see it, while there may be particular cases where the evidence justifies finding a proximate relationship between a police investigator and the victim of an offence being investigated, the circumstances would need to overcome both the inherently indirect nature of the relationship, and the critically important precept that criminal investigations do not serve private interests.

**61**  In summary, as with the tort of ***negligence*** generally, the tort of negligent investigation requires that not only the relationship be one of sufficient proximity but also that the damages arising from the alleged negligent investigation be reasonably foreseeable.

**62**  In the present case, the plaintiff is asserting that complaints (other than his) made against Mr. Cooke "were not investigated or, alternatively, not investigated appropriately or thoroughly" and this negligent investigation "constituted a continuation or aggravation of the assaults."

**63**  I find that the plaintiff is not sufficiently proximate in relation to the RCMP to give rise to a private law duty owed to him by the RCMP in negligent investigation. It is not reasonably foreseeable that the RCMP's negligent investigation of other complaints against Mr. Cooke would cause the type of harm alleged by the plaintiff. Without facts pleaded as to the nature of those other complaints there is no basis upon which to find a proximate relationship existed between the plaintiff and the RCMP. This is particularly so as the plaintiff made no complaints to the RCMP for ten years after the alleged sexual assaults of him ceased. His claim against Mr. Cooke was not known to the RCMP. Therefore, during the most relevant time period, the plaintiff was not within a discrete class of individuals reasonably known to be affected by the alleged failure to investigate by the RCMP.

**64**  Not falling within the failure to warn exception, I find that as an alleged victim of a crime, based on *Wellington,* the RCMP do no owe a private law duty of care to the plaintiff.

**65**  The plaintiff is also alleging that the RCMP owed him a private law duty to conduct an investigation of other complainants as to the conduct of Mr. Cook. In this regard, his position is similar to that of the father in *Thompson* insofar as he is not sufficiently proximate to found a duty of care.

**66**  In addition, as stated in *Burnett*, I find that the plaintiff's claim of negligent investigation is too speculative. There is nothing in the pleadings to support a finding that, but for a negligent investigation, the plaintiff would have not been harmed. Here the connection between the investigation and the harm is too speculative to support a cause of action. Likewise, the plaintiff's claim that the negligent investigation of Mr. Cooke aggravated or perpetuated the harm to him is also too speculative.

**67**  Counsel for the plaintiff submits that the plaintiff as an alleged victim of Mr. Cooke is clearly "within the circle of people the police would reasonably have in mind as a person potentially harmed by their actions" as articulated by Saunders J.A. in *Thompson*. The weight of authority, in particular *Wellington*, runs counter to that proposition.

**68**  Therefore, absent limited exceptions, the police, including the RCMP, do not generally owe a private duty of care to victims or potential victims with regards to their investigations. They owe a duty to the public to carry out proper criminal investigations. I do not see that duty abrogated in any way because the alleged wrongdoer in this case is a member of the RCMP.

**69**  While the motion to strike is a tool that should be used carefully so as not to prematurely destroy legitimate claims, pleadings should be struck if they reveal no cause of action.

**70**  In this case, I conclude that the pleadings in the Notice with regards to negligent investigation of Mr. Cooke by the RCMP do not reveal a cause of action for the plaintiff, and are therefore struck.

**Issue No. 2: Do those portions of the plaintiff's Notice relating to a breach of fiduciary duty owed by the RCMP to the plaintiff disclose a reasonable cause of action?**

***Portions of the Notice Relevant to Breach of Fiduciary Duty***

**71**  The plaintiff pleads that Mr. Cooke personally, the Hockey Association and the RCMP each owe him a fiduciary duty and this duty was breached. The plaintiff sets out his claim in Part 3 of the Notice.

1. The Plaintiff says that on the various occasions the assaults upon him were committed by the Defendant, Donald Cooke, the said Donald Cooke was reposed with authority, command, responsibilities, and control over the Plaintiff tantamount to parental control and authority. This authority was conferred by his status as an acting Assistant Coach employed by the Abbotsford Hockey Association engaged in duties of his office. The Plaintiff says that in the circumstances, the Defendant Donald Cooke, and his employer, the Abbotsford Minor Hockey Association, were in a fiduciary relationship with the Plaintiff.
2. The Plaintiff says that the Defendant, Donald Cooke, utilized his status as an assistant coach with the Abbotsford Minor Hockey Association, and the authority, command, responsibilities and control over the Plaintiff conferred by that status to groom, intimidate, influence or otherwise compel the Plaintiff into submission to and/or compliance with the assaults committed upon him.
3. The Plaintiff says that the Defendant, the Abbotsford Minor Hockey Association, failed to supervise and protect against the intentional and unlawful acts of the Defendant, Donald Cooke, who was at all material times, an employee and/or agent of the Defendant, the Abbotsford Minor Hockey Association and as such the Defendant, the Abbotsford Minor Hockey Association, was in breach of its fiduciary duty to the Plaintiff.
4. The Plaintiff says that on the occasions of the sexual assaults, the Defendant Donald Cooke, committed many of these acts while he was on duty, in uniform, and/or acting in his capacity as an officer or constable of the RCMP. The Plaintiff says that the Defendant Donald Cooke, while on duty, in uniform, acting in his capacity as an officer or constable of the RCMP, or while utilizing his status as such to groom or influence the Plaintiff in furtherance of his intentions to sexually assault the Plaintiff, was in a fiduciary relationship with the Plaintiff.
5. The Plaintiff says that the Defendant, Donald Cooke, utilized his status as a member of the RCMP, and the authority, command, responsibilities and control over the Plaintiff conferred by that status to groom, intimidate, influence, or otherwise compel the Plaintiff into submission to and/or compliance with the assaults committed upon him.
6. The Plaintiff says that the Defendant, The RCMP, failed to supervise and protect against the intentional and unlawful acts of the Defendant, Donald Cooke, who was at all material times, an employee and/or agent of the Defendant, the RCMP and as such the Defendant, the RCMP, was in breach of its fiduciary duty to the Plaintiff.

...

1. The Plaintiff says that the failures or omissions of the R.C.M.P. aforesaid further constitute a breach of the fiduciary duty of the R.C.M.P. to the Plaintiff.

***Position of the Attorney General***

**72**  It is the position of counsel for the Attorney General that the plaintiff's pleadings in paras. 6 and 15 of Part 3 of the plaintiff's Notice should be struck out for yielding no cause of action.

**73**  Counsel for the Attorney General submits that the special characteristics of governmental responsibilities and functions mean that public authorities will owe fiduciary duties only in limited and special circumstances: *Alberta v. Elder Advocates of Alberta Society*, [*2011 SCC 24*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X1WY-00000-00&context=) [*Elder Advocates*], at para. 37.

**74**  Where the exercise of a government power or discretion is at issue, the requirement of an undertaking to act in the alleged beneficiary's interest will typically be lacking. Compelling the RCMP (the alleged fiduciary) to put the best interests of the plaintiff (the alleged beneficiary) before others is inherently at odds with the RCMP's duty to act in the best interests of society as a whole, and its obligation to spread limited resources among competing groups with equally valid claims for assistance: *Elder Advocates*, at paras. 42 and 44.

**75**  The relationship between the RCMP and the plaintiff is not similar to the traditional categories of fiduciary relationship. A strong correspondence with one of the traditional categories of fiduciary relationship (executor-beneficiary, agent-principal, etc.) is a precondition to finding an implied fiduciary duty on the government: *Elder Advocates*, at para. 47.

**76**  Further, courts have held that no fiduciary duty exists between police and individual citizens, including suspects and victims: *R. v. Mosquito,* [*2005 SKCA 31*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K711-FG68-G3Y7-00000-00&context=); *Waudby v. McLaren*, [*[2003] O.J. No. 5302*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDM1-F361-M350-00000-00&context=).

**77**  In the present case, the Notice contains nothing more than the bald assertion that a fiduciary relationship exists and that it was breached. The Supreme Court of Canada has clearly stated that claims against the government that fail to satisfy the legal requirements of a fiduciary duty should not be allowed to proceed in the speculative hope that they may ultimately succeed. Plaintiffs suing for breach of fiduciary duty must be prepared to have their claims tested at the pleadings stage, as with any cause of action: *Elder Advocates*, at para. 54.

***Position of the Plaintiff***

**78**  Counsel for the plaintiff submits that the special circumstances and relationship that existed between Mr. Cooke and the plaintiff renders Mr. Cooke a fiduciary in the circumstances of the present case: *Elder Advocates*, paras. 22-54.

**79**  The plaintiff submits that the relationship of the plaintiff to Mr. Cooke, as a juvenile under the supervision of his hockey coach, transforms their relationship from that of police officer to a member of the general public, to that of guardian/ward or parent/child: *Elder Advocates,* at para. 33. Although not specifically pleaded, the plaintiff is asserting that it is the combination of both roles - that of hockey coach and RCMP officer - that gives rise to a fiduciary relationship in this case.

**80**  The factors unique to the relationship between Mr. Cooke and the plaintiff are important in an analysis of a fiduciary duty: *Galambos v. Perez*, [*2009 SCC 48*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1GF-00000-00&context=) [*Galambos*], at para. 68. The plaintiff does not suggest that the police are always in a fiduciary relationship with members of the public. Rather, counsel submits that the unique circumstances of this relationship give rise to Mr Cooke's fiduciary duty to the plaintiff.

**81**  Fiduciary law focuses on those particular relationships in which one party is given a discretionary power to affect the legal or vital practical interests of the other: *Galambos*, at para. 70. As such, "power dependency" relationships are not in a special category of fiduciary relationships and the law is clear that fiduciary duties will only be imposed on those who have expressly or impliedly undertaken them: *Galambos,* at para. 71. It is suggested that the implied undertaking by the fiduciary to act in the best interests of the other party can be clearly established in the relationship of police officer/hockey coach and child.

**82**  A specific instance of the existence of the fiduciary duty in the context of a "power dependency" relationship is illustrated 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=) [*Hodgkinson*], at p. 411:

More generally, relationships characterized by a unilateral discretion, such as the trustee-beneficiary relationship, are properly understood as simply as species of a broader family of relationships that may be termed "power-dependency" relationships. I employed this notion, developed in an article by Professor Coleman, to capture the dynamic of abuse 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=)*, supra*, at p. 255. *Norberg* concerned an aging physician who extorted sexual favours from a young female patient in exchange for feeding an addiction she had previously developed to the pain-killer Fiorinal. The difficulty in *Norberg* was that the sexual contact between the doctor and patient had the appearance of consent. However, when the pernicious effects of the situational power imbalance were considered, it was clear that true consent was absent. While the concept of a "power-dependency" relationship was there applied to an instance of sexual assault, in my view the concept accurately describes any situation where one party, by statute, agreement, a particular course of conduct, or by unilateral undertaking, gains a position of overriding power or influence over another party. Because of the particular context in which the relationship between the plaintiff and the doctor arose in that case, I found it preferable to deal with the case without regard to whether or not a fiduciary relationship arose. However, my colleague Justice McLachlin did dispose of the claim on the basis of the fiduciary duty, and whatever may be said of the peculiar situation in *Norberg*, I have no doubt that had the situation there arisen in the ordinary doctor-patient relationship, it would have given rise to fiduciary obligations: see, for example, *McInerney v. MacDonald*, [*[1992] 2 S.C.R. 138*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-607J-00000-00&context=).

**83**  The plaintiff submits that the Court must examine the particular relationship here and recognize this unique relationship as a fiduciary one. In *Hodgkinson*, LaForest J. (for the majority as to the existence of a fiduciary duty) stated at p. 413:

In summary, the precise legal or equitable duties the law will enforce in any given relationship are tailored to the legal and practical incidents of a particular relationship. To repeat a phrase used by Lord Scarman, "[t]here is no substitute in this branch of the law for a meticulous examination of the facts"; see *National Westminster Bank plc v. Morgan*, [1985] 1 All E.R. 821 (H.L.) at p. 831.

**84**  The plaintiff submits that his relationship while he was a juvenile with Mr. Cooke as both hockey coach and a member of the RCMP is characteristic of a fiduciary relationship. Counsel submits that from a subjective and objective point of view, the plaintiff was vulnerable and powerless as compared to Mr. Cooke. As an adult and both a hockey coach and a member of the RCMP, Mr. Cooke wielded discretion and power over the plaintiff, and this unilateral power or discretion gave Mr. Cooke the ability to influence the plaintiff's legal or practical interests. These facts entitle the Court to assume the existence of this power imbalance in their relationship for purposes of evaluating the pleadings. As such, the plaintiff describes a "power dependency" relationship that is capable of founding a fiduciary duty on the part of the RCMP in relation to the plaintiff.

**85**  Therefore, the plaintiff submits that the facts as asserted in the Notice establish a unique relationship and potential "power-dependency" existed between the plaintiff and Mr. Cooke in his capacity as a police officer such that the Court ought to permit the claim for breach of fiduciary duty to proceed against the RCMP as Mr. Cooke's employer.

**86**  The plaintiff does not make any claims as to the nature of the relationship between the RCMP defendant and the plaintiff which would give rise to a fiduciary duty.

***Analysis and Findings Regarding the Plaintiff's Claim of Breach of Fiduciary Duty by the RCMP***

**87**  The test for establishing an *ad hoc* fiduciary duty is clearly stated by Chief Justice McLachlin in *Elder Advocates*:

[36] For an *ad hoc* fiduciary duty to arise, the plaintiff must show, not only vulnerability arising from the relationship, but also: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

**88**  The plaintiff must first establish that the said fiduciary has undertaken to act in the best interest of the beneficiary.

[42] First, the requirement of an undertaking to act in the alleged beneficiary's interest will typically be lacking where what is at issue is the exercise of a government power or discretion ...

[43] The duty is one of utmost loyalty to the beneficiary. As Finn states, the fiduciary principle's function "is not to mediate between interests. It is to secure the paramountcy of *one side*'s interests . . . . The beneficiary's interests are to be protected. This is achieved through a regime designed to secure loyal service of those interests" (P. D. Finn, "The Fiduciary Principle", in T. G. Youdan, ed., *Equity, Fiduciaries and Trusts* (1989), 1, at p. 27 (underlining added); see also *Hodgkinson*, at p. 468, *per* Sopinka J. and McLachlin J. (as she then was), dissenting).

[44] Compelling a fiduciary to put the best interests of the beneficiary before their own is thus essential to the relationship. Imposing such a burden on the Crown is inherently at odds with its duty to act in the best interests of society as a whole, and its obligation to spread limited resources among competing groups with equally valid claims to its assistance: *Sagharian (Litigation Guardian of) v. Ontario (Minister of Education)*, [*2008 ONCA 411*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF21-FBV7-B2P9-00000-00&context=), [*172 C.R.R. (2d) 105*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF21-FBV7-B2P9-00000-00&context=), at paras. 47-49. The circumstances in which this will occur are few. The Crown's broad responsibility to act in the public interest means that situations where it is shown to owe a duty of loyalty to a particular person or group will be rare: see *Harris v. Canada*, [*2001 FCT 1408*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7F-5RH1-JTGH-B07K-00000-00&context=), [*[2002] 2 F.C. 484*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7F-5RH1-JTGH-B07K-00000-00&context=), at para. 178.

[Emphasis added.]

**89**  The pleadings do not disclose that the RCMP undertook to act in the best interest of the plaintiff. The RCMP has a duty to act in the public interest, which often includes balancing competing private interests. In the circumstances of this case as pleaded, the RCMP cannot properly be held to have a private law fiduciary duty to the plaintiff.

**90**  The RCMP did offer a "ride-a-long program" to some of the alleged complainants. The plaintiff also claims to have participated in ride-a-longs with Mr. Cooke. If the RCMP had held out Mr. Cooke as a guardian of the plaintiff, a minor, on a ride-along, a fiduciary duty may arise. However, there are no facts pleaded to support that proposition.

**91**  To further his claim of a fiduciary relationship the plaintiff must then establish that his vulnerability arose from his relationship with the RCMP. As stated by Justice Cromwell in *Galambos*:

[67] An important focus of fiduciary law is the protection of one party against abuse of power by another in certain types of relationships or in particular circumstances. However, to assert that the protection of the vulnerable is the role of fiduciary law puts the matter too broadly. The law seeks to protect the vulnerable in many contexts and through many different doctrines. As La Forest J. noted in *Hodgkinson*, at p. 406: "[W]hereas undue influence focuses on the sufficiency of consent and unconscionability looks at the reasonableness of a given transaction, the fiduciary principle monitors the abuse of a loyalty reposed" (emphasis added). This brief sentence makes two important points which help sharpen the focus on the role of fiduciary law.

[68] The first is that fiduciary law is more concerned with the position of the parties that *results from* the relationship which gives rise to the fiduciary duty than with the respective positions of the parties *before* they enter into the relationship. La Forest J. in *Hodgkinson*, at p. 406, made this clear by approving these words of Professor Ernest J. Weinrib: "It cannot be the *sine qua non* of a fiduciary obligation that the parties have disparate bargaining strength. . . . In contrast to notions of conscionability, the fiduciary relation looks to the relative position of the parties that results from the agreement rather than the relative position that precedes the agreement" ("The Fiduciary Obligation" (1975), 25 U.T.L.J. 1, at p. 6). Thus, while vulnerability in the broad sense resulting from factors external to the relationship is a relevant consideration, a more important one is the extent to which vulnerability arises from the relationship: *Hodgkinson*, at p. 406.

**92**  The plaintiff has pleaded that he was in a vulnerable position and was groomed by Mr. Cooke. In *Galambos,* Cromwell J. clearly refuted the proposition that simple vulnerability or "power-dependency" created a fiduciary duty.

[71] I return to the Court of Appeal's holding that a fiduciary duty may arise in "power-dependency" relationships without any express or implied undertaking by the fiduciary to act in the best interests of the other party. I respectfully disagree with this approach, for two reasons: "power-dependency" relationships are not a special category of fiduciary relationships and the law is, in my view, clear that fiduciary duties will only be imposed on those who have expressly or impliedly undertaken them.

**93**  The plaintiff's relationship of vulnerability existed primarily between Mr. Cooke and the plaintiff. It cannot be said that the RCMP expressly or impliedly undertook a fiduciary relationship with the plaintiff and indeed the plaintiff does not plead that he was in a power-dependent relationship with the RCMP.

**94**  The third element of the fiduciary relationship is the discretionary power the fiduciary has over the beneficiary. In trust relationships, this discretionary power is in relation to property.

**95**  The RCMP cannot be found to have discretionary power over the plaintiff. The RCMP has a public function that does not involve private discretionary power relationships with individual members of the public.

**96**  Perhaps while acting as guardian during a ride-a-long program the RCMP undertook to take care of the plaintiff accompanied by Mr. Cooke. The ride-a-longs may create a guardian-juvenile relationship where the RCMP had discretionary power over the plaintiff. However, the pleadings do not disclose the nature of these ride-a-longs, available supervision, waiver of liabilities or other material facts necessary to establish this relationship.

**97**  In *Elders Advocates*, Chief Justice McLachlin further discusses applying fiduciary duties to government agencies.

[25] This case thus raises the question of when governments, as opposed to individuals, may be bound by a fiduciary duty. Fiduciary duty originated as a private law doctrine. In the past, state actors have been held to be under a fiduciary duty in limited circumstances, namely, in discharging the Crown's special responsibility towards Aboriginal peoples and where the Crown is acting in a private capacity, as in its role as the public guardian and trustee. This claim does not fall within either of these situations.

*...*

[54] It thus emerges that a rigorous application of the general requirements for fiduciary duty will of necessity limit the range of cases in which a fiduciary duty on the government is found. Claims against the government that fail to satisfy the legal requirements of a fiduciary duty should not be allowed to proceed in the speculative hope that they may ultimately succeed. The truism that the categories of fiduciary duty are not closed (as Dickson J. noted in *Guerin*, at p. 384) does not justify allowing hopeless claims to proceed to trial: see M. V. Ellis, *Fiduciary Duties in Canada* (loose-leaf), at pp. 19-3 and 19-24.10. Plaintiffs suing for breach of fiduciary duty must be prepared to have their claims tested at the pleadings stage, as for any cause of action.

**98**  This is a case where a private law fiduciary duty has been alleged to exist between the plaintiff and the RCMP, but the pleadings do not disclose the requisite elements of this duty as outlined in *Elders Advocates*. As such I would strike para. 6 and 15 of Part 3 of the plaintiff's Notice.

**99**  I conclude by noting that in the plaintiff's Notice he states in Part 3:

1. The Defendant, the Attorney General of Canada is vicariously and statutorily liable for the action of the RCMP and its members and commissioned officers by operation of the *Crown Liability Act*, R.S.C. 1985, C. 50 as amended.

**100**  The Attorney General did not move to strike this claim.

**101**  The plaintiff alleges that at all material times, Mr. Cooke was employed by the RCMP. Further, the plaintiff alleges Mr. Cooke was on duty, in uniform and acting in his capacity as an officer or constable of the RCMP during some of the sexual assaults.

**102**  An employer can be vicariously liable for the intentional torts of their employee during the course of employment if the wrongful act is sufficiently related to conduct authorized by the employer: *Bazley v. Currie* [*[1999] 2 S.C.R. 534*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M42M-00000-00&context=), para. 10.

**103**  While I have found the RCMP is not in a direct fiduciary relationship with the plaintiff, Mr. Cooke may have been in a fiduciary relationship with the plaintiff. Further, the Hockey Association and the RCMP might be jointly liable for breaches by Mr. Cooke of his fiduciary duty (*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=) para. 65).

**Conclusion**

**104**  For these reasons, I strike out those portions of the plaintiff's Notice set out herein that relate to the alleged negligent investigation of Mr. Cooke by the RCMP and the claim for breach of a fiduciary duty owed by the RCMP to the plaintiff.

**105**  The Attorney General is entitled to costs at Scale B payable by the plaintiff in any event of the cause with regards to this application.

E.A. ARNOLD-BAILEY J.

**End of Document**

[***Cook v. Insurance Corp. of British Columbia, [2014] B.C.J. No. 1464***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B16J-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

J. Steeves J.

Heard: March 5, 2014; written submissions,

May 28, June 13 and 26, 2014.

Judgment: July 14, 2014.

Docket: S120649

Registry: Vancouver

**[2014] B.C.J. No. 1464** | 2014 BCSC 1289 | 243 A.C.W.S. (3d) 50 | 38 C.C.L.I. (5th) 217 | 2014 CarswellBC 2037

Between Daryl Edward Cook, Plaintiff Respondent, and The Insurance Corporation of British Columbia, Gene Krescy, The City of Vancouver, Defendants Applicants

(173 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Pleadings — Striking out pleadings or allegations — Grounds — Failure to disclose a cause of action or defence — Lack of jurisdiction — Application by defendant insurer and employee to strike large portions of claim for disclosing no reasonable cause of action allowed in part — Plaintiff insured's claims largely related to defendants' use and disclosure of his personal information and alleged breaches of defendant's obligations under Freedom of Information and Protection of Privacy Act — FIPA was exhaustive and applied to exclude courts for matters under statute, so paragraphs relating to breach of statutory duty struck, as were claims of implied undertaking, breach of confidence, intimidation, negligent disclosure that were predicated on FIPA so had no cause of action in court.**

**Government law — Access to information and privacy — Protection of privacy — Personal information — Legislation — Provincial and territorial — Unauthorized disclosure or *negligence* — Remedies — Application by defendant insurer and employee to strike large portions of claim for disclosing no reasonable cause of action allowed in part — Plaintiff insured's claims largely related to defendants' use and disclosure of his personal information and alleged breaches of defendant's obligations under Freedom of Information and Protection of Privacy Act — FIPA was exhaustive and applied to exclude courts for matters under statute, so paragraphs relating to breach of statutory duty struck, as were claims of implied undertaking, breach of confidence, intimidation, negligent disclosure that were predicated on FIPA so had no cause of action in court.**

**Insurance law — Insurers — Liability — *Negligence* — Application by defendant insurer and employee to strike large portions of claim for disclosing no reasonable cause of action allowed in part — Plaintiff insured's claims largely related to defendants' use and disclosure of his personal information and alleged breaches of defendant's obligations under Freedom of Information and Protection of Privacy Act — FIPA was exhaustive and applied to exclude courts for matters under statute, so paragraphs relating to breach of statutory duty struck, as were claims of implied undertaking, breach of confidence, intimidation, negligent disclosure that were predicated on FIPA so had no cause of action in court.**

**Insurance law — The insurance contract — Termination or breach — By insurer — Application by defendant insurer and employee to strike large portions of claim for disclosing no reasonable cause of action allowed in part — Plaintiff insured's claims largely related to defendants' use and disclosure of his personal information and alleged breaches of defendant's obligations under Freedom of Information and Protection of Privacy Act — FIPA was exhaustive and applied to exclude courts for matters under statute, so paragraphs relating to breach of statutory duty struck, as were claims of implied undertaking, breach of confidence, intimidation, negligent disclosure that were predicated on FIPA so had no cause of action in court.**

**Insurance law — Actions — By insured against insurer — Practice and procedure — Pleadings — Application by defendant insurer and employee to strike large portions of claim for disclosing no reasonable cause of action allowed in part — Plaintiff insured's claims largely related to defendants' use and disclosure of his personal information and alleged breaches of defendant's obligations under Freedom of Information and Protection of Privacy Act — FIPA was exhaustive and applied to exclude courts for matters under statute, so paragraphs relating to breach of statutory duty struck, as were claims of implied undertaking, breach of confidence, intimidation, negligent disclosure that were predicated on FIPA so had no cause of action in court.**

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| Application by the defendant insurer and employee to strike out large portions of the plaintiff insurer's notice of civil claim on the basis they disclosed no reasonable cause of action. The plaintiff entered into contracts of insurance with the defendant and made several claims of the years in which he disclosed personal information. The defendants challenged parts of the claim relating to breach of contract, breach of duty of good faith, breach of implied undertaking of confidentiality, intimidation, negligent disclosure, breach of privacy and reliance on the Freedom of Information and Protection of Privacy Act.  HELD: Application allowed in part.  The plaintiff's claims very much included the defendant's obligations under FIPA and alleged breaches of those obligations by misuse of information and improper disclosure. S. 30 of FIPA required a public body like the defendant to protect personal information in its custody. It was clear the plaintiff ultimately sought adjudication of his rights under FIPA and civil damages for breaches of his rights. There was no reference in FIPA to any role of the civil court in determining rights and penalties under FIPA. FIPA was specific legislation with an extensive set of procedures for adjudication of issues relating to personal information, and the Commissioner had extensive decision-making authority and enforcement mechanisms. FIPA clearly contained comprehensive adjudicative processes and the fact it contained penalties but not jurisdiction to award damages did not mean the court could do so. S. 79 stated FIPA prevailed over any conflict with other legislation, indicating legislature intended it to be a comprehensive code. Having two parallel schemes would be problematic. FIPA was exhaustive and applied to exclude the court from matters under the statute, including those relating to insurance contracts. The plaintiff's claim that it was an implied contract term that the defendant would safeguard his personal information fell under the statutory duties under FIPA so was struck. The defendant clearly owed a duty of good faith and the breach of duty of good faith claim was related to use of personal information collected during claims. The duty may continue to apply after the claims were completed, so those claims were not bound to fail and whether there were issues extricable from FIPA would have to be determined as the evidence arose. The implied undertaking claimed was really a statutory requirement and not separate from FIPA so those paragraphs were struck. The plaintiff claimed intimidation by the individual defendant to show material facts relating to his misuse of personal information claim. This claim was predicated on FIPA and struck. The claim for negligent disclosure of personal information was based on violations of FIPA and was a matter for the Commissioner, so struck. The breach of privacy claim was deficient with respect to components of the statutory tort under the Privacy Act but could be remedied by amendment. The defendants were relieved of the confidentiality undertaking made in another proceeding as those proceedings were inextricably connected, there would be no prejudice to the plaintiff and the documents from the other proceeding were needed for the defendants to prepare their defence. |

**Statutes, Regulations and Rules Cited:**

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B,

Exclusion Regulation, [*BC Reg 153/73, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F97-RC81-FD4T-B2JM-00000-00&context=)

Freedom of Information and Protection of Privacy Act, RSBC 1996, CHAPTER 16, s. 2(1), s. 2(1)(e), s. 2(2), s. 26, s. 26(c), s. 26(e), s. 28, s. 29, s. 30, s. 30.2(1), s. 30.4, s. 30.5, s. 32, s. 33, s. 33.1, s. 33.1(4), s. 33.2, s. 42, s. 42(2), s. 44, s. 52, s. 55, s. 56, s. 58, s. 59, s. 59.01, s. 74, s. 74.1, s. 73, s. 79

Insurance Corporation Act, [*RSBC 1996, CHAPTER 228, s. 7*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5HFN-GCX1-F528-G06G-00000-00&context=)(b), s. 45(b), s. 48

Insurance (Vehicle) Act, [*RSBC 1996, CHAPTER 231, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5X76-XJ51-DYV0-G44J-00000-00&context=), s. 2, s. 34, s. 35, s. 60, s. 61, s. 62, s. 63, s. 82.1, s. 84

Limitation Act, [*RSBC 1996, CHAPTER 266*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-FC1F-M0TW-00000-00&context=),

Privacy Act, [*RSBC 1996, CHAPTER 373, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-F5KY-B1KS-00000-00&context=)(1)

Supreme Court Civil Rules, Rule 9-5(1)

Vancouver Charter, S.B.C. 1953, c. 5,

**Counsel**

Counsel for the Plaintiff (Respondent): I. Donaldson, Q.C.

Counsel for the Defendants (Applicants), The Insurance Corporation of British Columbia and Gene Krescy: R.R. Hira, Q.C., M.L. Drouillard.

[Editor's note: A corrigendum was relased by the Court July 7, 2015; the changes have been made to the text and the corrigendum is appended to this document.]

[Editor's note: A corrigendum was relased by the Court August 10, 2015; the changes have been made to the text and the corrigendum is appended to this document.]

**Reasons for Judgment**

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| **J. STEEVES J.** |

***A.*Introduction**

**1**  The plaintiff's originating notice of civil claim raises issues about the use of his personal information by the defendants in the context of common law issues such as implied and express terms of insurance contracts, the duty of good faith and ***negligence***.

**2**  In his claim the plaintiff relies, among other things, on the duties and obligations on the defendants under the *Freedom of Information and Protection of Privacy Act,* *RSBC 1996, c. 165* ("FIPA") for concerns he has about how the defendants collected, distributed and used personal information about him obtained from insurance claims. Specifically, he objects on a number of grounds to the defendants giving information about him to the police and to a doctor. He also says that the defendants Insurance Corporation of British Columbia ("ICBC") and Gene Krescy ("Krescy") have threatened to bring criminal proceedings against him in order to obtain an advantage in a civil claim.

**3**  The defendants oppose the plaintiff's claim generally.

**4**  In this application, the defendants ICBC and Krescy are the applicants and the plaintiff is the respondent. The defendant City of Vancouver was served with notice of this application but did not attend the hearing.

**5**  The applicants apply under Rule 9-5(1) to strike out large parts of the respondent's notice of civil claim on the basis that those parts disclose no reasonable claim. The applicants say that the parts of the respondent's claim that relate to breach of contract, breach of the duty of good faith, breach of an implied undertaking of confidentiality in a prior proceeding, intimidation, negligent disclosure of personal information and breach of privacy should be struck. The applicants particularly challenge the respondent's reliance on *FIPA* to ground the claims he wants adjudicated by this Court. They say it is a complete code and if the respondent has rights and remedies they are under *FIPA*, which does not provide for adjudication of those rights and remedies in Supreme Court. They cannot be claimed in tort and they should, therefore, be struck.

**6**  The applicants accept that parts of the notice of claim that relate to breach of confidence against the applicants and breach of privacy on the part of the applicant Krescy are appropriate pleadings (subject to consideration of the *Limitation Act*, [*RSBC 1996, c 266*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-FC1F-M0TW-00000-00&context=)).

**7**  According to the respondent, there are serious issues of law raised by his claim, there is a clear question to be tried (notwithstanding its novelty and complexity) and the outcome of the trial is not beyond a reasonable doubt. As well, there are significant facts which cannot be known until at least discovery and certain rights turn on those facts. In the alternative, the pleadings may be amended to address some of the issues raised by the applicant.

**8**  With respect to *FIPA*, the respondent says that his action does not allege a breach of that statute. Instead breaches of that statute are material facts going to his claim founded on, for example, ***negligence***. His other claims based on other common law rights of breach of confidence, breach of privacy, breach of contract and breach of the duty of good faith are also valid and should not be struck.

**B. General background**

**9**  The plaintiff/respondent is a businessman in British Columbia and he and/or his business operate vehicles in British Columbia.

**10**  The defendant/applicant Insurance Corporation of British Columbia is a corporation under the *Insurance Corporation Act,* *RSBC 1996, c. 228*. It is the exclusive provider of mandatory basic automobile insurance in British Colombia.

**11**  The defendant/applicant Gene Krescy was an employee of ICBC at all material times.

**12**  The defendant City of Vancouver is a municipality incorporated under the *Vancouver Charter*, *SBC 1953, c. 55*. It is responsible for the provision of police services in Vancouver and operates the Vancouver Police Department ("VPD").

**13**  Commencing about 1987 the respondent entered into contracts of insurance with ICBC and obtained basic automobile insurance under those contracts and as required by law. In 1993, 2003, 2006, 2008 and 2011 claims were made either by the respondent (or by his business) with ICBC. In the course of these claims the respondent disclosed information to ICBC about those claims. He says this was personal information and I am assuming it included medical information. Two of these claims have settled, the others are ongoing and none have gone to trial.

**14**  It is the information collected by ICBC in the course of these claims that is at issue in the respondent/plaintiff's civil claim.

**15**  The respondent filed a lengthy notice of civil claim on January 27, 2012. As of the date of the hearing of this application only the City of Vancouver had filed a response to the respondent's claim. That is, the applicants/defendants have not filed a response. There have been no discoveries.

**C. Analysis**

**16**  The specific objective of the subject application by the applicants is to strike out large parts of the respondent's notice of civil claim on a number of issues. Perhaps the primary issue between the parties is the effect of *FIPA* on the claims of the respondent. As that issue guides many of the determinations on the application to strike, I will first consider that issue in general terms.

**17**  I will then consider the specific issues and paragraphs in the respondent's notice of civil claim as set out in the applicant's application to strike those paragraphs. They are as follows:

1. Breach of contract (notice of civil claim ("NCC") paras. 8, 48-49, 55-57);
2. Breach of the duty of good faith (NCC, paras. 8, 48-49, 55-57);
3. Breach of an implied undertaking (NCC, para. 12);
4. Statutory breach and breach of confidence (NCC, paras. 19-37, 47(a)-(c), 53(d), (e) and (g), 58, 61(c) and 61(d));
5. Intimidation (NCC, paras. 38-40, 53(c), 62(c));
6. Negligent disclosure of personal information (NCC, paras. 50-51, 58); and
7. Breach of privacy (NCC, paras. 14-30, 54, 58, 62(b), 62(d)).

**18**  There is also an issue between the parties with respect to whether counsel in another proceeding (in which the respondent is a party) should be released from implied undertakings associated with a discovery in the other proceeding in order to provide information in this proceeding. I will consider this as a final issue.

1. ***FIPA* and the respondent's claim**
2. ***Discussion of FIPA***

**19**  The general scope of *FIPA* can be seen from the following outline of its parts, divisions and schedules;

**Part 1:** Introductory Provisions

**Part 2:** Freedom of Information

Division 1: Information Rights and How to Exercise Them

Division 2: Exceptions

Division 3: Notice to Third Parties

Division 4: Public Interest Paramount

**Part 3:** Protection of Privacy

Division 1: Collection, Protection and Retention of Personal Information by Public Bodies.

Division 2: Use and Disclosure of Personal Information by Public Bodies

Division 3: Data-linking Initiatives

**Part 4:** Office and Powers of Information and Privacy Commissioner

**Part 5:** Reviews and Complaints

Division 1: Reviews by the Commissioner

Division 2: Investigations and Reviews by Adjudicator

**Part 6:** General Provisions

**Schedule 1:** Definitions

**Schedule 2:** Public Bodies

**Schedule 3:** Governing Bodies of Professions or Occupations

**20**  Schedule 2 of *FIPA* states that ICBC is a public body under that legislation (as is the defendant City of Vancouver).

**21**  Personal information" is defined in Schedule 1 of *FIPA* as "recorded information about an identifiable individual other than contact information." The respondent uses this term in his civil claim to refer to the information that is the subject of his claim.

**22**  Looking at some specific provisions of *FIPA*, s. 2 sets out the purposes of the Act including making public bodies "more accountable to the public" and "to protect personal privacy". Section 2(1) includes specific purposes as follows:

1. giving the public a right of access to records,
2. giving individuals a right of access to, and a right to request correction of, personal information about themselves,
3. specifying limited exceptions to the rights of access,
4. preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
5. providing for an independent review of decisions made under this Act.

**23**  Section 2(2) states that *FIPA* "does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public." This leaves open access to personal information through procedures other than *FIPA*. It does not address the issue in this case: whether the respondent can proceed with his claim for civil damages for violations of the protection of that information, including protections under *FIPA*.

**24**  As can be seen from the above outline of *FIPA*, Part 3 is the primary source for the protection of personal information. It has provisions setting out the purpose for which personal information may be collected, how it is to be collected and when it is not collected (ss. 26 - 27.1). Other provisions require a public body to "make every reasonable effort to ensure that ... personal information is accurate and complete", make "reasonable security arrangements" against the risks of unauthorized access, collection, use, disclosure or disposal and a public body must ensure that personal information in its custody or under its control is stored only in Canada with a small number of exceptions (ss. 28, 30, 30.1, respectively). An applicant who believes there is an error or omission in his or her personal information "may request the head of the public body that has the information in its costs the odor under its control to correct the information" (s. 29).

**25**  Unauthorized disclosure of personal information is defined in s. 30.2(1) as "disclosure of, production of or the provision of access to personal information to which this Act applies, if that disclosure, production or access is not authorized by this Act."

**26**  S. 30.4 prohibits unauthorized disclosure of personal information by a public body as follows:

**30.4** An employee, officer or director of a public body or an employee or associate of a service provider who has access, whether authorized or unauthorized, to personal information in the custody or control of a public body, must not disclose that information except as authorized under this Act.

**27**  Where there has been unauthorized disclosure, s. 30.5 applies:

**30.5** (1) In this section, **"unauthorized disclosure of personal information"** has the same meaning as in section 30.2 (1).

1. An employee, officer or director of a public body, or an employee or associate of a service provider, who knows that there has been an unauthorized disclosure of personal information that is in the custody or under the control of the public body must immediately notify the head of the public body.

**28**  Under s. 33, a public body may disclose personal information in its custody or under its control but only as permitted by ss. 33.1, 33.2 or 33.3. In addition, use of personal information by a public body is regulated by s. 32:

**32** A public body may use personal information in its custody or under its control only

1. for the purpose for which that information was obtained or compiled, or for a use consistent with that purpose (see section 34),
2. if the individual the information is about has identified the information and has consented, in the prescribed manner, to the use, or
3. for a purpose for which that information may be disclosed to that public body under sections 33 to 36.

**29**  Section 33.1 regulates disclosure of personal information inside or outside Canada and s. 33.1(4) specifically provides that in addition to the authority it has under s. 33.1 or s. 33.2, ICBC is specifically authorized to disclose personal information if:

1. the information was obtained or compiled by that public body for the purposes of insurance provided by the public body, and
2. disclosure of the information is necessary to investigate, manage or settle a specific insurance claim.

**30**  Part 4 of *FIPA* describes the office and powers of the Information and Privacy Commissioner. The Commissioner is "generally responsible for monitoring how [*FIPA*] is administered to ensure that its purposes are achieved" (s. 42).

**31**  Section 42 (1)(a) states that the general powers of the Commissioner include the authority to conduct investigations and audits to ensure compliance with any provision of *FIPA*. Section 42(2) states that the Commissioner may investigate and attempt to resolve complaints in a number of areas including: whether a duty under the *Act* has not been performed; whether a correction of personal information requested under the *Act* has been refused without justification; and whether personal information has been collected, used or disclosed in contravention of Part 3 by a public body or an employee or by other persons.

**32**  Under s. 44 the Commissioner has the authority to require a person to attend before the Commissioner to answer questions on oath or affirmation and to produce for the Commissioner a record in the custody or under the control of a person. An order may be sought by the Commissioner from the Supreme Court directing a person to comply with a direction from the Commissioner to attend a hearing or produce documents. A public body must produce to the Commissioner within 10 days any record or copy of any record requested by the Commissioner. The failure or refusal of a person subject to an order under s. 44 may be the subject of an application by the Commissioner to the Supreme Court for a finding of contempt (s. 44.1).

**33**  Part 5 of *FIPA* governs reviews and complaints. It includes s. 52, which provides a right for a person to request a review of a decision by the head of a public body related to access to a record or for correction of personal information. The Commissioner may authorize a mediator to investigate and to try and settle an application for review (s. 55) or the Commissioner may conduct an inquiry and there are broad powers to make decisions about the nature of the inquiry (s. 56). Section 58 sets out broad powers for the Commissioner to make orders, s. 59 requires a head of a public body to comply with an order of the Commissioner and s. 59.01 sets out the enforcement of orders of the Commissioner.

**34**  Part 6 of *FIPA* includes general provisions including general offences and penalties (s. 74) and privacy protection offences (s. 74.1). Under the former, a person who makes a false statement to the Commissioner or obstructs the Commissioner may be subject to a fine up to $5,000. Under the latter, a person who commits a "Privacy protection" offence can be fined $2,000 in the case of an individual (who is not a "service provider"), $25,000 in the case of a partnership or service provider or $500,000 in the case of a corporation.

**35**  Section 73 is titled "Protection of public body from legal suit" and is as follows:

**73** No action lies and no proceeding may be brought against the government, a public body, the head of a public body, an elected official of a public body or any person acting on behalf of or under the direction of the head of a public body for damages resulting from

1. the disclosure, or failure to disclose, in good faith of all or part of a record under this Act or any consequences of that disclosure or failure to disclose, or
2. the failure to give any notice required under this Act if reasonable care is taken to give the required notice.

**36**  Finally, s. 79 is titled "Relationship of Act to other Acts" and it is as follows:

**79** If a provision of this Act is inconsistent or in conflict with any provision of another Act, the provision of this Act prevails unless the other Act expressly provides that it, or a provision of it, applies despite this Act.

***(ii) The respondent's claim and FIPA***

**37**  The respondent relies on the exclusive nature of the basic insurance contract provided by ICBC under the *Insurance (Vehicle) Act*, *RSBC 1996, c. 231* as well as the previous statutory contracts he had with ICBC under that statute.

**38**  According to the respondent, the monopoly position of ICBC and these contracts create common law protections for his personal information. For example, paragraph 8 of his notice of civil claim ("NCC") alleges an express or implied term of the insurance contracts between ICBC and the respondent that ICBC will safeguard his personal information. As well, according to the respondent, collection of this information by ICBC is limited to insurance purposes and the applicants are to use or disclose it only as necessary and only for the purposes of insurance or for other lawful purposes. The legal basis for this allegation is in the same terms and is in paragraph 57 of Part 3, Legal Basis, of the NCC.

**39**  The first question here is whether, based on the respondent's NCC (and assuming the facts asserted there to be true), the claims made by the respondent include issues under *FIPA*, and if so, to what extent? In the event the respondent's claim includes issues under *FIPA,* the next question is what is the significance of the inclusion?

**40**  With regards to the first question, I note particularly the following paragraphs of the respondent's NCC:

1. Paragraph 48(g) claims that ICBC owed the respondent a duty of good faith and fair dealing including "a duty to comply with the implied undertakings of confidentiality and the statutory obligations to which it was subject including under Part 3 of [*FIPA*]."
2. Paragraph 50(e) states that ICBC owed a duty of care to the respondent to comply with "its statutory duties to protect personal information in its custody or under its control including the duties under Part 3 of [*FIPA*]."
3. Paragraph 51(m) claims that ICBC was negligent by, among other things, "failing to comply with its duties under Part 3 of [*FIPA*]."

(Similar claims are made against the defendant City of Vancouver in paragraphs 66(f) and 67(m)).

**41**  I conclude that these claims very much include the obligations and duties of ICBC under *FIPA*.

**42**  Looking at other relevant parts of the respondent's claim, sub-paragraph 48 (a) alleges a duty of good faith by ICBC that includes a duty "to protect the security and confidentiality of the Plaintiff's personal information" and sub-paragraph 48 (b) alleges a duty by ICBC to exercise discretion "to collect, use and disclose [the respondent's] personal information in a reasonable manner and for lawful purposes. Sub-paragraph 48 (c) alleges a duty by ICBC "to respond promptly, fairly and accurately to the Plaintiff's lawful inquiries about how ICBC collected, used and disclosed his personal information."

**43**  Paragraph 50 sets out part of the legal basis for the respondent's claim in ***negligence*** against ICBC and it includes a duty "to manage his personal information in its custody or under its control in a reasonable manner" including to take care to "collect, use and disclose his personal information only as necessary for the purposes of the insurance relationship or as otherwise permitted by law" (50(a)) and to "ensure that the confidentiality of his personal information was maintained" (50(c)).

**44**  Paragraph 53 alleges breaches of confidence by ICBC including claims of misuse of the respondent's personal information (53(d)) and disclosing it without his consent or lawful order (53(f)). Paragraph 57 alleges ICBC's breach of implied contractual terms including failure to safeguard the respondent's personal information (57(e)). A number of the respondent's other claims are described in the same terms and they will be considered below.

**45**  Looking at these claims in the context of *FIPA*, I note that s. 30 of that statute requires a public body such as ICBC to protect personal information in its custody or control by making reasonable security arrangements against risks such as unauthorized access, collection, use, disclosure or disposal. Further, s. 26 sets out the specific purposes for which personal information may be collected. These include collecting personal information only if "the information relates directly to and is necessary for a program or activity of the public body" (s. 26(c)) or if "information is necessary for the purposes of planning or evaluating a program or activity of a public body" (s. 26(e)).

**46**  The respondent submits that he is not suing for breach of *FIPA* and, instead he is pleading that the duties imposed by *FIPA* constitute material facts which inform, for example, the standard of care for the issue of ***negligence***. I disagree. Determination of those issues may be, in part, factual adjudications but *FIPA* clearly sets out a legal framework for those factual determinations. However, in my view, it is clear that the respondent seeks adjudication of his rights under *FIPA* and, ultimately, civil damages for breach of those rights. This is stated expressly in the claims that ICBC had a duty of care to comply with the statutory obligations in *FIPA* and that ICBC was negligent by failing to comply with *FIPA.* Those claims engage *FIPA* directly. The other claims are to the same effect only more generally plead. The result is that the respondent's claim includes issues under *FIPA*.

**47**  I turn next to the significance, if any, of a situation like this where the respondent seeks remedies in civil court on grounds other than FIPA for rights protected under *FIPA*. According to the respondent he can use *FIPA* to inform his tort and other common law claims. Further, he can make claims under *FIPA* and in civil court for how the applicants have collected, used and disclosed his personal information. And he says that he can proceed with a claim for civil damages for breaches of his insurance contracts (which are under the *Insurance (Vehicle) Corporation Act*) where the breaches are violations of the protection of his personal information. This is to be contrasted with the applicants' view that *FIPA* prevails in an exclusive sense and the respondent's claims for civil remedies for his rights under *FIPA* should be struck.

**48**  As a first point here, I note that specific protections for personal information appear to be unavailable at common law. That is, prior to the existence of *FIPA* (counsel advise it came into force in 1992) there was no tort or other civil action available to a party for the protection of personal information. There is the statutory tort of violation privacy in the *Privacy Act*, *RSBC 1996, c 373*, but that is substantively different and far less extensive than the protections under *FIPA*. And the law and remedies of the tort of defamation are very different than the protections under *FIPA*.

**49**  Therefore, it seems to me that there is at least the basis of an argument that there are not competing jurisdictions over protection of personal information as between the common law and *FIPA*. Nor does it seem to be a situation of *FIPA* (or the civil courts) occupying the field, as submitted by the respondent. The rights the respondent seeks for the protection of his personal information would seem to arise from *FIPA,* not from common law. Significantly, I can find no reference in *FIPA* for any role for the civil courts for determination of rights and penalties under *FIPA* (except, presumably, for judicial review).

**50**  I qualify this conclusion because the subject proceedings, including the pleadings, are at a very early stage. There are few facts, no adjudication of those facts and, therefore, a record to make conclusive findings is minimal at best. Therefore, bearing in mind the historical adaptability of common law remedies in particular, I will proceed on the assumption that there is some jurisdiction in common law or under the *Insurance Corporation Act* for the claims of the respondent about the protection of his personal information. On that basis, there remains the issue as to whether those claims can proceed in common law and claims or complaints under *FIPA* can also proceed on essentially the same facts.

**51**  If there is an issue of *FIPA* versus the common law (i.e. tort law) or where two (or more) legislative provisions apply to the same facts, there are four possibilities:

1. The overlapping provisions do not conflict, and since both apply, the court gives effect to both.
2. The overlapping provisions might conflict, but the conflict is avoided through legislative fiat or judicial interpretation.
3. The overlapping provisions do not conflict, but the court concludes that one of the provisions was meant to be exhaustive and therefore applies to the exclusion of the other.
4. The overlapping provisions conflict and, in order to resolve the conflict, the court applies a paramountcy rule.

Ruth Sullivan, *Statutory Interpretation*, 2nd ed., (Toronto: Irwin Law, 2007), page 303.

**52**  In the subject case, it cannot be said that there is a conflict between *FIPA* and the *Insurance (Vehicle) Act*, nor is a conflict alleged by either party. Instead the respondent asserts his claims for protections of personal information under *FIPA* are valid rights within his tort claim. He also says that he can apply for remedies under *FIPA* independent from a tort claim. On this view, the first of the above possibilities applies and the respondent has remedies under *FIPA* and in civil court.

**53**  For their part, the applicants submit that *FIPA* is a complete code and the rights and remedies therein cannot be part of a tort claim. They say the result is the third possibility: there is no conflict but one legislative provision is exhaustive (protection of personal information under *FIPA*) and it applies to the exclusion of the other (a tort claim under a contract of insurance regulated by the *Insurance (Vehicle) Act*).

**54**  Previous decisions discussed by Professor Sullivan are of assistance here.

**55**  In *B.C.T.F. v. British Columbia (Attorney General)* [*(1985), 68 B.C.L.R. 106*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-2153-00000-00&context=) (CA) the petitioner sought an order that a Treasury Board directive limiting funding to local school boards be set aside for being unlawful. The directive would have had the effect of reducing the number of teachers but increasing compensation to teachers who remained. The petitioners argued that the provisions of the *School Act* took precedence over the statutory authority under which the directive was ordered. On appeal, a majority of the Court of Appeal agreed with the petitioner. They found (para. 36):

Where the legislature, as in the case on appeal, has established a comprehensive statutory code encompassing all aspects of a particular subject matter, subsequent legislation will not prevail over that code unless the subsequent legislation is framed in express terms to achieve that purpose.

**56**  Similarly, in *G. (C.) v. Catholic Children's Aid Society of Hamilton-Wentworth* [*(1998), 110 O.A.C. 338*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FFTT-X1K1-00000-00&context=) the Ontario Court of Appeal confirmed that a child welfare statute established "a comprehensive and exhaustive code" for children in need of protection to the exclusion of the other statutes. Therefore, children in need were not to be dealt with under the general protection of another statute that was "not directly concerned with them, unless, of course, the provisions of that statute say so in specific terms" (para. 19; citing *W. (C.G.) v. M.J.* [*(1981), 24 R.F.L. (2d) 342*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJV1-JK4W-M524-00000-00&context=) (Ont. C.A.), at pgs. 348-49).

**57**  In *G. (C.)* there was some discussion about whether the analysis involved specific legislation being preferred over general legislation. That point appears to be significant to the reasoning in *W. (C.G.).* However, in the former case the Ontario Court of Appeal reviewed a number of decisions and specifically held that this was not the question at issue (paras. 20-27). Instead the question was one of legislative intent (para. 21; and whether established procedures could be circumvented (paras. 26-27)). Similarly, Professor Sullivan focuses on the exhaustive nature of one statute compared with another: this "does not follow from the fact that the provision is more specific, but rather from the fact that it would have no point if it were not considered exhaustive" (page 308).

**58**  If it is an issue, I find that *FIPA* is the more specific legislation with respect to personal information when compared with the *Insurance (Vehicle) Act* (and the common law). As well, I note the scope of *FIPA* with respect to the collection, use and disclosure of personal information, as set out above, and it is clear that these issues are highly regulated under *FIPA*. In addition, the office of Commissioner is created under *FIPA* with powers to make inquiries, investigations and reviews of complaints under the legislation. The overall result is the creation of legislation, including a tribunal, with specialized jurisdiction over the protection of personal information.

**59**  It is also of significance, in my view, that *FIPA* has an extensive set of procedures for the adjudication of issues related to personal information. Section 2(1)(e) states that a purpose of *FIPA* is to provide for "an independent review of decisions made under this *Act*." Further, the Commissioner has the power to conduct investigations, audits or inquiries (s. 44), the power to maintain order at a hearing (s. 44.1), the power to seek contempt orders in Supreme Court (s. 44.2) and power to authorize mediation (s. 55). There is protection against libel and slander s. 46 and a right of a review (ss. 52-54.1).

**60**  In addition, the Commissioner has extensive order-making authority (s. 58), there is a duty to comply with these orders (s. 59) and there is an enforcement mechanism through Supreme Court (s. 59.01). There is also provision in *FIPA* for investigations and reviews by an adjudicator (ss. 59.1-65). It is unlawful for a person to make a false statement to the Commissioner, attempt to mislead the Commissioner or another person performing duties or to obstruct the Commissioner or another person under *FIPA* (s. 74). Finally, there are "privacy protection" offences prescribed, as are financial penalties against offenders (s. 74.1).

**61**  The above clearly represents a detailed and comprehensive adjudication process, including investigations, mediations and reviews, under *FIPA*. Again, there is no reference in *FIPA* to the civil courts having a role in these matters although I accept that is not conclusive on its own.

**62**  The respondent points out that the Commissioner under *FIPA* has no common law jurisdiction or authority otherwise to award damages, only penalties payable to the state as described above are described in *FIPA*. That is an accurate description of the regime under *FIPA*. However, I am not persuaded that it means that the civil courts somehow have authority to consider *FIPA* and ultimately award civil damages for violations of that legislation. In this regard, the following comments from the Supreme Court of Canada in *Canada v. Saskatchewan Wheat Pool,* [*[1983] 1 S.C.R. 205*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M278-00000-00&context=), where a civil remedy for a statutory breach of the *Canada Grain Act* was sought, are apt:

Assuming that Parliament is competent constitutionally to provide that anyone injured by a breach of the *Canada Grain Act* shall have a remedy by civil action, the fact is that Parliament has not done so. Parliament has said that an offender shall suffer certain specified penalties for his statutory breach. We must refrain from conjecture as to Parliament's unexpressed intent. The most we can do in determining whether the breach shall have any other legal consequences is to examine what is expressed. In professing to construe the Act in order to conclude whether Parliament intended a private right of action, we are likely to engage in a process which Glanville Williams aptly described as "looking for what is not there", p.244 ["The Effect of Penal Legislation in the Law of Tort", (1960) 23 *Modern L. Rev.* 233]. The *Canada Grain Act* does not contain any express provision for damages for the holder of a terminal elevator receipt who receives infested grain out of an elevator.

**63**  Transposing those comments to the subject case, it is self-evident that *FIPA* does not contain any express provision for damages for breaches of that statute. Instead the legislature has said that an offender (an individual, a partnership, a service provider or a corporation) shall suffer certain specified penalties for a statutory breach. Financial penalties are then payable to the state.

**64**  It is conjecture, in the sense of looking for what is not there, to read access to the civil courts for civil damages into *FIPA.* The legislature has determined the penalties available for statutory breaches related to personal information and civil damages is not one of those penalties. Penalties under *FIPA* are a penalty imposed by the state rather than damages between parties.

**65**  There is also s. 79 of *FIPA*. It is titled "Relationship of Act to other Acts" and it is as follows:

1. If a provision of this Act is inconsistent or in conflict with any provision of another Act, the provision of this Act prevails unless the other act expressly provides that it, or a provision of it, applies despite this Act.

This provision also supports the conclusion that the legislature intended that *FIPA* should be read as a comprehensive code that prevails over other legislation. Specifically, it is consistent with the conclusion that *FIPA* is intended to prevail over legal approaches to the collection, use and disclosure of personal information.

**66**  Section 79 is consistent with other authority that the protection of privacy is "a fundamental value in modern democratic states" and that privacy legislation is to be considered as having quasi-constitutional status (*Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [*2002 SCC 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4D1-00000-00&context=), paras. 24-25; *H.J. Heinz Co. of Canada v. Canada (Attorney General)*, [*2006 SCC 13*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B16J-00000-00&context=), paras. 26, 28).

**67**  In addition, I note that s. 33.1(4) of *FIPA* provides express authority for ICBC to disclose personal information as follows:

33.1(4) In addition to the authority under any other provision of this section or section 33.2, the Insurance Corporation of British Columbia may disclose personal information if

1. the information was obtained or compiled by that public body for the purposes of insurance provided by the public body, and
2. disclosure of the information is necessary to investigate, manage or settle a specific insurance claim.

**68**  This provision also supports the conclusion that the intention of the legislature when *FIPA* was enacted was to establish a comprehensive code for the protection of personal information. Applications of that code to specific public bodies such as ICBC are in *FIPA* so that they can conduct their business in compliance with *FIPA*. The logic of s. 33.1(4) is that the affairs of ICBC are subject to *FIPA* rather than the reverse; indeed, it is difficult to understand how legislation such as *FIPA* could be effective any other way.

**69**  Looking at the issue from a policy point of view, the prospect of having two parallel legal schemes with respect to the protection of personal information is problematic for a number of reasons. At a general level a multiplicity of proceedings should be avoided because they can lead to separate decisions with the real possibility of different decisions. This creates a situation where issues such as issue estoppel can arise and then have to be resolved. And having parallel legal proceedings for the same issues obviously creates issues of additional time and cost.

**70**  I find that the third category set out by Professor Sullivan is applicable here. In my view, *FIPA* is exhaustive and therefore applies to the exclusion of the civil courts for matters under that statute, including common law remedies related to statutory insurance contracts under the *Insurance (Vehicle) Act*.

**71**  It is true that the common law is dynamic and, for example, the categories where ***negligence*** applies are not closed. As well, pleadings should not be struck simply because they raise novel issues. However, in my view the above analysis supports the conclusion that the personal information issues raised by the respondent in his claim are intended by the legislature to be addressed under *FIPA*.

**72**  I find some support for this view in *Bracken v. Vancouver Police Board*, [*2006 BCSC 189*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1W8-00000-00&context=). There Madam Justice Holmes considered a situation where the plaintiff alleged that a public body wrongfully disclosed her personal information. She noted that there was no common law tort of invasion of privacy and "... if [the plaintiff's] claims are to find legal expression, they must do so through either s. 1(1) of the *Privacy Act* ... or s. 33 of [*FIPA*]" (para 28).

**73**  In summary, I conclude that *FIPA* is an exhaustive legislative scheme for the investigation and adjudication (subject to judicial review) of complaints related to the collection, use and disclosure of personal information in this province. Investigations of complaints about how a public body such as ICBC has collected, used or disclosed personal information are prescribed in *FIPA*. I am unable to find a role for the civil courts in these matters (except for judicial review).

**74**  Some attention was given to s. 73 of *FIPA* in argument. It is titled "Protection of public body from legal suit" and is as follows:

**73** No action lies and no proceeding may be brought against the government, a public body, the head of a public body, an elected official of a public body or any person acting on behalf of or under the direction of the head of a public body for damages resulting from

1. the disclosure, or failure to disclose, in good faith of all or part of a record under this Act or any consequences of that disclosure or failure to disclose, or
2. the failure to give any notice required under this Act if reasonable care is taken to give the required notice.

**75**  For reasons that are not clear, s. 73 applies only to disclosure or failure to disclose (and failure to give notice). On its face, it does not apply to collection of personal information. As well, if there is difference between use and disclosure of personal information, the former is not specifically addressed in s. 73.

**76**  In any event, previous decisions interpreting and applying s. 73 do not assist the respondent. In *Scory v. Langley (Township)*, [*2012 BCSC 951*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24JD-00000-00&context=) Madam Justice Fenlon said this:

1. Under s. 73 of FOIPPA, there is no cause of action for damages against a public body or its employees for disclosing or failing to disclose information in good faith. Under the scheme of the Act, the remedy for a person who is of the view that a public body has failed to provide information in compliance with the Act is for that party to make a complaint to the Privacy Commissioner, who then has extensive powers to investigate and order the public body to comply with the Act. If the Privacy Commissioner's review is considered by the complainant to be unsatisfactory, a review of that decision may be brought in this Court under the Judicial Review Procedure Act.
2. Put simply, FOIPPA does not give the plaintiff a right to sue for damages because a public authority has not complied with the Act.

**77**  Also in argument, s. 73 of *FIPA* was contrasted with s. 57 of the *Personal Information Protection Act*, RSBC 2003, c. 63 ("*PIPA")*. That provision is as follows:

**57** (1) If the commissioner has made an order under this Act against an organization and the order has become final as a result of there being no further right of appeal, an individual affected by the order has a cause of action against the organization for damages for actual harm that the individual has suffered as a result of the breach by the organization of obligations under this Act.

1. If an organization has been convicted of an offence under this Act and the conviction has become final as a result of there being no further right of appeal, a person affected by the conduct that gave rise to the offence has a cause of action against the organization convicted of the offence for damages for actual harm that the person has suffered as a result of the conduct.

**78**  It is accepted by all parties that *PIPA*, generally speaking, applies to personal information collected, used and disclosed by private organizations, as opposed to public bodies as in the case of *FIPA*. However, s. 57 of *PIPA* creates a cause of action for damages from a final order of the Commissioner for actual harm suffered as a result of the order. This is not the effect of s. 73 of *FIPA*.

**79**  Overall, I conclude that s. 73 of *FIPA* is of limited application to the subject application.

**80**  I next turn to the application of the above analysis to the specific paragraph numbers in the respondent's NCC.

1. **The pleadings**

**81**  The parties agree on the approach to be taken on an application to strike pleadings.

**82**  If it is plain and obvious, assuming the facts plead to be true, that a pleading discloses no reasonable cause of action then it will be struck. Striking out claims that have no reasonable prospect of success promotes two goals: efficiency in the conduct of litigation and correct results. Further, litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are not supportable. The efficiency gained by weeding out unmeritorious claims contributes to better justice.

**83**  However, neither the length of the pleadings, the complexity of the issues, the novelty of the cause of action, or the potential for the applicants to present a strong defence should prevent a party from proceeding with his or her case. Only if an action is certain to fail because it contains a radical defect should it be struck (*Hunt v. Carey Canada Inc.*, *[1990] 2 S.C.R. 959* at paras. 33, 39; *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 paras. 17, 20; *Woolsey v. Dawson Creek (City)*, [*2011 BCSC 751*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JJK6-S23T-00000-00&context=) at para. 29; and *Callan v. Cooke*, [*2012 BCSC 1589*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JWR6-S2FW-00000-00&context=) at para. 17).

**84**  The applicants accept that parts of the NCC that relate to breach of confidence against the applicants and breach of privacy on the part of the applicant Krescy are appropriately plead (subject to any issues under the *Limitation Act*).

**85**  The specific issues and paragraphs of the respondent's claim challenged by the applicants and my decision on those challenges follow. They are the issues as characterized by the applicants and, as will be seen, the respondent does not agree with all of those characterizations.

***(i) Breach of contract (paras. 8, 48-49, 55-57)***

**86**  The respondent has plead that the applicant ICBC is the exclusive provider of mandatory basic automobile insurance in British Columbia. This is a result of s. 2 of the *Insurance (Vehicle) Act*. The respondent has also plead that he was a party to contracts of insurance with ICBC. Those contracts would have been pursuant to the *Insurance (Vehicle) Act*. Sections 7(b) and 45(6) of the *Insurance Corporation* Act are also applicable, as is s. 1 of the *Exclusion Regulation,* [*B.C. Reg 153/73*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5W2C-X5M1-FCYK-202N-00000-00&context=) under the *Insurance Corporation Act.* I do not consider these matters to be in dispute.

**87**  Paragraph 8 of the NCC is very much in dispute, as are others. It alleges that there were a number of express or implied terms of the insurance contracts between the respondent and ICBC. The subject areas includes terms that ICBC would act fairly and in good faith; would disclose to the respondent information touching on his interests; safeguard the respondent's personal information; fairly and reasonably exercise its discretionary power to collect, use, disclose and manage personal information about the respondent; and act in a manner that is consistent with the values in the *Canadian Charter of Rights and Freedoms*.

**88**  Paragraphs 48 to 49 are in Part 3 of the NCC, the Legal Basis of the claim. They are under the heading "ICBC's Breach of the Duty of Good Faith."

**89**  Paragraph 48 says that the respondent is "at the mercy of ICBC by virtue of its exclusive powers over the provision of mandatory basic automobile insurance" and ICBC owed the respondent a duty of good faith and fair dealing in a number of areas. These include a duty to protect the security and confidentiality of the respondent's personal information (48(a)); a duty to exercise its discretion to collect, use and disclose the respondent's personal information in a reasonable manner and for lawful purposes (48(b)) and other matters related to the applicants personal information. Other duties alleged include that ICBC is not to exploit the relative vulnerability of the respondent with intimidating tactics in an attempt to avoid or settle a claim (48(d)), not to facilitate information-gathering for law enforcement agencies without notice to the respondent (48(f)) and to give at least as much consideration to the plaintiff's interests as a gives to its own interest (48(i)).

**90**  Finally under para. 48, it is alleged that ICBC has a duty to comply with the implied undertakings of confidentiality and the statutory obligations in *FIPA* (48(g)) and act in a manner that is consistent with the values in the *Canadian Charter of Rights and Freedoms* (48(h)).

**91**  Paragraph 49 has sixteen sub-paragraphs and it alleges that ICBC reached its duty of good faith and fair dealing "willfully, intentionally and high-handedly." Among other things, ICBC exploited its position as the exclusive provider of basic vehicle insurance in British Columbia to the benefit of its own interests and to the detriment of the interests of the respondent (49(a)). It also established a policy for routinely facilitating the arbitrary and unauthorized disclosure of the personal information of the respondent, which was collected for the purposes of insurance contracts, but was given to the "ICBC Police Line" (49(b)). A number of other breaches by ICBC are alleged with respect to the use or disclosure of the personal information of the respondent. Specific allegations are also made with regards to the applicant/defendant Krescy.

**92**  Paragraphs 55 - 57 are under the heading "ICBC's Breach of Contract."

**93**  Paragraph 55 alleges that the relationship between the respondent and ICBC was contractual in nature. Further an implied term of the contract was that ICBC would exercise due care, skill and diligence in providing insurance coverage to the respondent taking into account his interests, privacy, confidentiality and the security of his personal information.

**94**  Paragraph 56 alleges that it was reasonably foreseeable to ICBC that its failures to exercise reasonable care and diligence in respect of the respondent's interests, confidentiality, privacy and informational security would result in harm to the respondent.

**95**  Paragraph 57 sets out the alleged particulars of breach of contract in the same terms as in paragraph 8 with the addition of "further and other particulars" that will not be known until discovery or trial.

**96**  I turn to consideration of the allegations in these paragraphs of the respondent's claim.

**97**  Sub-paragraph 8(a) states that it is an implied term of the insurance contracts that ICBC will comply with all statutory obligations. I do not consider that claim, drafted in the general way it is, as being objectionable. The same conclusion applies to sub-paragraph 57(a), failing to comply with all statutory obligations under applicable law.

**98**  Sub-paragraph 8(b) relates to good faith and it is considered below, as is sub-paragraph 8(d).

**99**  Sub-paragraphs 8(c), (e) and (f) allege contractual terms to protect the respondent's personal information.

**100**  For example, sub-paragraph 8(e) states that it was an express or implied term of the insurance contracts between ICBC and the respondent that ICBC would safeguard the respondent's personal information it collected for the purposes of insurance and use or disclose it only as necessary and only for the purposes of insurance or other lawful purposes. As above, s. 30 of *FIPA*, states that a public body "must protect personal information in its custody or under its control by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or disposal." As well, s. 30.4 states that an employee or other persons of a public body, whether there is authorized or unauthorized access, must not disclose personal information except as authorized by *FIPA*. I conclude that this claim falls within the statutory duties that ICBC has under *FIPA*. Paragraph 8(f) similarly alleges that the insurance contracts at issue included a term that ICBC would fairly and reasonably exercise its discretionary power to collect, use, disclose and manage personal information about the respondent having due regard to the imbalance of power between them and its position as the exclusive provider of basic automobile insurance. I conclude that, if there are specific features to the obligation of ICBC to protect the personal information of the respondent, those are matters that are properly considered under *FIPA*.

**101**  The result is that sub-paragraphs 8(c), (e) and (f) are struck as not disclosing a reasonable claim The same result applies to sub-paragraphs 48 (a), (b), (c) and (f); they are also struck. Sub-paragraphs 48(d) and (e) are considered under duty of good faith below.

**102**  To the extent that paragraph 55 alleges protections of personal information under *FIPA*, as discussed above, those portions are struck. Other aspects of this paragraph are considered under duty of care below, as is para. 56.

**103**  Sub-paragraphs 57 (c), (e) and (f) also engage issues under *FIPA* and they are struck. Sub-paragraphs 57 (b) and (d) are considered below, under good faith.

**104**  Sub-paragraphs 8(g), 48(h) and 57(g) allege that the contracts of insurance at issue include implied or express terms that ICBC would act in a manner consistent with the *Canadian Charter of Rights and Freedoms*. The applicants have not challenged these sub-paragraphs in this application and I make no comment on them.

**105**  As a separate matter from the application of *FIPA*, I am urged by the defendants to find that an insurance contract under the *Insurance (Vehicle) Act* is not open to having contractual terms implied into it. On this view, only the Lieutenant Governor in Council can amend an insurance contract under that legislation.

**106**  It is true that the insurance relationship between the plaintiffs and ICBC is governed by the *Insurance (Vehicle) Act*. Section 2 provides that ICBC must "operate the plan of universal compulsory vehicle insurance in accordance with this Act and the regulations." A "plan" is defined in s. 1 as being a "plan of universal compulsory insurance referred to in section 2 and operated by [ICBC] under Part 1 and the regulations under that Part." ICBC may establish classification of vehicles and basic premiums (s. 34) and premium discounts and additional premiums (s. 35) but these are not specified. Part 4 relates to optional insurance contracts and it sets out the duty of the insurer (s. 60) and coverage of optional insurance contracts (s. 61). There are also requirements with respect to coverage of non-owners policy (s. 62), what should be included in an optional insurance contract (s. 63) and other matters. Limited liability for some classes of owners is set out (s. 82.1) as is subrogation (s. 84).

**107**  There is authority that an insurance contract, even in the private insurance industry, is properly characterized as a statutory contract (*Simison (Litigation guardian of) v. Catlyn* [*(2004), 73 O.R. (3d) 266*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FD4T-B2W0-00000-00&context=) (CA) at para. 21). Some reliance was put on an Ontario decision that concluded *stare decisis* should not apply to statutory contracts because it would be anomalous for one insurance contract to be interpreted differently from another (*McNaughton Automotive Ltd. v. Co-Operators General Insurance Co.* [*(2005), 74 O.R. (3d) 216*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FD4T-B2Y4-00000-00&context=) at para. 110). However, a subsequent decision of the Ontario Court of Appeal overruled this decision (*David Polowin Real Estate Ltd. v. The Dominion of Canada General Insurance Co* [*(2005), 76 OR (3d) 161*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FD4T-B33G-00000-00&context=) (CA)).

**108**  A previous decision from the Saskatchewan Court of Appeal has held that, where legislation prescribes all of the provisions of a statutory contract (that is not negotiated between the parties), there is no room to imply any other terms (*Saskatchewan Crop Insurance Corp. v. Deck*, [*2008 SKCA 21*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K711-JWBS-631B-00000-00&context=) at para. 21). But in that case the legislation at issue contained essentially an entire agreement provision. In the subject case there is no equivalent to an entire agreement provision in the *Insurance (Vehicle) Act*.

**109**  I also note that the provisions of the insurance contract under the B.C. legislation are described broadly and ICBC has considerable discretion to develop specific provisions. This is not to say that there is necessarily equal bargaining power between insureds and ICBC, but I am unable to find that the entire contract of insurance is described in the *Insurance (Vehicle) Act*.

**110**  For these reasons, at this early stage in these proceedings, I am unable to find that it is clear and obvious that the respondent's claims of implied terms in the contract or contracts of insurance at issue will fail because only the Lieutenant General in Council can amend an insurance contract in B.C. That issue will have to be decided at trial.

***(ii) Breach of duty of good faith (paras. 8, 48-49, 55-57)***

**111**  The respondent alleges in his NCC that ICBC owes him a duty of good faith and fair dealing because ICBC has exclusive powers over the provision of mandatory basic automobile insurance and the respondent is at the mercy of ICBC. Some of these allegations relate to the respondents' personal information and they are dealt with in other sections. Other allegations include that it is an implied term of insurance contracts that ICBC exercise due care, skill and diligence in providing insurance coverage and that ICBC respect the respondents' interests, privacy, confidentiality and security of personal information (NCC, para. 55).

**112**  The paragraphs at issue here are the same ones as at issue under the issue of breach of the insurance contract. The contract issues are discussed above and the paragraphs at issue raise both issues of contract and good faith.

**113**  There cannot be much doubt that a duty of good faith arises under insurance contracts. The key factor is the manner of the insured's conduct, not whether there turns out to be coverage or not. The duty arises due to the special nature of the relationship and, in particular, the insurer has a duty of good faith because the insured is in a vulnerable position economically and psychologically. The insurer is required to treat the insured fairly throughout the process of investigating and assessing a claim (*I.C.B.C. v. Hosseini*, [*2006 BCCA 4*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JG02-S30P-00000-00&context=) at paras. 54 and 56; citing Craig Brown, *Insurance Law in Canada* (loose leaf), (Toronto: Thomson, 2002) (2004 Rel. 2), page 10-26).

**114**  Further this duty of good faith operates independently of any contractual duty to pay for a loss (*Hosseini* at paras. 57-59; citing *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. 79; *Asselstine v. Manufacturers Life Insurance Co.*, [*2005 BCCA 292*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FC6N-X118-00000-00&context=) at para. 23; *Shea v. Manitoba Public Insurance Corp.* [*(1991), 55 B.C.L.R. (2d) 15*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-F8KH-X1H1-00000-00&context=) (SC) at para. 191).

**115**  As pointed out by the applicant ICBC, the respondent's reliance on the duty of good faith in the subject case does not arise from a specific motor vehicle accident. Nor do the respondents claim damages for physical injury and other damages as a result of a motor vehicle accident or accidents. That is, the respondent's claim in this action is not an insurance claim (or defence of one). Instead, the respondent's action relates to how the applicants (and VPD) collected and used his personal information that was collected by ICBC under claims made by the respondents in 1993, 2003, 2006 and 2011.

**116**  However, I note the following from *Hosseini:*

1. *The duty of good faith is owed at every stage of the process.* It arises on the entry into a contractual relationship and continues throughout the life of the contract. A breach of the duty of good faith is a breach of a "contractual duty." The duty of good faith is as fundamental to the contract as are the statutory conditions and the contractual terms contained in the contract.

[Emphasis added]

**117**  From this I conclude that the duty of good faith owed by ICBC as a result of the previous claims of the respondents may continue to apply after those claims are completed and even for what might be described as collateral issues. I am not deciding those issues here but I am unable to find that they are bound to fail at this early stage of the proceedings. They will have to be more fully developed through discovery and ultimately at trial. Again, issues related to the collection, use and disclosure of personal information are dealt with in other sections of this judgement. Whether there are difficulties separating out issues under *FIPA* from issues of good faith will also have to be considered as they arise in the evidence.

**118**  To be clear the following sub-paragraphs are not struck from the respondent's notice of civil claim: sub-paragraphs 8(b) and (d); sub-paragraphs 48 (d),(e) and (i); parts of para. 55 that relate to "due care, skill and diligence in providing insurance coverage"; parts of para. 56 related to "due diligence"; and sub-paragraphs 57(b) and (d).

***(iii) Breach of implied undertaking in insurance (para. 12)***

**119**  Paragraph 12 is in the Statement of Facts of the notice of civil claim, under the heading "The Insurance Contract." It alleges that the defendants ICBC and Krescy knew or ought to have known that the information disclosed by the respondent in his 1993, 2003 and 2006 claims was subject to an implied undertaking of confidentiality. This information, according to the respondent, could not be used or disclosed for any purpose other than for the three claims except with the respondent's consent or a court order.

**120**  According to the applicants, an implied undertaking is not a contract or promise to an opposite party. It is an obligation to the court and, on that basis, it cannot constitute a cause of action (*McDaniel v. McDaniel*, [*2008 BCSC 653*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G2H4-00000-00&context=); para. 33; rev'd on other grounds, [*2009 BCCA 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B16V-00000-00&context=)).

**121**  The respondent says in argument that there is no claim for an implied undertaking. Instead, para. 12 of his claim pleads material facts that the information in dispute was subject to an implied undertaking and disclosed by the respondent in confidence and subject to an implied undertaking.

**122**  Reading para. 12 of the respondents claim, and considering it in the context of the above analysis of *FIPA*, it seems to me that it very much relates to the protections of personal information in *FIPA*. As above, ss. 30 and 30.4 regulate these matters.

**123**  On this basis it is certainly the case under *FIPA* that the respondent's personal information is subject to confidentiality on the part of public bodies like ICBC and their employees or other persons associated with them. Accordingly, the obligation plead is not an undertaking, implied or otherwise, but a statutory requirement. I can find no aspect of this issue that is not included in *FIPA*.

**124**  Paragraph 12 of the respondent's notice of claim is struck on the basis that it discloses no reasonable claim.

***(iv) Statutory breach and breach of confidence (paras. 19-37, 47(a)-(c), 53(d),(e) and(g), 58, 61(c), 61(d)***

**125**  Paragraphs 19-37 are in the Statement of Facts part of the respondent's NCC.

**126**  Paragraphs 19 and 20 are under the heading "The ICBC Police Line." The respondent describes (in para. 14-18) a "dedicated telephone line" operated by ICBC and available only to law enforcement agencies in British Columbia. This is the "Police Line." It is alleged that ICBC provided information to the police through this line in March 2010. The respondent says that he has requested that ICBC confirm what information was given to the police and there has been no reply.

**127**  In para. 19 the respondent alleges that ICBC willfully, deliberately and in bad faith avoided answering his requests for information and willfully suppressed records or information in its control. This was done to hide the existence of the Police Line and to prevent the respondent from determining how and to whom the information was disclosed. In para. 20, the respondent claims that ICBC has caused him distress, anxiety, worry and financial costs, and his trust in ICBC has been damaged.

**128**  Paragraphs 21 to 30 are under the heading "Improper Collection from the VPD." In these paragraphs the respondent alleges that ICBC and the applicant Krescy unlawfully collected information from the VPD about the respondent. The result of this (and the disclosure by VPD) is that the respondent suffered humiliation, embarrassment, distress, anxiety, worry and financial costs, and his trust in ICBC (and the VPD) has been damaged.

**129**  Paragraphs 31 to 37 are under the heading "Improper Use and Disclosure of Confidential Information." The respondent alleges that ICBC provided his personal information from previous claims to a doctor who was assessing the respondent under the 2006 claim. The respondent says that he disclosed the information on the previous claims in confidence and only for the purposes of those previous claims. He has asked ICBC for access to the information that was disclosed to the doctor and this has been refused. As a result the respondent has suffered worry, distress and anxiety and his trust in the good faith of ICBC has been damaged.

**130**  Sub-paragraphs 47(a) to (c) are in the Relief Sought section of the NCC. An interim and permanent injunction is sought by the respondent that would prohibit ICBC from using or disclosing for any purpose: information about the respondent that it improperly collected, compiled, used or disclosed; information about the plaintiff derived from information it improperly collected, compiled used or disclosed; and documents or information subject to an implied undertaking of confidentiality, without the respondent's prior written consent or a court order.

**131**  Two other orders are sought. One requires each defendant to deliver up a list and copies of all records in its possession containing information about the plaintiff that is being improperly collected, compiled, used or disclosed. The second order is one that would require each defendant to destroy all records in their possession relating to the plaintiff.

**132**  Sub-paragraphs 53(d), (e), and (g) are in the Legal Basis part of the NCC and under the title "ICBC's Breach of its Duty of Confidence." They allege that ICBC breached its duty of confidence to the respondent by disclosing confidential information about the respondent to a doctor and disclosing information to the VPD Police Line. Paragraph 53(g) alleges that ICBC breached its duty of confidence to the respondent by routinely failing to ensure the confidentiality of his personal information.

**133**  Paragraph 58 is also in the legal basis part of the respondents claim and under the title "ICBC's Breach of Contract." It alleges that the respondent has suffered harm as a result of the various breaches of duty by ICBC.

**134**  Subparagraphs 61(c) and (d) are in the Legal Basis part of the respondents claim under the title "Krescy's Duty of Confidence and Breach." They allege that the applicant Krescy breached his duty of confidence to the respondent by using the respondent's personal information to intimidate the respondent. Further and other particulars that will be known at discovery or trial are also relied on.

**135**  In their Notice of Application the applicants say that *FIPA* is a comprehensive legislative code, breaches of *FIPA* are not to be dealt with at first instance in court and the paragraphs at issue should be struck. The respondent replies by saying that the applicants are confusing a claim with a material fact. He is not suing for breach of *FIPA* but for breach of confidence, breach of privacy, ***negligence***, breach of contract and breach of the duty of good faith.

**136**  In my view this is an area of the respondent's claim that clearly attempts to replicate the protections available to him under *FIPA*. The material facts relied on by the respondent would be facts found pursuant to *FIPA* and any legal remedies available to the respondent as a result of those factual determinations are ones under *FIPA*. I do not agree that the protections in *FIPA* can be the basis of, for example, an action for breach of confidence without adjudicating the specific rights under *FIPA*. These points are also discussed in the above analysis of *FIPA* and in other parts of this judgement.

**137**  The result is that the following are struck as not disclosing a reasonable claim: paras. 31-37; sub-paragraphs 47 (a), (b) and (c); sub-paragraphs 53 (d), (e) and (g). Sub-paragraph 61 (c), challenged here by the applicants, relates to intimidation and that is addressed under that issue below. Sub-paragraph 62(d), also challenged here, relates to further particulars that may arise in discovery or at trial. It is in very general terms and may apply to the other parts of paragraph 61 that remain. On this basis it is not struck.

***(v) Intimidation (paras. 38-40, 53(c), 62(c))***

**138**  Paragraphs 38 to 40 are in the Legal Basis part of the respondent's claim under the title "Intimidation by Krescy and ICBC." They allege that Krescy willfully, deliberately and without color of right accused the respondent of criminal conduct in an "apparent attempt" to exploit the respondent's relative vulnerability to ICBC and to pressure him into not starting a proceeding in respect of a claim in 2011. Further, it is alleged that Krescy telephoned the respondent's then counsel and said that the respondent had filed a misleading claim in 2011.

**139**  It is also alleged that Krescy said to counsel for the respondent that he would recommend charges under the *Insurance Corporation Act*, that respondent's counsel might be called as a witness and that counsel for the respondent declined to act further. It is alleged that the respondent has suffered embarrassment, humiliation, distress, anger and anxiety as a result of the actions of Krescy.

**140**  Paragraph 53(c) is under the heading "ICBC's Breach of its Duty of Confidence" in the Legal Basis of the respondents claim. It alleges that ICBC breached its duty of confidence to the respondent by misusing his confidential information to intimidate him. The same allegation is made against the applicant Krescy in para. 62(c).

**141**  According to the applicants, unless a party who is threatened complies with the threat, there can be no tort of intimidation (*Fouillard Implement Exchange Ltd. v. Kello-Bilt Indust. Ltd*. [*(1985), 36 Man.R. (2d) 133*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DD1-JC5P-G33V-00000-00&context=) at paras. 21-25 (QB); aff'd [*(1985) 37 Man. R. (2d) 111*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DF1-JWR6-S3BG-00000-00&context=) (CA)). On this view, since the respondent continued with his 2011 claim, there was no intimidation.

**142**  In reply, as part of his argument, the respondent states that he has not made a claim for intimidation and is not seeking damages for the tort of intimidation. Instead, he says that paras. 38 - 40 are material facts related to the misuse by Krescy of the respondent's personal information collected for the purposes of insurance. Paragraphs 53(c) and 62(c) plead, respectively, breach of confidence and breach of privacy with respect to these facts.

**143**  I confirm the respondent's clarification that he is not proceeding with the tort of intimidation or otherwise seeking damages for that cause of action. Nonetheless, the respondent's allegations are that the applicants "used the plaintiff's personal information" to intimidate him. On this basis the claim is still predicated on a factual matter that would have to be adjudicated under FIPA. In other words, if the applicants did use his personal information to intimidate him, that would be a question to be adjudicated under s. 32 of FIPA, which governs how public bodies may use personal information. Paras. 38-40, 53(c), 62(c)) are struck to this extent. Finally, I note that sub-paragraph 61(c) relates to intimidation but it has not been challenged by the applicants here.

***(vi) Negligent disclosure of personal information (paras. 50-51, 58)***

**144**  Paragraphs 50 and 51 are in the Legal Basis part of the respondents claim under the title "ICBC's ***Negligence***."

**145**  Paragraph 50 alleges that ICBC owed the respondent a duty of care to manage his personal information in a reasonable manner including its collection, use and disclosure only for insurance purposes and ensuring its confidentiality was maintained. Further, ICBC had a duty of care to establish and apply reasonable policies and procedures and implement adequate employee training to protect personal information in its custody. And ICBC had a duty of care to "comply with its statutory duties to protect personal information in its custody or under its control including the duties under part 3 of the [*FIPA*]."

**146**  Paragraph 51 alleges that ICBC was negligent and breached its duty of care by failing to manage the respondent's personal information in a reasonable manner. Sixteen particulars of the ***negligence*** of ICBC are set out including failure to comply with the duties under Part 3 of *FIPA*.

**147**  Paragraph 58 is under the title "ICBC's Breach of Contract." It alleges that the respondent has suffered harm as a result of ICBC's ***negligence***.

**148**  The parties are joined on whether there exists in law an action for negligent breach of statutory duty. The applicants submit that the respondent's claim is for breach of *FIPA* but that is not recognized in law. The respondent replies that *FIPA* does not bar a claim in ***negligence***. This is because there was proximity in the relationship between the parties, public policy strongly supports the need for an existence of a duty of care in the circumstances of the respondent's claim and the acts, there is no provision for civil damages in *FIPA* and the acts and omissions the respondent complains of are operational acts rather than policy decisions.

**149**  A recent decision of this court is of some assistance here, *Ari v. Insurance Corporation of British Colombia*, [*2013 BCSC 1308*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JCRC-B221-00000-00&context=) (counsel advise that this decision has been appealed but no hearing date has been scheduled). Similar to the subject case, the plaintiff in *Ari* claimed that s. 30 of *FIPA* was a legislative decree to protect personal information that gave rise to a duty of care. The claim was not for loss arising from a breach of *FIPA* but for negligent acts or omissions done in implementing its legislated duty of care. Since *FIPA* does not provide any specific penalty or mechanism of enforcement under s. 30 the plaintiff in *Ari* submitted that it must be inferred that the legislature intended for the courts to enforce that provision. (See paras. 6-12, 43).

**150**  In *Ari* Madam Justice Russell ultimately concluded that it was plain and obvious that the plaintiff had failed to disclose a reasonable claim of negligent protection of privacy and negligent protection of privacy, among other findings. She applied the Supreme Court of Canada decision in *Saskatchewan Wheat Pool*, (considered in the above section on *FIPA*) and noted that the court declined to recognize a nominate tort of statutory breach (*Ari*, para. 82). The reasoning for this included a conclusion that the civil consequences for statutory breach should be subsumed in the law of ***negligence*** and the notion of a nominate tort of statutory breach should be rejected (*Saskatchewan Wheat Pool,* para. 42). "***Negligence*** and its common law duty of care have become pervasive enough to serve the purpose invoked for the existence of the action for statutory breach" (*Saskatchewan Wheat Pool,* para. 37).

**151**  In a subsequent decision, also applied by Madam Justice Russell in *Ari*, the Supreme Court of Canada returned to the issues in *Saskatchewan Wheat Pool* in *Holland v. Saskatchewan* , [*2008 SCC 42*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1CS-00000-00&context=). The court in *Holland* addressed the issue of whether a claim for negligent failure to implement a judicial decree could succeed in law. Such a claim is different from negligent breach of a statute because it is a claim for damages for ***negligence*** based on acts done in pursuance or in implementation of legislation or of adjudicative decrees. The court concluded that there is a distinction between "policy" and "operational" decisions:

Policy decisions about what acts to perform under a statute do not give rise to liability in ***negligence***. On the other hand, once a decision to act has been made, the government may be liable in ***negligence*** for the manner in which it *implements* that decision: *Kamloops (City of) v. Nielsen,* [*[1984] 2 S.C.R. 2*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2339-00000-00&context=); *Just v. British Columbia,* [*[1989] 2 S.C.R. 1228*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-652N-00000-00&context=); *Laurentide Motels Ltd. v. Beauport (City),* [*[1989] 1 S.C.R. 705*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-23NR-00000-00&context=); *Lewis (Guardian ad litem of) v. British Columbia*, [*[1997] 3 S.C.R. 1145*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M3WV-00000-00&context=). Public authorities are expected to implement a judicial decision. Consequently, implementation of a judicial decision is an "operational" act. It is therefore not clear that an action in ***negligence*** cannot succeed on the breach of a duty to implement a judicial decree.

[emphasis in original]

**152**  As above, the respondent says his claim is that ICBC failed in its implementation of a judicial decree and, therefore, his claim in ***negligence*** is a valid one to advance.

**153**  On the basis of the judgement in *Ari*, and without the benefit of seeing the pleadings in that case, I accept that the respondent in the subject case has pleaded ***negligence*** in considerable detail when compared with *Ari*. However, I am not persuaded that this changes the substance of the respondent's claim that there have been violations of the principles of *FIPA*.

**154**  It is true that *FIPA* does not authorize the Commissioner to award civil damages. However, as discussed in *Saskatchewan Wheat Pool* and above, the legislature has decided that financial remedies for breaches of *FIPA* are in the form of penalties payable to the state. It would be conjecture to conclude that the legislature intended to include a private right (and private damages) in *FIPA*.

**155**  In general, the respondent here claims that the applicants were negligent when they collected, used and disclosed his personal information. As discussed above, the Commissioner is authorized by *FIPA* to investigate and make decisions (including reviews) about these matters. In his claim the respondent urges this court to make them. Applying the case law discussed above, that is not the role of this court. Once those decisions are made by the proper authority there may be claims in ***negligence*** about how they are implemented but that is not the claim here; those decisions have not yet been made.

**156**  In summary, it is plain and obvious that the respondent has failed to disclose a reasonable claim for negligent protection of private information. Paras. 50-51 are struck from his NCC and the parts of para. 58 that relate to ***negligence*** are also struck.

***(vii) Breach of privacy (paras. 14-30, 54, 58, 62(b), 62(d))***

**157**  According to the applicants' notice of application paras. 14 to 30 are problematic. The written argument of the applicants identifies paras. 14-30 as being at issue. I will proceed on the basis that the applicants are challenging paras. 14-30. They are in the Statement of Facts part of the respondents notice of civil claim and under the title "The Defendants Misconduct/The ICBC Police Line."

**158**  Paragraphs 14 to 20 describe a dedicated telephone line operated by ICBC and available only to law enforcement agencies in British Columbia, the Police Line. The respondent says that in February 2006 ICBC disclosed personal information about the respondent using this line. In March 2010 the respondent requested that ICBC disclose information collected used or disclosed by ICBC. ICBC has not responded to that request.

**159**  Paragraphs 21 to 30 allege that the applicant Krescy arbitrarily and in bad faith collected information from the VPD about the respondent. In June 2009 Krescy requested and obtained from the VPD three files involving the respondent. None of these files related to any claim filed by the respondent with ICBC. The respondent also alleges that ICBC or Krescy (or the VPD) did not take reasonable steps to determine whether the three files contained information that was necessary to investigate any claim by the respondent with ICBC. As a result of this collection and disclosure of information the respondent says he has suffered humiliation, embarrassment, distress, anxiety, worry and financial costs, and his trust in ICBC and the VPD has been damaged.

**160**  Paragraph 54 is in the Legal Basis part of the respondents claim under the title "ICBC's Breach of Privacy." It alleges that the collection of the respondent's private personal information by ICBC willfully and without color of right violated the respondent's privacy. A number of particulars are set out including disclosing information to the Police Line, collecting information from the VPD and disclosing information to a doctor and other matters.

**161**  Paragraph 58 is described above.

**162**  Subparagraphs 62(b) and (d) alleges that the applicant Krescy willfully and without claim of right violated the respondent's privacy by using his personal information for purposes other than that for which it was collected or compiled or otherwise permitted by law. He also violated the respondent's privacy by collecting personal information about the respondent in the three files obtained from the VPD.

**163**  According to the applicants, there is no common law tort of invasion of privacy in British Columbia and any such claim must arise from a statutory cause of action under the *Privacy Act*. Further, a corporation is only able to act through his agents and employees so any tort liability for a corporation is governed by the rules of vicarious liability. The applicants also say that the respondent's pleadings on this issue fail because he has not pleaded an individual who formed the directing mind of ICBC to commit the tort.

**164**  For his part, the respondent submits that a corporation may be liable for an intentional tort and it is not correct that a corporation is governed solely by the rules of vicarious liability. The respondent accepts that a corporate entity must act through the medium of individuals as the corporations directing mind, but the identity of such individuals is a matter of evidence and is not an essential element of the tort.

**165**  To the degree that the pleadings are deficient with respect to the statutory tort of invasion of privacy and the issue of any directing mind of ICBC, I conclude that this can be remedied through an amendment of the pleadings (*Owners, Strata Plan LMS 1328 v. City of Surrey, et al.*, [*2001 BCCA 693*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JSC5-M45B-00000-00&context=) at para. 5). I do not agree with the applicants that paras. 14-30, 54, 58, 62(b), 62(d) should be struck. I take the applicants point that paras. 14-30 set out matters that are properly under *FIPA*. That may be the result at the end of the day but at this early stage in this proceeding is not possible to separate matters under *FIPA* from the tort of invasion of privacy.

1. **Implied undertaking (discovery)**

**166**  The applicant ICBC is involved in another proceeding in this court where the respondent is a party. ICBC seeks release from all implied undertakings with respect to that other proceeding (for themselves and for their counsel in that other proceeding) for the purpose of providing documents and oral discovery evidence in the subject proceeding. It accepts that the two proceedings are not similar but they are inextricably connected. The respondent opposes releasing ICBC from its implied undertakings in the other proceeding.

**167**  I have discretion to relieve a party to one proceeding from its implied undertaking to keep information in another proceeding confidential. Leave will generally be granted where there is little prejudice to the producing party and there are issues of cost and effort. An applicant for leave must demonstrate, on a balance of probabilities, that there exists a public interest of greater weight than the value of confidentiality (*Juman v. Doucette*, [*2008 SCC 8*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1BF-00000-00&context=) at para. 30; *Bodnar v. The Cash Store Inc.*, [*2010 BCSC 660*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-632S-00000-00&context=) at paras. 49-57; *Cochrane v. Heir*, [*2011 BCSC 477*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1W0-00000-00&context=) at paras. 4-7).

**168**  I conclude that this is a case where ICBC should be relieved of its undertaking of confidentiality in the other proceeding. There is no significant prejudice to the respondent and documents from the other proceeding are required in order to prepare a defence. Finally, there would be additional cost and time if the parties were to essentially duplicate what occurred in the other proceeding. In this case the public interest outweighs the value of confidentiality.

**169**  The applicants and their counsel in the proceeding of *Cook v. Kang*, Supreme Court of British Columbia, Vancouver Registry file #M084033, are released from all implied undertakings with respect to that proceeding solely for the purpose of providing any documents and oral discovery evidence for the subject proceeding.

**D. Summary**

**170**  The following paragraphs and sub-paragraphs in the respondent's NCC are struck as disclosing no reasonable claim:

1. Subparagraphs 8(c), (e) and (f).
2. Paragraph 12.
3. Paragraphs 31-37.
4. Paragraphs 38-40.
5. Subparagraphs 47(a), (b), and (c).
6. Subparagraphs 48(a), (b), (c) and (f).
7. Paragraphs 50 and 51.
8. Sub-paragraphs 53(c), (d), (e) and (g).
9. Paragraph 55 to the extent it includes issues under *FIPA*
10. Sub-paragraphs 57(c), (e) and (f)
11. Paragraph 58 to the extent it includes issues under *FIPA* and ***negligence***.
12. Sub-paragraph 61(d).
13. Paragraph 62(c)

**171**  Finally, the applicants and their counsel in the proceeding of *Cook v. Kang*, Supreme Court of British Columbia, Vancouver Registry file #M084033, are released from all implied undertakings with respect to that proceeding solely for the purpose of providing any documents and oral discovery evidence for the subject proceeding.

**172**  I remain seized to determine any issues with respect to the implementation of the above, including any disputes over the amendment of pleadings that result.

**173**  Costs will be in the cause.

J. STEEVES J.

\* \* \* \* \*

**CORRIGENDUM**

Released: July 7, 2015

[1] Following a judgment issued on July 14, 2014 (Cook v. The Insurance Corporation of British Columbia, 2014 BCSC 1289) (the "Judgment") there there is a need for amendments to settle the final order.

[2] The Judgment related to the defendants' application to strike a number of parts of the plaintiff's Notice of Civil Claim ("NCC") because they came within the exclusive authority of the Freedom of Information and Protection of Privacy Act, *RSBC 1996, c. 165*. The Judgment concluded that a number of

[3] The Summary in paragraph 170 of the Judgment is amended as follows:

1. Pursuant to paragraph 143 of the Judgment, add as sub-paragraph (d) to the Summary: "(d) Paragraphs 38-40" of the NCC and re-letter the following items.
2. Pursuant to paragraph 143 of the Judgment, add: "53(c)" of the NCC to sub-paragraph (h) of the Summary.

(c) Pursuant to paragraph 143 of the Judgment, add as a new

sub-paragraph to the Summary: "(m) Paragraph 62(c)" of the

[4] There is no sub-paragraph 60(d) in the NCC; therefore, paragraph 165 of the Judgment is amended to delete "and 60(d)."

[5] For the purposes of the final order, pursuant to paragraph 102 of the Judgment, the following is deleted from paragraph 55 of the NCC: "taking into account his interests, his privacy, confidentiality and the security of his personal information, and at minimum exercise at least as much care and diligence as ICBC would exercise in respect of its own interests,

[6] As stated in paragraph 165 of the judgment, I confirm that paragraphs 14-30 of the NCC are not struck at this stage.

J. STEEVES J.

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**CORRIGENDUM**

Released: August 10, 2015

[1] A judgment was issued on July 14, 2014 (Cook v. The Insurance Corporation of British Columbia, 2014 BCSC 1289) (the "Judgment"). Subsequently, a corrigendum was issued on July 7, 2015 (2014 BCSC 1289), amending the Judgment and correcting the final order (the "Corrigendum").

[2] The Judgment and Corrigendum dealt with the defendants' application to strike certain portions of the Notice of Civil Claim ("NCC") because they were within the exclusive authority of the Freedom of Information and Protection of Privacy Act, *RSBC 1996, c. 165*. A number of paragraphs from the plaintiff's

[3] Further amendments now need to be made to the Judgment to resolve an inconsistency that was not addressed in the Corrigendum of July 7, 2015.

[4] At paragraph 137 of the Judgment, paragraphs 19-37 of the NCC were struck out as not disclosing a reasonable claim. This contradicts paragraph 165 of the Judgment where paragraphs 14-30 of the NCC are not struck out as to do so would be premature at this stage of the proceeding. Paragraph 6 of the Corrigendum stated: "As stated in paragraph 165 of the [J]udgment, I confirm that paragraphs 14-30 of the NCC are not struck at this stage."

[5] As can be seen there is an overlap between paragraphs 137 and 165 of the Judgment such that paragraphs 19-30 of the NCC are both struck and not struck. At this early stage the resolution is to delete the reference reference in paragraph 137 of the Judgment to paragraphs 19-37 of the NCC and replace it with paragraphs 31-37. That is, paragraphs 31-37 of the NCC are struck and paragraphs 19-30 are not struck. For completeness, the conclusion in paragraph 165 of the Judgment that paragraphs 14-30 of the NCC are not struck is confirmed.

[6] The summary in paragraph 170 of the Judgment will also need to be amended to reflect this change. The reference in paragraph 170 (c) of the Judgment to paragraphs 19-30 of the NCC is also deleted and replaced with paragraphs 31-37.

J. STEEVES J.

**End of Document**

[***J.C. v. Shaw, [2011] B.C.J. No. 2329***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JPP5-22P0-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

G.B. Butler J.

Heard: May 9-13 and June 6-7, 2011.

Judgment: November 10, 2011.

Docket: 07-1807

Registry: Victoria

**[2011] B.C.J. No. 2329** | 2011 BCSC 1529 | 89 C.C.L.T. (3d) 296 | 210 A.C.W.S. (3d) 386 | 2011 CarswellBC 3449

Between J.C., Plaintiff, and Phil Shaw and Ian Baker and Baker Industries Ltd., Defendants

(139 paras.)

**Case Summary**

**Damages — For torts — Affecting the person — Assault — Sexual assault — Action by plaintiff against her supervisor and employer for damages for sexual assault allowed — Plaintiff was sexually assaulted by her supervisor nine times while they were working together — Plaintiff was credible witness — Supervisor's denial was unconvincing — Employer not liable in *negligence* and not vicariously liable — Employer's employment of supervisor did not materially increase risk of sexual assault — Plaintiff awarded non-pecuniary damages of $70,000, reduced by 15 per cent for pre-existing conditions caused by childhood sexual abuse — Plaintiff awarded $22,500 for past income loss and $3,000 for costs of future care — No punitive damages.**

**Damages — Physical and psychological injuries — Considerations impacting on award — Pre-existing injury — Action by plaintiff against her supervisor and employer for damages for sexual assault allowed — Plaintiff was sexually assaulted by her supervisor nine times while they were working together — Plaintiff was credible witness — Supervisor's denial was unconvincing — Employer not liable in *negligence* and not vicariously liable — Employer's employment of supervisor did not materially increase risk of sexual assault — Plaintiff awarded non-pecuniary damages of $70,000, reduced by 15 per cent for pre-existing conditions caused by childhood sexual abuse — Plaintiff awarded $22,500 for past income loss and $3,000 for costs of future care — No punitive damages.**

**Damages — Types of damages — General damages — For personal injuries — Considerations — Cost of future care — Special damages — Past loss of income — Action by plaintiff against her supervisor and employer for damages for sexual assault allowed — Plaintiff was sexually assaulted by her supervisor nine times while they were working together — Plaintiff was credible witness — Supervisor's denial was unconvincing — Employer not liable in *negligence* and not vicariously liable — Employer's employment of supervisor did not materially increase risk of sexual assault — Plaintiff awarded non-pecuniary damages of $70,000, reduced by 15 per cent for pre-existing conditions caused by childhood sexual abuse — Plaintiff awarded $22,500 for past income loss and $3,000 for costs of future care — No punitive damages.**

**Tort law — Trespass — To person — Sexual assault — Action by plaintiff against her supervisor and employer for damages for sexual assault allowed — Plaintiff was sexually assaulted by her supervisor nine times while they were working together — Plaintiff was credible witness — Supervisor's denial was unconvincing — Employer not liable in *negligence* and not vicariously liable — Employer's employment of supervisor did not materially increase risk of sexual assault — Plaintiff awarded non-pecuniary damages of $70,000, reduced by 15 per cent for pre-existing conditions caused by childhood sexual abuse — Plaintiff awarded $22,500 for past income loss and $3,000 for costs of future care — No punitive damages.**

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| Action by JC for damages for sexual assault. Baker alleged that she was sexually assaulted by her supervisor, Shaw, nine times while they were working together. JC claimed against her employer, Baker Industries Ltd., and its owner, Baker. Baker was Shaw's stepfather. There were no witnesses to the assaults. The evidence of JC and Shaw about the allegations was entirely at odds. JC testified about each of the assaults in detail. The alleged assaults ranged from Shaw touching her breasts through her shirt to his restraining her while he pressed his body against hers. JC had been the victim of childhood sexual abuse.  HELD: Action allowed.  JC was a very credible witness. JC's explanation for not telling anyone about the assaults because she did not want to lose her job was credible. Shaw's denial of the assaults was unconvincing. Baker Industries was not liable in ***negligence***. When it learned of JC's allegations, it ensured that Shaw and JC no longer worked together. Baker Industries was not vicariously liable for Shaw. Baker Industries' employment and empowerment of Shaw did not materially increase the risk of the sexual assault. JC was awarded non-pecuniary damages of $70,000, to be reduced by 15 per cent for her pre-existing condition due to her childhood sexual abuse. JC was awarded $22,500 for past income loss and $3,000 for costs of future care. There was no award for future income loss or punitive damages. |

**Statutes, Regulations and Rules Cited:**

***Negligence*** Act, [*RSBC 1996, CHAPTER 333, s. 4*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JBDT-B069-00000-00&context=)

**Counsel**

Counsel for the Plaintiff: Angela R. Atwood-Brewka.

Counsel for the Defendants: Alison D. Taylor.

**Reasons for Judgment**

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| **G.B. BUTLER J.** |

**1**   At the suggestion of her employer, J.C. decided to leave work at the local laundromat and learn a trade. She took an introductory plumbing course at Malaspina College and started working at Baker Industries Ltd. ("Baker Industries"), a small family plumbing business. Initially, she worked as an unpaid "job-shadow" with a journeyman plumber, but was soon hired as an apprentice. Her employment at Baker Industries lasted for less than a year. She says that her supervisor, Phil Shaw, sexually assaulted her on a number of occasions in 2005 while they were working together (the "Assaults"). Shortly after revealing this to Ian Baker, the owner of Baker Industries and stepfather of Mr. Shaw, she quit and eventually commenced this action. She says that since the Assaults, she has suffered severe emotional distress.

**2**  Mr. Shaw says he never sexually assaulted Ms. Corfield. He admits that he worked with Ms. J.C. at the job sites where she says the Assaults occurred but denies that the alleged incidents took place as she described, or at all. The defendants say they first learned of the allegations of sexual assault when the writ of summons was issued approximately one and a half years after Ms. J.C. left Baker Industries. They say the only complaint Ms. J.C. made when she quit was that Mr. Shaw acted inappropriately, and that Baker Industries dealt with that complaint in an appropriate manner at the time.

**3**  There were no witnesses to the Assaults. The evidence of Ms. J.C. and Mr. Shaw about the allegations is entirely at odds. There is no middle ground; one of them is not telling the truth. As Justice Rothstein noted at para. 81 in *F.H. v. McDougall*, [*[2008] 3 S.C.R. 41*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1D5-00000-00&context=) [*McDougall*], this places the court in a difficult position:

Trial judges faced with allegations of sexual assault may find that they are required to make a decision on the basis of whether they believe the plaintiff or the defendant and as difficult as that may be, they are required to assess the evidence and make their determination without imposing a legal requirement for corroboration.

**4**  While the task facing a trial judge is difficult, the standard of proof and the proper approach to determining liability is the same in cases of sexual assault as it is in all civil cases. The standard of proof is not elevated because the plaintiff has alleged morally blameworthy conduct on the part of the defendant. Rothstein J. concluded at para. 49 in *McDougall*:

In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

**5**  As Rothstein J. noted at para. 46, the evidence required to satisfy the standard of proof must be clear, convincing and cogent:

Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency.

**6**  Having scrutinized the evidence with care, I conclude Ms. J.C. has proved on a balance of probabilities that Mr. Shaw assaulted her as alleged on nine occasions while they worked together. My reasons for arriving at this conclusion and for my assessment of the damages to which she is entitled are set out below, as are my conclusions regarding the liability of Mr. Baker and Baker Industries. The issues I have considered are:

1. Did Mr. Shaw assault Ms. J.C.?
2. Is either or both of Mr. Baker and Baker Industries directly liable for the Assaults?
3. Is Baker Industries vicariously liable for the Assaults?
4. What damages should be awarded to Ms. J.C.?

**Issue 1. Did Mr. Shaw assault Ms. J.C.?**

**7**  I begin my examination of this issue by summarizing the evidence of Ms. J.C. and Mr. Shaw regarding the Assaults. Ms. J.C. described each of the Assaults in some detail. In spite of being examined for discovery for two days and testifying at trial for more than two days, she was consistent in her description of the Assaults. Mr. Shaw did not describe the events that occurred at the various job sites in any detail but consistently denied the Assaults.

**8**  Following the summary of their evidence, I consider Mr. Shaw's arguments challenging Ms. J.C.'s credibility and, in the course of doing so, explain why I have accepted her evidence regarding the Assaults.

**Ms. J.C.'s Evidence**

**9**  Ms. J.C. described 12 incidents. Three of them did not involve assaults. She described the nine incidents of assault in chronological order, although she could not recall the dates of the incidents. The Assaults occurred between May and late November of 2005. Most of the Assaults happened later in that time period. This is because Ms. J.C. was assigned to work with Mr. Shaw more frequently as time went by. Mr. Shaw was responsible for handing out the job assignments at Baker Industries. She said that by the later part of her tenure she worked with him frequently. It seemed to her that she was always assigned to jobs with him.

**10**  The Assaults occurred at the following locations:

Incident #1 - 2nd St.

Ms. J.C. was assigned to a small house to fix a broken toilet flange. She was unable to do so and called Mr. Shaw for assistance. He came to the residence while she was working and explained the steps required to accomplish the repair. She completed the repair and was on her knees in front of the toilet while tightening the T-bolts. Suddenly, and without warning, Mr. Shaw put his hands over her breasts from behind. She was stunned at what happened as it could not have been an accident. She left in her van in a hurry.

Incident #2 - Maple Bay Rd.

This was similar to the first incident. It was at a large house where she was doing a toilet repair. She was not able to remove the tank. She called and asked Mr. Shaw for assistance. He told her to try to drill the old bolts. She was doing this when Mr. Shaw arrived and again grabbed her breasts from behind her. Immediately after he did that, the owner of the house came in. She was startled and froze. She does not recall how the embarrassing situation ended.

Incident #3 - Sherman Rd.

This was a multi-residential new construction project where Baker Industries was doing all of the finishing plumbing. The incident occurred in unit 16 or 17. Ms. Corfield was lying on her back working on a sink. Mr. Shaw came into the room and commented on her looks. He said she was supporting a nice body. He put his hand on her chest. She froze and held her breath until he left the room.

Incident #4 - Nitnat

Baker Industries had a contract to do repairs to the plumbing at the First Nations reserve. The reserve is a two hour drive from Duncan. Ms. J.C. and Mr. Shaw drove out in his van and performed the repairs. On the way back, in the vicinity of the town of Sahtlam, his cell phone rang. He pulled the van off the road. After he hung up he did some paperwork and then approached Ms. Corfield's side of the car. He opened the door and grabbed her legs. She resisted and tried to turn into the van. He persisted and climbed in after her. He touched her all over including her breasts, buttocks and legs. He moaned and said that he wanted to have sex with her. She attempted to push him off. She shook her head and said no. She distinctly recalls what he smelled like and how he moaned. Eventually he stopped and drove the rest of the way back to Duncan. It was during this drive that Ms. Corfield told Mr. Shaw that she had been sexually abused by her own stepfather (the "Childhood Abuse"). She told Mr. Shaw this was bringing back those difficult memories.

Incident #5 - Drinks with Bill Elder

After working together, Ms. J.C. and Mr. Shaw went to a bar to have drinks with Bill Elder, one of the other plumbers working for Baker Industries. When they left the bar, Mr. Elder departed and Mr. Shaw drove Ms. J.C. to the location where she left her van earlier in the day. When she tried to get into her own van, Mr. Shaw prevented her from closing the door. He said he wanted to have sex with her. She said no and told him she wanted to go home. He grabbed one of her arms and held it behind her and pushed his body towards her. She was fighting and pushing him away. She twisted and tried to get into her van. He continued to hold on to her arm which was behind her and she ended up facing the interior of the van. Mr. Shaw pressed his body against her from behind. She could feel his erection through both of their clothing. He was excited as he pushed himself against her. He was touching or rubbing her neck. Eventually she got into her van. Her arm was sore and she was trembling and very upset. She drove home, showered and cried.

Incident #6 - Cowichan River Park

After completing a plumbing job with Ms. J.C., Mr. Shaw drove towards Duncan on back roads past the Cowichan River Park. He stopped at the park and they got out of the vehicle to look at the river. After they got back into the van he reached over to touch her. She turned away with her back to him. He continued to touch her and held her arms to restrain her. She struggled and tried to push him but could not get away. He touched her legs and chest and put his hand up her shirt. He pushed his body against her. As he got more excited he became rougher. He was mumbling and moaning. Ms. J.C. closed her eyes and tried to put her mind somewhere else. He eventually climbed off her and drove back to Duncan. She does not remember the rest of the drive.

Incident #7 - McNeil Rd.

This incident occurred at a four-unit new construction project. Ms. J.C. and Mr. Shaw were working on the plumbing installation in the crawl space. She was working on a water line when he put his hands on her chest. It happened suddenly and unexpectedly. That was the extent of the assault. Ms. J.C. also described an incident at the same job where Mr. Shaw angrily threw a piece of pipe across the space in which they were working. He had a real temper. It was not unusual for him to hit his steering wheel angrily or to throw his tools into the van. He often criticized his wife and said that Ms. Corfield's boyfriend was no good for her.

Incident #8 - at Mr. Shaw's residence

After work one evening, Mr. Shaw called Ms. J.C. and asked her to bring him his note pad which he had left in her van. She offered to bring it the next morning but he insisted she bring it over as he needed it for work he was doing. She complied and helped him with the paperwork he was doing at his home. They each had a Mike's Hard Lemonade while working. As she got up to leave, he approached her and put his arms around her and got her down on the floor. She got up and tried to leave but he cornered her by the door to his bedroom. She grabbed onto the door frame so she wouldn't be taken into the bedroom but could not fight him off. He got her down on the floor with her head under the edge of the bed. He touched her all over her body. He lay on top of her and thrust his body against her. He tried to take her clothes off but she resisted. She kept saying she wanted to go home. Again, she says her mind shut off and went elsewhere. Eventually he stopped, but she did not describe how that occurred. She went home, showered and locked herself in the bathroom until she could face the rest of the evening.

Incident # 9 - Wilson Rd. Pump house

Ms. J.C. told Mr. Shaw that she wanted to get some experience with well systems. This job came up late in the afternoon. As they were driving to the pump house in separate vans, he stopped at a liquor store and bought a six-pack of beer. When he did this, Ms. J.C. told him that she did not want to go to the job. However, he gave her a look that terrified her and he smashed his hand against the van. She decided she had to go to the job. She recalls seeing rats and a mattress in the pump house. She tried to stay away from him as they worked but he soon grabbed hold of her and restrained her arms. He pushed her up against the wall of the pump house and thrust his body against hers. He fumbled with her clothing and slammed himself against her. He tried to kiss her. Although they were still clothed, she could feel his erection against her. She closed her eyes and was very concerned about whether Mr. Shaw would carry on with the assault. She was very frightened. He eventually stopped and she left in her van and drove home. She was bruised on her back as a result of being thrust against the wall. This was the last incident.

**11**  She also described three incidents that did not involve an assault. One of these occurred at Aros Road. Mr. Shaw became angry, swore and struck the steering wheel of the van. Ms. J.C. was quite upset by his behaviour and asked to be taken home. The second incident took place one evening at Mr. Shaw's residence. She went to his home at his suggestion in order to clean out her van. In the course of that evening they consumed quite a bit of alcohol. At one point Mr. Shaw became angry and tried to grab Ms. J.C.. She continued working in the van and managed to avoid him. The third incident took place at a job at a pump house. It was a small cramped space and he cornered her. She managed to get past him to the compressor and indicated she didn't want him to touch her. She used a number of different strategies to try to tell him that she didn't want him to touch her but they didn't always work.

**12**  After the various incidents took place, when Ms. Corfield and Mr. Shaw next met at work they carried on as if nothing had happened. They spoke to each other and joked around as usual. Observers would not expect that anything unusual was going on between them. At some point after the incident which occurred following drinks at the pub with Bill Elder, she spoke to Mr. Shaw about his behaviour and told him that it had to stop. She explained that she loved her boyfriend. Mr. Shaw was upset and angry. After that he treated Ms. J.C. poorly and gave her the "cold shoulder"; he didn't talk to her. He made her life miserable and made her work late. She felt lost, frustrated, confused and left out.

**13**  Ms. J.C. did not tell her friends, family or anyone at work about the Assaults. She did not tell anyone because she thought she could handle it herself. She thought she could fix the situation by telling Mr. Shaw that she was not interested in his advances. She thought it would end if she kept saying no and indicated by her actions that she did not want his attentions. Ms. J.C. was concerned that, as one of only a few young women working in a male dominated industry, she could lose her job if she told people at work about the Assaults. She also thought she would lose her relationship if her boyfriend learned about them. She thought she could lose everything.

**14**  Ms. J.C. first told Mr. Baker about Mr. Shaw's inappropriate behaviour after the company Christmas party. This occurred at a meeting between Ms. J.C., the Bakers and Mr. Elder. Ms. J.C. testified that this meeting took place a number of days after the Christmas party. Mr. Elder thought it was a week or more after the party. The Bakers both said the meeting occurred on the day after the party. I need not decide with precision when the meeting occurred. There is no doubt that it must have been shortly after the Christmas party because Ms. J.C. quit within a week of the party. It seems likely that the meeting took place on either the Monday or Tuesday after the Christmas party.

**15**  The Christmas party was memorable because of an incident that occurred at the end of the evening. The party was held at the Bakers' residence, which was also the location of the office for Baker Industries. Ms. J.C. and her boyfriend came to the party in the same car with Mr. Shaw and his wife. At the end of a pleasant evening, Ms. J.C., her boyfriend and Mr. Shaw's wife went to the car after saying goodbye to the hosts. Mr. Shaw stayed to tell his parents how much he appreciated everything they had done for him. After some time, Ms. J.C.'s boyfriend went back to the house to tell Mr. Shaw it was time to leave. Mr. Shaw reacted angrily and, according to Ms. J.C., struck and pushed her boyfriend. Mr. Baker and the boyfriend tried to calm Mr. Shaw but had difficulty doing so. Eventually, Mr. Baker asked someone to call the police. The police attended and Mr. Shaw was taken to jail for the rest of the night, at the Bakers' request. He was not charged with any offences. The incident was upsetting for everyone.

**16**  On the day of the meeting with the Bakers, Mr. Elder saw Ms. J.C.'s truck at Reggies Veggies, where she was working. He went in to see her. She was distraught. He asked her what was wrong and she told him that Mr. Shaw was behaving inappropriately with her and she couldn't take it anymore. She did not describe the inappropriate behaviour in any detail. She was crying and extremely upset. Mr. Elder told her that she must tell Mr. Baker. He called Mr. Baker and the two of them went to the Baker residence and met with Mr. and Mrs. Baker.

**17**  At the meeting, Mr. Elder explained what he had just learned from Ms. J.C.. She was hysterical at the time. She sat on the floor and cried throughout the meeting. She told them that Mr. Shaw had acted inappropriately with her and that she did not want to work with him anymore. She could not recall exactly what she said. She believed that Mr. Baker asked her questions about what kind of inappropriate behaviour. He may have asked if Mr. Shaw tried to kiss her. However, she does not recall what she told him. Mr. Baker indicated that he would investigate the matter and that in the meantime, she would not have to work with Mr. Shaw. Indeed, he would arrange the job assignments so that Mr. Shaw would never be in the same room with her.

**18**  Over the next few days she did not have to work with Mr. Shaw. He was not in the office when the work was handed out in the morning but she could see him in other parts of the Baker house. She felt very awkward. In addition, she had told her boyfriend about Mr. Shaw's advances and her boyfriend said she had to quit working for Baker Industries. At the end of that week, she resigned. She told Mr. Baker that her boyfriend said she could not work there anymore.

**Mr. Shaw's Evidence**

**19**  Mr. Shaw said he worked at job sites with Ms. Corfield on a maximum of ten occasions. He described those jobs. Most of them are at the locations described by Ms. Corfield. The following is Mr. Shaw's description of his work experiences with Ms. J.C.:

Sahtlam Rd.

This job involved a residential well system that was not producing enough water. He assigned the job to her and attended with her so she could get some experience in simple well systems.

Norcross Rd.

This job involved work in the crawl space of an old house. The client indicated there was a leak in the crawl space but could not say what kind of pipe was leaking. Given the age of the house, it was possible that the pipe could be galvanized or cast iron. Ms. J.C. did not have much experience with either. It is possible to have problems with cast iron pipe if it is cut in the wrong place. He went with her to the job to assist. He thought it would be a good learning experience for her.

Aros Rd.

This job involved gutter cleaning on a two storey house using an 18 foot ladder. He needed someone to work with him to hold the ladder. Ms. J.C. was the logical employee to take with him because her hourly rate was the lowest. He did not have an angry outburst at that job.

Sherman Rd.

Ms. J.C. was working with Gus Pimental, one of the other Baker Industries plumbers, at this new construction site. Mr. Shaw prepared the quotes for the job and attended at the site on occasion to see how the work was coming. He recalls seeing Ms. J.C. when he attended the site. The work involved perimeter drains as well as new fixtures.

Wilson Rd.

This job was at a pump station on the reserve for the Cowichan band. She was assigned the job to get experience on a more complex well system. The call came because the system was not delivering any water. It was a low yield well with two pumps, a bladder tank and a water softening system. It was quite complex.

Nitnat Rd.

Mr. Shaw took Ms. J.C. to the Nitnat site because the job required two people. It was easy service work that involved fixing tub drains, toilets, hose bibs, and vanity sinks. She was the best plumber to take with him given her lower hourly rate. He recalled two events that took place on the Nitnat trip. Ms. J.C. had been bruised on a prior occasion when a hot water tank she was working on fell and hit her leg. She told Mr. Shaw about the incident and showed him the bruise either on the way to or return from Nitnat. To do so she pulled down her pants to show the very large bruise on her hip or upper leg. He asked if she needed to go on compensation or see a doctor. She indicated that she was fine and did not require medical attention. Mr. Shaw described her as a tough lady. Mr. Shaw also recalled playing an alphabet game with Ms. Shaw on the Nitnat trip. The game involved choosing a category and then going through the alphabet trying to find examples from the category beginning with each letter. Ms. J.C. chose "body parts" as one of the categories. He felt a bit uncomfortable about that choice.

Highway 18

This job involved service work at a farm. Ms. J.C. required assistance to help remove a hot water tank. She called Mr. Shaw to come out to the site.

McNeil Rd.

This was a new installation. Mr. Shaw could not recall if he or Mr. Pimental was the journeyman who did most of the work. He does recall attending at the site when Ms. Corfield was there. A neighbouring property owner was tired of trades people parking in front of his property and became verbally aggressive with Ms. J.C.. Mr. Shaw told the neighbour to show some respect and if he did they would move the van.

**20**  Mr. Shaw did not recall working with Ms. J.C. at 2nd Street or Sherman Road, and he did not recall going to Cowichan River Park with her. With respect to the other incidents described by Ms. J.C., Mr. Shaw either did not recall working with her on those occasions or did not give evidence about those incidents.

**21**  Mr Shaw denied having a sexual relationship of any sort with Ms. J.C.. He denied ever touching her for a sexual purpose. He says he never made sexually suggestive comments to her.

**Analysis**

**22**  I will explain my reasons for accepting Ms. Corfield's evidence in the context of an examination of the defendants' arguments. I have separated these arguments into four categories. I have done this for ease of reference even though it is somewhat artificial as the arguments are interrelated and are all directed at Ms. J.C.'s credibility. I should note that the categories are mine. The arguments were not organized this way by counsel.

**23**  The first category is inconsistency. Mr. Shaw says that Ms. J.C.'s evidence should not be accepted as it is seriously inconsistent. The most contentious aspect of this argument centres on the defendants' submission that Ms. Corfield did not raise the issue of sexual assault until the writ was issued, a year and a half after she left Baker Industries. The defendants say I should conclude, as a result of the inconsistencies, that the allegations are fabrications. The defendants also say that Ms. J.C.'s evidence at trial was inconsistent with her discovery evidence as a result of which I should conclude that her evidence generally should not be accepted.

**24**  The second category is Ms. J.C.'s alleged inherent lack of credibility. Many aspects of the argument fall into this category. The defendants say that Ms. Corfield's allegations are not credible when considered together with other evidence which is not controversial. A number of witnesses stated that Mr. Shaw's and Ms. J.C.'s behaviour in the presence of others did not change over time. There did not seem to be any tension between them. Ms. Corfield commissioned a painting from Mrs. Baker which, the defendants argue, she would not have done if Mr. Shaw was assaulting her as alleged. The defendants also say that Ms. Corfield's evidence about how the Assaults impacted her is inherently unbelievable. She blames the emotional problems she has faced since 2005 on the Assaults rather than on the more serious Childhood Abuse.

**25**  The third category is financial motivation. The defendants say that the evidence of Veronica McCabe, Ms. Corfield's former friend, is uncontradicted. She said Ms. Corfield told her that she was hoping to pay off her mortgage with money recovered in this action.

**26**  The fourth category is Ms. J.C.'s inappropriate behaviour. The defendants highlight examples of Ms. J.C.'s behaviour which they say show she was attracted to, and flirted with Mr. Shaw. Much was made of this evidence during trial. The defendants did not specify what inference I should draw from it. However, I assume the suggested inference is that Ms. J.C. was trying to attract the attention of Mr. Shaw and felt scorned when that did not happen.

Inconsistency

**27**  Mr. and Mrs. Baker both testified that at the meeting after the Christmas party, Ms. J.C. told them Mr. Shaw acted inappropriately, but did not say his inappropriate behaviour involved sexual assaults. They say the first time they became aware of allegations of sexual assault was when they received the statement of claim. According to Mrs. Baker, Ms. J.C. said Mr. Shaw was coming to her worksite too often and that made her uncomfortable. Mr. Baker described the complaint in similar terms. He said Ms. J.C. was upset because Mr. Shaw was in her presence too often and that his presence made her uncomfortable. They both agreed that Ms. Corfield appeared to be upset at the meeting although Mrs. Baker suggested Ms. J.C.'s emotional condition was much better by the end of the meeting. Further, they agreed that Mr. Baker asked Ms. J.C. if Mr. Shaw attempted to kiss her. Mr. Baker recalled asking her if Mr. Shaw attempted to have sex with her, and Mrs. Baker recalled him asking if Mr. Shaw touched her sexually. They both indicated that Ms. Corfield gave negative responses to those questions.

**28**  Mr. Baker was not quite as definitive in his evidence as Mrs. Baker. At one point in his cross-examination he agreed that the complaint Ms. J.C. made at the meeting "could be called sexual" even though there was no allegation of an assault. He attempted to withdraw that statement later in the examination.

**29**  Neither of the Bakers was convincing in their denial of the sexual element of Ms. J.C.'s complaint. There are a number of reasons why I do not accept their evidence. First, I accept the evidence of Mr. Elder, in preference to that of the Bakers. He attended the meeting with Ms. J.C. and the Bakers. The Bakers have a dual interest in presenting evidence to suggest that the Assaults did not occur: Phil Shaw is their son and, until very recently, Mr. Baker was the sole owner of Baker Industries. Mr. Elder, by contrast, has no interest in these proceedings. He does not have a close connection with either Ms. J.C. or the defendants as he is no longer employed by Baker Industries.

**30**  Mr. Elder first learned of the complaint by Ms. Corfield when he talked to her at Reggies Veggies. He understood from her comments that her complaint was about sexual harassment by Mr. Shaw, even though she did not tell him exactly what Mr. Shaw did to her. When they met with the Bakers, according to Mr. Elder, Ms. J.C. was so distraught that she could not speak. She was crying and trembling and sitting on the floor beside him. He was the one who told the Bakers that Mr. Shaw had acted inappropriately towards Ms. Corfield. As he was not aware of particulars of the allegations, he could not provide them to the Bakers, but he did indicate that there was sexual impropriety in Mr. Shaw's actions. Ms. J.C. was, according to Mr. Elder, too upset to speak. He did not recall Mr. Baker asking Ms. J.C. if Mr. Shaw tried to kiss her or have sex with her.

**31**  I note that Mr. Elder's evidence about the meeting was similar to Ms. J.C.'s evidence. She acknowledged that she had difficulty expressing herself in the meeting with the Bakers. Throughout the meeting she was embarrassed and extremely upset. She admitted that Mr. Baker may have asked if Mr. Shaw tried to kiss her. She does not recall if she gave a response. While I accept that Ms. Corfield did not give any specifics about the nature of the Assaults, I conclude that enough was said by Mr. Elder and Ms. Corfield to make it clear to those present that Ms. J.C.'s complaints about Mr. Shaw's inappropriate behaviour were allegations of sexual assault or harassment. Ms. J.C.'s emotional condition during the meeting would have brought home to the Bakers the serious nature of the complaint.

**32**  All witnesses agreed that Mr. Baker said at the conclusion of the meeting that he was going to investigate the allegations. Further, he indicated to Ms. J.C. that while he was carrying out the investigation, Mr. Shaw would not work with her or be in her presence at the Baker Industries office. Neither the investigation nor the isolation of Mr. Shaw makes sense if all that Ms. J.C. complained about was that Mr. Shaw was spending too much time with her. The only plausible explanation for the actions taken by Mr. Baker is that Ms. Corfield was making serious allegations - and Mr. Baker agreed the allegations were serious - of some form of sexual impropriety committed by Mr. Shaw.

**33**  There was also evidence from other witnesses confirming that Ms. J.C. made the allegations of sexual assault shortly after leaving her employment with Baker Industries. She told her mother and a social worker that she had been sexually assaulted at work. She also told Ms. McCabe of the Assaults at that time. Ms. McCabe, who was called as a witness by the defendants, confirmed in cross-examination that Ms. J.C. told her of the Assaults at the time.

**34**  Aside from my conclusions on the evidence, there is an additional reason to find that Mr. Elder and Ms. Corfield did convey the message that Mr. Shaw's inappropriate actions were sexual in nature. The statement of defence filed by Mr. Shaw and Mr. Baker on May 30, 2007 admits that Ms. Corfield advised Mr. Baker of allegations of sexual assault by Mr. Shaw on December 12, 2005. Baker Industries makes a similar admission at paragraph 4 of its statement of defence filed on September 25, 2008:

In response to paragraphs, 15 and 16 of the Statement of Claim, the Defendant says that on or about December 12, 2005 the Plaintiff first made allegations of sexual assaults carried out against her by Phil Shaw.

**35**  The defendants never applied to withdraw those admissions. At trial, Ms. J.C. was taken by surprise by the suggestion that she did not advise the Bakers of the allegations of sexual assault until the writ was issued. Ms. Corfield was clearly prejudiced by having this issue raised so late in the day contrary to the admission of fact made in the pleadings. Had the defendants applied to withdraw the admissions, I would not have permitted them to do so. In any event, I find that the defendants were advised of the Assaults shortly after December 11, 2005. The allegations were not fabricated later by Ms. J.C..

**36**  The other inconsistencies relied upon by the defendants relate to differences in Ms. J.C.'s testimony at trial and on discovery. The particular inconsistencies alleged are:

1. at trial Ms. J.C. said she lost weight after the Assaults but on discovery she said she could not recall anything about the period of time when she stopped eating;
2. at trial she agreed in cross-examination that she told Mr. Shaw about the Childhood Abuse on the trip back from Nitnat but on discovery she could not recall when she told him that;
3. at trial Ms. J.C. said that Mr. Shaw paid money for her boyfriend's ripped vest (after the Christmas party incident) but she could not recall the amount, while on discovery she believed that Mr. Baker paid $40 for the vest;
4. Ms. J.C. gave evidence at trial about the assault at McNeil Rd. but on discovery when asked about it she could not recall but said "maybe if I could remember where McNeil Rd. is ...";
5. in a Response to Demand for Particulars, Ms. Corfield provided a list of locations where assaults occurred and it included 1015 Aros Road. At trial Ms. J.C. described an incident at Aros Road that was not a sexual assault.

**37**  As I have already indicated, I found Ms. J.C. to be a very credible witness. She was prepared to acknowledge that she could be incorrect about some of her recollections. She also frankly admitted at times that she could not recall certain particulars. This is to be expected as she was being questioned in detail about matters that took place six years ago. Taking all of her testimony into account, I conclude that the substance of her evidence always had the ring of truth.

**38**  The inconsistencies relied upon by the defendants do not alter my assessment of Ms. J.C.'s credibility. The first three alleged inconsistencies are very minor. The other two relate to the allegations particularized by Ms. J.C. through counsel. When those two inconsistencies are examined, it is clear that these are also relatively minor. At the end of a long day of discovery she could not recall the McNeil Rd. location, but implied that she may be able to do so with further consideration. She had particularized it prior to the discovery and she did recall it at trial.

**39**  The Aros Rd. incident was not the scene of a sexual assault but it was included in the list of locations given in Ms. J.C.'s response to the Demand for Particulars. However, it was one of the locations where an incident took place that Ms. J.C. relies upon. She says it was an example of the kind of angry outbursts that she experienced when working with him. She did not swear either on discovery or at trial that a sexual assault took place at Aros Rd. In other words, there was no inconsistency in her sworn testimony.

Inherent Lack of Credibility

**40**  The Bakers, Mr. Elder, Ms. McCabe, and Gary Watkins all said that when they saw Ms. J.C. with Mr. Shaw, she did not seem to be uncomfortable or nervous. They did not notice any change in her behaviour during the time she worked for Baker Industries. The defendants argue that the inference to draw from these uncontradicted observations is that the allegations of assault are untrue. In other words, the defendants say Ms. J.C.'s allegations lack credibility in light of her behaviour when she was with Mr. Shaw in the presence of other people.

**41**  This argument has little merit. It assumes that it will be readily evident to other people when an acquaintance has been the subject of sexual assaults. If that was the case, victims of assault who have been unable or unwilling to tell others of the assault, would still be identified, or identifiable by their acquaintances. Perpetrators of assaults would not be able to continue to assault their victim over long periods of time because other people would know that something was wrong simply through observation of their friends or fellow workers.

**42**  No evidence was presented to support this proposition. There is, unfortunately, no obvious and easily recognizable behaviour in victims of abuse or sexual assault that informs friends and family of their victimization. This is evident from the many cases in our courts where sexual assaults or other forms of abuse have persisted for long periods of time. The unfortunate truth is that there may be many reasons why a victim does not let others know of abuse. The relationship between the victim and perpetrator may be such that the victim remains silent and does not advise others. The victim may be embarrassed and afraid to tell others about the abuse.

**43**  Ms. J.C. explained why she did not tell anyone about the Assaults. She thought she could handle the situation on her own. She was concerned that if she complained, she may lose her job. She was just starting out as a young woman in an occupation dominated by men. She was concerned that she may lose the chance to continue working as a plumber. She was also afraid that if she told others about the Assaults, it might damage her relationship with her boyfriend. I accept her explanation and reject the argument that her behaviour was such that her evidence is inherently lacking in credibility.

**44**  Indeed, Ms. J.C.'s description of the Assaults was extremely credible. The Assaults started in a relatively minor way. They built up over time as Mr. Shaw became emboldened when Ms. J.C. did not complain to others about what was happening. As a result of her desire to manage her relationship with Mr. Shaw without the assistance of others and her desire to keep her job and her position as an apprentice plumber, she did not disclose the Assaults to others. Ironically, this enabled the Assaults to escalate. However, there is nothing inherently implausible about the sequence of events described by Ms. J.C..

**45**  The argument that Ms. J.C. would not have commissioned Mrs. Baker to do a painting for her mother for Christmas if Mr. Shaw actually assaulted Ms. J.C. is also without merit. I fail to see any possible connection between the commissioning of the painting and Ms. J.C.'s credibility. Ms. J.C. liked Mrs. Baker and admired her paintings. She believed her mother would like one for Christmas and so she commissioned a painting from Mrs. Baker. That event has no probative value in relation to the Assaults.

**46**  The defendants also say I should conclude that Ms. J.C.'s assessment of the impact of the Assaults on her is inherently unbelievable. The basis for this argument is that the Childhood Abuse was more serious than the Assaults. Ms. J.C.'s stepfather pleaded guilty to charges of sexual assault in relation to incidents that occurred over many years and involved sexual touching and intercourse. At the time of the Childhood Abuse, Ms. J.C. was between the ages of 13 and 17. By comparison, the Assaults are much less intrusive. As Ms. J.C. explained, during all of the Assaults, the parties remained clothed. Mr. Shaw put his hand under her clothing in only one of the incidents. The Assaults do not include intercourse.

**47**  In spite of the fact that the Childhood Abuse was more invasive, Ms. J.C. attributes her emotional and personal problems since 2005 to the Assaults, rather than the Childhood Abuse. The defendants argue that logically, some and perhaps most of Ms. J.C.'s current problems must relate to the earlier, more invasive assaults. Accordingly, they say her contrary view is inherently unbelievable, from which I should conclude that her evidence about the Assaults is not credible.

**48**  There is logic to the argument that the Childhood Abuse is an active cause of the difficulties suffered by Ms. Corfield since 2005. However, I do not consider that Ms. Corfield's contrary belief raises a significant credibility issue in relation to her evidence about the Assaults. In many cases involving personal injury, there is a significant credibility element to causation. However, credibility has less prominence where the question is, to what extent did two traumatic sexual assaults cause or contribute to psychological injury. It is evident that the injuries from the two incidents may be indivisible. The causation question is thus less capable of direct or certain proof. When Ms. J.C. says she blames the difficulties she has experienced in the last six years on the Assaults, she is expressing a personal view and not testifying to an observable fact. As a result, even if on the basis of all of the evidence, I reject her opinion regarding causation, I do not have to find that she lacks credibility generally. Her statement as to causation is an opinion that she holds and not a statement of fact about an observable, readily apparent, fact.

**49**  I have considered the extent to which the Childhood Abuse caused or contributed to Ms. J.C.'s emotional and psychological injuries later in these reasons. I do not accept her view that the difficulties she has suffered since 2005 are solely caused by the Assaults but conclude instead that the injuries from the two assaults are indivisible. However, Ms. J.C.'s assertion that the Assaults are the sole cause of the injuries since 2005 is not inherently unbelievable. Further, my conclusion does not cause me to question her credibility regarding the Assaults.

Financial Motivation

**50**  Ms. McCabe, who was until recently a close friend of Ms. J.C., testified that Ms. J.C. said she was hoping her mortgage could be paid off by the damages awarded in this case. The statement was made sometime after the action was commenced, perhaps in 2008. Ms. J.C. could not recall such a statement but did not deny it. The defendants also note that Ms. J.C. said that finances were a source of stress for her.

**51**  The defendants say that I should infer from this evidence that Ms. J.C. is motivated by financial reward and that this should cause me to question her credibility. There is little merit to this submission. There was no suggestion in Ms. McCabe's evidence that Ms. J.C.'s allegations were fabricated or untrue. A statement by a claimant about the use she might make of a damage award does not necessarily imply that her claim lacks merit. Here, there was nothing about the statement to Ms. McCabe, or any other circumstances that lead me to conclude that the claim was fabricated for the purpose of financial gain.

Ms. J.C.'s Inappropriate Behaviour

**52**  The inappropriate behaviour complained of by Mr. Shaw and his mother included the following:

1. On one occasion when Mr. Shaw was at Ms. J.C.'s residence they played basketball. Mr. Shaw said that Ms. J.C. was quite physical in her play which included bumping into him.
2. After the first few months at the job, Ms. J.C. wore more makeup and put her hair in French Braids. When asked about this she said she was "dangling the carrot".
3. She chose "body parts" for the word game played with Mr. Shaw on the drive to Nitnat.
4. She showed Mr. Shaw the large bruise on her thigh.

**53**  Ms. J.C. did not deny any of the actions. However, none of them are significant in any way to the claim that is before the court. Mr. Shaw's suggestion that the basketball game and the word game made him feel uncomfortable is simply not credible. There may have been impropriety in the revelation of the thigh bruise, but according to Mr. Shaw the discussion that followed was entirely work related. He asked if she needed to see a doctor or make a compensation claim and she indicated she was fine and did not need medical attention. The suggestion that Ms. J.C. was trying to flirt with Mr. Shaw seems strained, but whether or not it is true, it is of no consequence to the allegations raised by Ms. J.C..

**54**  In short, I reject the credibility arguments advanced by the defendants. I have no hesitation in finding Ms. J.C. to be a credible witness. Her evidence regarding the Assaults was detailed and consistent. There is nothing inherently unbelievable about her description of the events and the relationship; indeed, her evidence was logical and compelling.

**55**  By contrast, I found Mr. Shaw's denial of the Assaults to be unconvincing. Mr. Shaw failed to give details about what happened at the job sites in question. Indeed, he said little about his relationship when working with Ms. Corfield at the sites where the Assaults occurred. He did not attempt to explain what happened. His failure to do so was striking. If, as he asserted, nothing untoward occurred on the jobs in question, it might be possible for him to assert that because of the passage of time he had no recollection of the events. However, that was not the import of his evidence. Instead of testifying about the events at the job sites, he explained why he asked Ms. J.C. to go to those jobs with him. In some cases he did so to further her education, in other cases it was because a second plumber was required and it made good business sense to have Ms. J.C. attend because of her lower hourly rate. I can conclude from this evidence that he does recall the jobs in question. This makes his failure to give his version of the events at the job sites a significant omission.

**56**  One of the reasons that Mr. Shaw provided an explanation for Ms. J.C.'s attendance at the sites was his denial of her assertion that the two of them worked together frequently towards the end of her time with Baker Industries. He said they only worked together on approximately ten occasions. His evidence on this issue was not believable. It is contrary to Ms. J.C.'s evidence, and is also inconsistent with the evidence of Gary Watkins and Veronica McCabe.

**57**  Mr. Watkins worked in one of the plumbing supply stores in Duncan. He stated in cross-examination that Mr. Shaw and Ms. J.C. came in to the store together frequently: usually once or twice a day. It was often apparent to him that they were working together as they would arrive and leave together in one of the company's vans.

**58**  Ms. McCabe also worked at the plumbing supply store. She gave evidence that was similar to Mr. Watkins' evidence. She testified that she saw Mr. Shaw and Ms. J.C. together either every day, a couple of times a day, or sometimes not at all. She said she did not know how often they worked together but from her observations she believed they were working on jobs together on some of the occasions when she saw them.

**59**  When I consider all of the evidence, I conclude that Mr. Shaw did work frequently with Ms. J.C.. This conclusion is supported by the evidence of Ms. J.C. and the two supply store witnesses. It is also supported by the phone records of telephone calls between Mr. Shaw and Ms. Corfield. I infer that the dramatic increase in calls between the two of them during the last few months when Ms. J.C. was at Baker Industries occurred because they were often working together, and because of the tension that had arisen in their relationship as a result of the Assaults.

**60**  The evidence regarding the fight at the Christmas party provides further support for my conclusion that Mr. Shaw is not credible. Even though the incident has little to do with the allegations in this action, much time at trial was spent on the fight. Mr. Shaw, his mother and Mr. Baker all described the incident as a relatively minor shoving match that started between Mr. Shaw and Ms. J.C.'s boyfriend and was resolved when Mr. Baker stepped in to restrain Mr. Shaw. Ms. J.C. described a more violent incident that included punches and the choking of Mr. Baker by Mr. Shaw. Ms. Corfield's version of the events is far more credible. The altercation ended with the arrival of the police who were called by the Bakers. They took Mr. Shaw into custody overnight. The police must have taken that step based on what they were told about Mr. Shaw's actions by the other guests at the party. I conclude that Ms. J.C.'s description of the events is closer to the reality, and that Mr. Shaw and his parents attempted to downplay Mr. Shaw's aggression to put him in a better light.

**61**  In summary, I conclude that Mr. Shaw assaulted Ms. J.C. on the nine occasions she described and that the events occurred as described by Ms. J.C..

**Issue 2. Is either or both of Mr. Baker and Baker Industries directly liable for the Assaults?**

**62**  Ms. J.C. argues that Mr. Baker and Baker Industries were negligent in failing to adequately supervise their employees. She notes that Baker Industries had no workplace policies regarding the conduct of employees, generally, or sexual harassment in particular. She argues that the ***negligence*** of either or both of these defendants was an effective cause of the Assaults. In addition, she argues that after her disclosure of the Assaults, her employer failed to establish a safe work environment for her and failed to carry out a proper investigation into the allegations. She says that these are also negligent breaches of an employer's duties and that these breaches led to her decision to leave Baker Industries.

**63**  There is no doubt that Baker Industries, as Ms. Corfield's employer, owed her a duty of care. Of course, to establish liability Ms. J.C. must also show that these defendants were in breach of the standard of care. The two questions that arise in this case then are: a) what is the standard of care owed by a small family plumbing contractor and b) did Baker Industries, or Mr. Baker, breach that standard of care. I have concluded that neither Mr. Baker as the manager of the business, nor the employer, Baker Industries, was negligent. Further, I find that no action or omission of Baker Industries was a cause of the Assaults.

**64**  Ms. J.C. led no evidence regarding the appropriate standard of care. While that is not fatal to the claim, it is difficult to prove a breach of duty where no proof has been offered as to the appropriate standard of care. Mr. Baker admitted that he was aware that there could be problems within a workplace regarding sexual harassment and that Baker Industries had no formal policy in place. However, Ms. J.C. led no evidence regarding recommended practices and no evidence about norms or standards within the small business community.

**65**  Given the lack of evidence regarding the standard of care, I must assess Baker Industries' employment practices based on the limited evidence presented and determine whether those practices created a risk of harm.

**66**  Baker Industries' business primarily consisted of performing service calls for smaller jobs usually at residential premises. They also performed smaller new construction work. Their plumbers attended at jobs in vans provided by the company. The work was usually carried out by a single plumber but on occasion two plumbers would attend together. The plumbers started out each day at the Baker residence which was also the company office. By all accounts it was a warm, collegial workplace. The employees had ample opportunity to meet with and exchange information with their manager, Mr. Baker. They were all provided with cell phones so that they could contact Mr. Baker at the office at any time. When Ms. J.C. started work for the company she worked with an experienced plumber who provided supervision and mentoring. For most of the time, Mr. Elder filled that role.

**67**  Given the nature of the business, I find that there was nothing about the employment practices of Baker Industries that created or exposed the employees to a risk of the kind of harm that occurred. The possibility of one worker assaulting another cannot be eliminated when employees are required to work together, sometimes in confined spaces, and when they spend time travelling together. However, I conclude that the way in which Baker Industries carried on its operations was reasonable. It provided adequate supervision of its employees and no act or omission of Baker Industries caused or contributed to the Assaults. Further, there was no credible evidence to suggest that Mr. Shaw was previously involved in similar tortious activities. There was no reason for Baker Industries to take special care regarding his activities.

**68**  I reject Ms. J.C.'s argument that Baker Industries failed to provide a safe work environment after learning of the Assaults or that this alleged failure led to her departure from the company. Mr. Shaw did not work with Ms. Corfield and was prevented from being in the office at the time of work assignments for the few days after she told the Bakers about the Assaults. I conclude that Ms. J.C. left her employment with Baker Industries as she was simply unable to continue working at the same job, in relatively close proximity to Mr. Shaw once she had told others about the Assaults. Ms. J.C.'s boyfriend was encouraging her to leave the job given what had happened. This was undoubtedly good advice. I find that Ms. J.C. had no real choice but to quit, given the actions of Mr. Shaw and his position in the family business.

**69**  Finally, I also reject Ms. J.C.'s argument that Mr. Baker's failure to investigate the Assaults was a breach of duty which also caused her to leave her employment with Baker Industries. While I accept that Mr. Baker did not take active steps to investigate the Assaults, his failure to do so did not cause her any loss or damage and was not a factor in her decision to quit.

**Issue 3. Is Baker Industries vicariously liable for the Assaults?**

**70**  Ms. J.C. argues that Baker Industries should be vicariously liable for the Assaults. She relies on the decision in *Bazley v. Curry*, [*[1999] 2 S.C.R. 534*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M42M-00000-00&context=), for the proposition that an employer who was not negligent can be found liable for the sexual assault of an employee. The central question is whether the wrongful act is sufficiently related to conduct authorized by the employer. She says that when the relevant factors are considered, there is a sufficient connection in this case between the employer's creation or enhancement of the risk and the intentional tort committed by Mr. Shaw. She argues that the circumstances of this case are very similar to those in *Pawlett v. Dominion Protection Services Ltd.*, [*2007 ABQB 415*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9391-F528-G47M-00000-00&context=), where the defendant company was found vicariously liable for the sexual assault of an employee by her supervisor.

**71**  The defendants did not make submissions on this aspect of the case. That may be because Mr. Shaw is, as of the date of trial, the sole shareholder of Baker Industries. In spite of the defendants' failure to seriously contest this issue, I have determined that Baker Industries cannot be held vicariously liable for the actions of Mr. Shaw.

**72**  At the time of the trial in this action, the parties did not have available to them the recent decision in *A.B. v. C.D.*, [*2011 BCSC 775*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JJK6-S25R-00000-00&context=), where Gray J. considered the liability of a school district for the sexual battery committed by a teacher. She found that the school district, as employer was neither negligent nor vicariously liable. In doing so, Gray J. set out the proper approach to the analysis of vicarious liability with reference to the decisions in *Bazley* and *Jacobi v. Griffiths*, [*[1999] 2 S.C.R. 570*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M42N-00000-00&context=). I accept and adopt her thorough analysis.

**73**  The question a court must consider where there has been a sexual battery is whether the unauthorized acts of the employee are so connected with authorized acts that "they may be regarded as modes (albeit improper modes) of doing authorized acts". In *Bazley*, the court set out a two-step process for determining when an unauthorized act is so connected to the employer's enterprises that vicarious liability should be imposed. The first step is to consider whether there are precedents which unambiguously determine whether vicarious liability should apply in the circumstances. The second step is to determine whether vicarious liability should be imposed in light of the policy rationales behind strict liability.

**74**  The parties did not fully argue the first step analysis; whether there are precedents applicable to the vicarious liability analysis in this case. This is likely because very few decisions which have considered the vicarious liability of employers since *Bazley* involve adult co-workers in commercial enterprises. The decision in *Pawlett* is an exception. While the decision was appealed to the Alberta Court of Appeal, [*[2008] A.J. No. 1191*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-93C1-JKHB-63TM-00000-00&context=), that court did not consider the vicarious liability issue.

**75**  The decision in *Pawlett* is, of course, not binding on this court. Further, I do not consider that decision to be an unambiguous precedent that applies to the circumstances of this case. The analysis in *Pawlett* was perfunctory. The court did not consider the first step in the analysis at all. It did not refer to *G.A. v. McGregor*, [*2003 ABQB 960*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9371-JJK6-S2RT-00000-00&context=), or other cases which might have provided some assistance on that issue. More significantly, the court did not refer to *Jacobi* or other decisions where courts have looked carefully at the policy considerations which are significant in the second step of the analysis.

**76**  In the absence of prior decisions which unambiguously determine whether vicarious liability should be found, I must proceed to the second step of the analysis. This is described at paras. 41 and 42 in *Bazley*. At this stage of the analysis, a court is to "openly confront the question of whether liability should lie against the employer". That is done by considering if there is "a significant connection between the creation or enhancement of a risk and the wrong that accrues". Incidental connections to the employment enterprise, like time and place (without more), will not suffice. Once engaged in a particular business, it is fair that an employer be made to pay the generally foreseeable costs of that business. In contrast, to impose liability for costs unrelated to the risk would effectively make the employer an involuntary insurer.

**77**  At para. 41 of *Bazley*, McLachlin J. (as she then was) set out some of the factors that may be considered by a court to determine if there was a strong connection between what the employer was asking the employee to do (i.e. the risk created by the employer's enterprise) and the wrongful act:

1. the opportunity that the enterprise afforded the employee to abuse his or her power;
2. the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);
3. the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
4. the extent of power conferred on the employee in relation to the victim;
5. the vulnerability of potential victims to wrongful exercise of the employee's power.

**78**  At para. 46, McLachlin J. summarizes the approach to this step:

In summary, the test for vicarious liability for an employee's sexual abuse of a client should focus on whether the employer's enterprise and empowerment of the employee materially increased the risk of the sexual assault and hence the harm. The test must not be applied mechanically, but with a sensitive view to the policy considerations that justify the imposition of vicarious liability -- fair and efficient compensation for wrong and deterrence. This requires trial judges to investigate the employee's specific duties and determine whether they gave rise to special opportunities for wrongdoing. Because of the peculiar exercises of power and trust that pervade cases such as child abuse, special attention should be paid to the existence of a power or dependency relationship, which on its own often creates a considerable risk of wrongdoing.

**79**  When I apply the relevant factors to the circumstances of this case, I conclude that there was not a strong connection between what Mr. Shaw was asked to do and the sexual assaults he committed. The opportunity afforded to Mr. Shaw to abuse his power was not significant or unusual. The assignment of work was done openly. There was ample opportunity for employees to raise issues about the work or work assignments with senior management, Mr. Baker. The wrongful acts did not further the employer's aims in any way. It cannot be seriously contended that there was friction, confrontation or intimacy inherent in the business of Baker Industries. There was nothing about the operation of a residential service plumbing business that created situations of intimacy between employees. While Mr. Shaw was provided with supervisory authority in relation to Ms. J.C. and other employees, the power given to him was not extensive. As I have already noted, it was not power that could be easily used for a wrongful purpose. Finally, plumbers in the employ of Baker Industries would not be expected to be potentially vulnerable to the wrongful exercise of Mr. Shaw's authority as a supervisor.

**80**  In short, there is nothing about the enterprise of Baker Industries or the authority imparted to Mr. Shaw that materially increased the risk of sexual assault of fellow employees. Quite simply, this is a situation where Mr. Shaw took advantage of incidental connections to Ms. J.C. that occurred in an employment relationship. He took advantage of the opportunities of time and place. That alone is not sufficient for a finding of vicarious liability.

**81**  Looking at the broader policy considerations, it would significantly increase the potential liability of commercial employers to impose vicarious liability in these circumstances. Many employers would face the risk of becoming insurers in situations where a supervisor wrongfully took advantage of incidental opportunities presented by their relationship with fellow employees. There are legions of circumstances where employees may be alone with other employees in vehicles, offices or work spaces. In the absence of ***negligence*** on the part of the employer, it would be unfair to hold the employer responsible for sexual assaults merely because an employee took advantage of those opportunities. Of course, vicarious liability may be imposed if the nature of the work, the special position of the empowered employee, or the vulnerability of the victim, increases the risk of that kind of harm.

**82**  The decision I have arrived at here is not surprising. Indeed, it is to be expected given the decisions regarding vicarious liability in cases such as *Jacobi*; *A.B. v. C.D.*; and *H. (S.G.) v. Gorsline*, [*2004 ABCA 186*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9371-JKHB-62VR-00000-00&context=), [*[2005] 2 W.W.R. 716*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9371-JKHB-62VR-00000-00&context=), leave to appeal ref'd [*[2004] S.C.C.A. No. 385*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SF1-F1P7-B3JG-00000-00&context=). Even though those cases involved sexual assaults of children, courts declined to find vicarious liability. The defendant employees, teachers and a recreation director, took advantage of incidental opportunities presented through employment to assault the children. However, their employment did not encourage or require them to have intimate contact with the youth. In *Jacobi*, at para. 82, Binnie J. rejected the argument that putting an employee in the position of a mentor created an increased risk of sexual abuse:

I do not accept that an enterprise that seeks to provide a positive role model thereby encourages intimacy. Nor do I believe that "mentoring", as such, puts one on the slippery slope to sexual abuse. If it did, any organization that offered "role models" would be looking at no-fault liability.

**83**  That reasoning is apposite here. The fact that a supervisor is put in a position to supervise and mentor a new and younger employee does not put the supervisor on a slippery slope to sexual abuse. Supervision and mentoring are essential roles in any organization and the fact that the employment presents opportunities where those tasks may be carried out in private does not by itself materially increase the risk of harm.

**84**  I conclude that Baker Industries is not vicariously liable for the actions of Mr. Shaw. Given the decision I have reached on this issue, I need not consider Ms. Corfield's argument that Mr. Baker should be found personally liable because the company rendered invoices and issued cheques and other documents using the trade name, "Baker Plumbing and Renovations" rather than the company name.

**Issue 4. What damages should be awarded to Ms. Corfield?**

**Positions of the Parties**

**85**  Ms. J.C. alleges that she has suffered psychological and emotional harm as a result of the Assaults. The symptoms she suffers from include anxiety, depression, loss of self-esteem, inability to concentrate, sleep disturbance, and anger. She says she has abused alcohol as a result of her anxiety and depression, and that she has a fear of working with new male plumbers. She also blames her repeated failure to pass the Interprovincial apprenticeship exams required for certification as a journeyman plumber ("Interprovincial Exams") on her psychological and emotional situation. In short, she says the Assaults have had a profound and long-lasting effect on her personal and working life.

**86**  Ms. J.C. acknowledges that she suffered from similar problems following the Childhood Abuse. However, she says she was functioning well by the summer of 2005 and was well on the way to recovery. In these circumstances, she believes that the problems she has suffered since working with Mr. Shaw were primarily caused by the Assaults. Alternatively, if the Childhood Abuse has had a longer impact on her emotional well-being, she argues that most of the psychological injuries she has suffered are indivisible.

**87**  Ms. J.C. claims damages under several heads of damage. She seeks an award for non-pecuniary damages in the amount of $150,000, taking into account the aggravating circumstances of this case. She says that Mr. Shaw's misconduct is malicious, highhanded and deserving of punishment. She asks for an award of $40,000 in punitive damages. She claims past income loss of $30,000 based primarily on the difference between what she would have earned had she continued to work for Baker Industries and what she did earn from her new employer. She also seeks an award of $50,000 for loss of future earning capacity and $10,000 for the cost of future counselling.

**88**  The defendants dispute the plaintiff's assertion that all of her current difficulties are related to the Assaults. The Childhood Abuse was egregious and prolonged. From the age of 12 to 17 she was abused verbally, physically and sexually. The defendants say it is inconceivable that Ms. Corfield did not continue to suffer from the prolonged Childhood Abuse after 2005. Further, they say she would have continued to suffer from that prior abuse with or without the additional assaults by Mr. Shaw. The defendants also dispute the extent of Ms. J.C.'s emotional and psychological difficulties. They note that she found a job within two weeks of leaving Baker Industries and held the job continuously for more than five years. She has been able to sustain a healthy relationship with her current partner for three years and is now acting as a stepmother to his children. Further, the defendants note that in spite of opportunities to do so, she has not regularly attended counselling. The defendants say that an appropriate award for non-pecuniary damages taking into account the aggravating factors is $25,000.

**89**  The defendants say that there should be no award for punitive damages in this case. If the award for non-pecuniary loss fully takes into account the aggravating circumstances then there is no need to further punish Mr. Shaw given his degree of moral culpability. The defendants say Ms. Corfield has failed to prove any past wage loss amount other than a modest amount that should be awarded on constructive dismissal principles. They also say Ms. J.C. has failed to prove that there is a substantial possibility of future income loss.

**Non-Pecuniary Damages**

**90**  Ms. J.C. has been seriously impacted by the Assaults. While she was still working at Baker Industries, she went into what she described as "survival mode". She maintained a happy appearance on the outside, but was not functioning well. She slept poorly, experienced nightmares and started closet drinking. She was anxious most of the time and felt that she was not in control of her emotions. After leaving Baker Industries, she quickly found work with another plumbing contractor in Duncan. She continued in her survival mode and attempted to ignore the emotional difficulties she was experiencing. She did not go to counselling until 2007 at which time she felt that she was spiralling out of control. Over the past five years she has continued to experience anxiety, insecurity, inability to sleep, nightmares, excessive drinking, fear of social situations and lack of enjoyment of life.

**91**  While I accept Ms. J.C.'s general description of the emotional and psychological harm she has suffered, she did not give detailed evidence regarding the severity of symptoms or describe with any precision how the symptoms changed over time. I appreciate that this may be a difficult task for someone in her situation. However, Ms. J.C.'s evidence lacked detail and this shortcoming was not remedied by evidence from a family doctor or counsellor.

**92**  In this situation, a good barometer of the impact of the Assaults on Ms. J.C. is the objective evidence of her ability to function. She says that she continues to have difficulty with everyday living. However, the emotional and psychological difficulties she has encountered did not prevent her from quickly finding plumbing work with a new company. She continued to work with that company for more than five years and only left shortly before this trial because of a shortage of work and a desire to prepare for the trial. She appears to have functioned well within that organization. In addition, she managed to work her way through a separation from one partner and successfully establish a new relationship. Her new partner did not give evidence, but based on the evidence of Ms. J.C. and her mother, this relationship is strong and healthy, and indeed a significant improvement over her previous relationship.

**93**  I must conclude from Ms. J.C.'s actions and accomplishments since she left Baker Industries, that the impact of the Assaults has not been as significant as she believes. Her failure to attend regularly for scheduled counselling sessions provides additional support for this conclusion. More importantly, the report of Dr. Bruce, a registered counselling psychologist who first saw Ms. J.C. in November 2010, suggests that her depression and anxiety symptoms are moderate or mild.

**94**  Dr. Bruce's report has a number of limitations. The report was prepared after only four counselling sessions with Ms. J.C.. She did not attempt to assess the cause of Ms. J.C.'s symptoms and provided no opinion on causation. She did not attempt to assess the impact of the Childhood Abuse or Ms. J.C.'s position prior to 2005. She accepted, without qualification, Ms. J.C.'s subjective statements. Even with those shortcomings, Dr. Bruce's report is useful. She provides an assessment of Ms. J.C.'s current psychological and emotional condition. She finds that Ms. Corfield is suffering from Post Traumatic Stress Disorder and major depression with anxiety symptoms. She states as follows in the report:

[Ms. J.C.'s] scores indicated that she is moderately depressed, mildly anxious and has a minimal level of hopelessness. The moderate depression, minimal hopelessness and mild anxiety indicate that J.C. is very distressed with her depressive symptoms but is not overwhelmed with feelings of anxiety or despair about her future. This response set may indicate acute, transient, reactive depression that is highly responsive to treatment. (p. 2)

J.C.'s history of childhood abuse and neglect could and probably does make her more vulnerable to experience a more intense emotional affect from stressful events. It most likely exacerbates and affects her ability to process the emotional impact of the incident with her supervisor at her former workplace. (p. 5)

**Recommendations**

I would recommend that J.C. could benefit from counselling treatment on a regular basis once every couple weeks [sic] over a period of six months in order for her to comes [sic] to terms with the psychological distress, in particular the posttraumatic stress symptoms that continue to cause her difficulties. (p. 5)

**95**  I accept Dr. Bruce's assessment including her findings regarding the severity of the symptoms and the likelihood Ms. J.C.'s condition is amenable to treatment.

**96**  The defendants argue that the amount awarded to Ms. J.C. for non-pecuniary damages must be reduced to take into account the emotional and psychological injury suffered by her as a result of the Childhood Abuse. This raises two questions. First, to what extent are the injuries from the Assaults and the Childhood Abuse divisible? Second, what was Ms. J.C.'s condition immediately prior to the Assaults?

**97**  The proper approach to these questions is described by Chiasson J.A. in *B.P.B. v. M.M.B.*, [*2009 BCCA 365*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-625F-00000-00&context=) at para. 33:

In a case such as this where there are multiple causes of a plaintiff's injury, the core question is whether the injury is divisible. If it is, a plaintiff can recover from a defendant only the damages attributable to the injury caused by that defendant. If the injury is indivisible, subject to considerations I shall discuss, a plaintiff can recover 100% from the defendant of the damages attributable to the injury which is caused or contributed to by the defendant regardless of the contribution to the injury by others. ...

**98**  The additional consideration, the application of the thin or crumbling skull rules, is described at para. 43:

I[f] the injury is indivisible, the court must consider the possible application of the thin skull or crumbling skull rules in the context of the victim's original condition. If the crumbling skull rule applies, it forms part of returning the victim to his or her original condition and the tortfeasor is not responsible for events that caused the crumbled skull. Absent the application of the crumbling skull rule, where the injury is indivisible, all torfeasors who caused or contributed to the injury are 100% liable for the damages sustained by the victim.

**99**  In *Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=), at para. 24, Major J. gave a simple example of a divisible injury: one tortfeasor injures the plaintiff's arm and another injures the plaintiff's foot. Of course, in sexual assault cases it is more difficult to differentiate between injuries. Where a plaintiff has suffered emotional and psychological harm as a result of the tortious acts of two or more defendants, it will often be impossible to neatly separate the injuries between the tortious acts. 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=), [*[2005] 3 S.C.R. 3*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B153-00000-00&context=), the Court commented on this difficulty at para. 74:

The calculation of damages for sexual assault to Mr. Barney is complicated by two other sources of trauma: (1) trauma suffered in his home before he came to AIRS; and (2) trauma for non-sexual abuse and deprivation at AIRS that was statute barred. In reality, all these sources of trauma fused with subsequent experiences to create the problems that have beset Mr. Barney all his life. Untangling the different sources of damage and loss may be nigh impossible. Yet the law requires that it be done, since at law a plaintiff is entitled only to be compensated for *loss caused by the actionable wrong*. It is the "essential purpose and most basic principle of tort law" that the plaintiff be placed in the position he or she would have been in had the tort not been committed. ...

**100**  In the present case, the evidence about the nature of Ms. J.C.'s psychological and emotional trauma following the Childhood Abuse was not extensive. However, the difficulties she encountered included loss of self-esteem, anxiety and depression. She drank to excess and had difficulty sleeping. Dr. Bruce noted that the Childhood Abuse left Ms. Corfield "more vulnerable to experience a more intense emotional affect from stressful events."

**101**  There is no question that the nature of the emotional and psychological injuries she suffered as a result of the Childhood Abuse is similar to, if not the same as, what she has experienced since the Assaults. Any attempt to divide those injuries into causes as between the two tortfeasors would be artificial. There was no evidence proffered which would allow me to conclude that some of the symptoms or emotional difficulties suffered by Ms. J.C. since 2005 were caused solely by the Childhood Abuse. Accordingly, I conclude that all of Ms. J.C.'s emotional and psychological difficulties since 2005 were caused or contributed to by the Assaults. In other words, the injuries she has suffered from since 2005 are indivisible from those injuries suffered from the Childhood Abuse.

**102**  In reaching that conclusion, I am not suggesting that the Assaults were the only cause of her injuries, just that her "damage and loss has been caused by the fault of two or more persons", one of whom is Mr. Shaw. As a result, in accordance with the provisions of s. 4 of the ***Negligence*** *Act*, *R.S.B.C. 1996, c. 333*, Mr. Shaw is jointly and severally liable for the injuries suffered since the Assaults, and he is responsible for the full cost of loss and damage suffered since the Assaults subject to consideration of the crumbling skull principle.

**103**  The difference between a thin skull and a crumbling skull is described in *Athey* at paras. 34 and 35:

... The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.

The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position".

**104**  One aspect of Ms. J.C.'s "original position" was described by Dr. Bruce; she was "more vulnerable to experience a more intense emotional affect from stressful events". In other words, she was fragile and susceptible to suffering emotional damage. There is no question that this condition falls within the "crumbling skull" category. Ms. Corfield continues to have that susceptibility and Mr. Shaw does not have to compensate her for continuing vulnerability.

**105**  However, the defendants also argue that Ms. Corfield was still experiencing emotional and psychological difficulties from the Childhood Abuse before she was assaulted by Mr. Shaw. They say the symptoms she suffered from included anxiety, depression, poor sleep, nightmares, alcohol abuse and other symptoms. The evidence of Ms. J.C.'s mother provides some support for this position. Ms. J.C. herself said that she "felt herself fairly recovered" from the Childhood Abuse. I take this to mean that she was doing reasonably well but had not fully recovered. In cross-examination she admitted that her doctor recommended she attend counselling in 2003 and 2004. This confirms that in the two years before she started working at Baker Industries she was experiencing emotional difficulties. She also admitted to continuing intimacy problems arising from the Childhood Abuse.

**106**  The Childhood Abuse started when Ms. J.C. was 12 years old and continued until just before her high school graduation, a period of five years. She was subjected to physical, verbal and sexual abuse which included intercourse. Her stepfather pleaded guilty to criminal charges arising from the abuse. The Childhood Abuse ended only three or four years prior to Ms. J.C.'s work at Baker Industries. The defendants say the Childhood Abuse was so invasive, such a breach of trust and persisted for so long that the psychological and emotional impact of that abuse must have continued up to 2005, and would have continued thereafter even without Mr. Shaw's wrongful actions.

**107**  The defendants did not present any expert evidence on this issue. As I have noted, Dr. Bruce did not offer any opinion on causation generally or on the impact of the Childhood Abuse in particular. In spite of the absence of expert evidence and Ms. J.C.'s assertion that the Childhood Abuse was not a factor in her ongoing difficulties, I conclude that she did have ongoing emotional and psychological problems in 2005 that would have persisted even if Mr. Shaw had not assaulted her. Ms. J.C. was still struggling with emotional issues from the Childhood Abuse and was vulnerable to emotional stress. Her fragility and vulnerability were inherent in her original position. When I take all of the evidence into account, I conclude there was a "measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future": *Athey*, at para. 35. Indeed, her situation was a classic example of a crumbling skull situation.

**108**  The difficult question here is how to assess damages to take into account the original position and that measurable risk. I could either award an amount to represent the additional injury suffered over and above her original position, or award an amount that represents her loss and damage as a result of the 2005 Assaults and reduce that by some percentage to take into account the original position. I am of the view that the latter approach is preferable as it will show clearly the deduction made to take into account Ms. Corfield's original position.

**109**  I accept Ms. J.C.'s statement that she was feeling "fairly recovered" as of 2005. She had managed to enrol in the plumbing program through Malaspina College and started off well with her new employer. The emotional and psychological difficulties she was experiencing were not debilitating and were not having a large impact on her day to day life. However, she continued to be emotionally fragile and vulnerable. Given my conclusion that all the injuries suffered were indivisible, the deduction to take into account Ms. Corfield's original position must be modest. I will apply a discount of 15% to take into account Ms. J.C.'s pre-existing condition.

**110**  The principles to apply to the assessment of non-pecuniary damages for sexual assault in British Columbia are set out in *Y. (S.) v. C. (F.G.)*, [*[1997] 1 W.W.R. 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-FJM6-61BF-00000-00&context=), [*26 B.C.L.R. (3d) 155*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-FJM6-61BF-00000-00&context=) (C.A.). The "cap" on non-pecuniary damage awards does not apply to intentional torts of a quasi-criminal nature, such as sexual assault. Aggravated damages do not constitute a separate head of damages. Due to the inherent difficulty of separating the physical harm inflicted by sexual assaults from the emotional and psychological harm, aggravating circumstances must be taken into account when assessing an award for non-pecuniary damages in a sexual assault case. The court noted at para. 57 that the view which the trier of fact takes of the aggravating features is critical to the assessment of non-pecuniary damages. Aggravating circumstances can include the relationship between the parties, particularly if it is one of trust, the duration of abuse, the number of assaults, the age of the victim, the degree of violence and coercion, the nature of the abuse, the physical pain and mental suffering associated with the abuse, as well as the lack of remorse on the part of the defendant: *C.C.B. v. I.B.*, [*2009 BCSC 1425*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JGBH-B245-00000-00&context=), at para. 56.

**111**  In *A.B. v. C.D.*, at para. 165, Gray J. also provided a useful list of factors to be considered in awarding damages in sexual assault cases:

1. the frequency of assaults;
2. the nature of the assaults;
3. the age of the complainant at the time;
4. the vulnerability of the complainant;
5. the relationship between the parties;
6. whether force or violence was used;
7. the effect and consequence on the victim; and
8. whether aggravated damages are included.

**112**  Ms. J.C. relied on a number of cases where substantial awards of non-pecuniary damages were made to plaintiffs who were sexually abused as children for long periods of time including *B.P.B.*; *Y. (S.)*; and *C.C.B.* She also referred to *Pawlett*; *Sulz v. Canada (Attorney General)*, [*2006 BCSC 99*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1M0-00000-00&context=); and *Brooks v. British Columbia*, [*2000 BCSC 735*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JWBS-61DP-00000-00&context=).

**113**  The defendants relied on a number of cases where modest awards for sexual assault or harassment were made including: *B. (D.J.) v. B. (A.R.)* [*(1997), 44 B.C.L.R. (3d) 154*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JCJ5-246G-00000-00&context=) (S.C.); *Plouffe v. Roy* [*(2007), 50 C.C.L.T. (3d) 137*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF01-FCSB-S3DN-00000-00&context=) (Ont. S.C.J.); *Pawlett*; and *McLean v. Battle*, [*2005 BCSC 1502*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JS5Y-B29N-00000-00&context=).

**114**  The aggravating factors relevant to the assessment of damages include the following:

1. Mr. Shaw was Ms. J.C.'s immediate supervisor and so stood in a position of power in relation to her. This was amplified somewhat because she was a young apprentice and he was 15 years older. He was responsible for the assignment of work at Baker Industries and enjoyed a significant amount of authority regarding the day-to-day operations of the business. Ms. J.C. relied on Mr. Shaw for advice and training. She was reluctant to complain about his conduct because of concerns for her job security and professional development.
2. Mr. Shaw frequently assigned Ms. J.C. to jobs where he was working. She was thus placed in a position of vulnerability as they were often the only people working on site.
3. The Assaults were frequent. There were nine incidents in six months.
4. Mr. Shaw repeatedly groped Ms. J.C. and some of the Assaults involved the use of force. His sexual advances were quite aggressive and she was forcibly restrained on three occasions. He ignored her persistent pleas for him to leave her alone. On one occasion he put his hand under her shirt.
5. The Assaults persisted even after Mr. Shaw learned of Ms. J.C.'s Childhood Abuse, and knew, or ought to have known, that his conduct would be harmful to her.
6. Mr. Shaw has shown no remorse.

**115**  While there are a number of aggravating factors, the circumstances of this case are quite different from those in *Y. (S.)*; *C.C.B.*; and *B.P.B.*, where the abuser was a father or person in a fiduciary relationship to the plaintiff. The parties were adult co-workers and Mr. Shaw was not in a position of trust. Further, the assessment must take into account Ms. J.C.'s current condition. She is mildly anxious, moderately depressed and her condition is amenable to treatment. It is likely she will return to her pre-existing condition with continued counselling and the passage of time. In addition, the assessment must take into account the impact of the Assaults on Ms. J.C.'s life. While I accept that she has suffered ongoing emotional and psychological trauma, she has been able to function reasonably well in both her personal and working life. As I will discuss below, I do not accept Ms Corfield's contention that her failure to pass the Interprovincial Exams is related to the Assaults.

**116**  In these circumstances, an appropriate award for non-pecuniary damages including the aggravating circumstances is $70,000. This must be reduced to take into account Ms. Corfield's pre-existing condition. A deduction of 15% results in an assessment of $59,500. I will round that up and award the sum of $60,000 for non-pecuniary damages.

**Income Loss**

Past Income Loss

**117**  Ms. J.C. says that she was forced to leave Baker Industries because of the Assaults. She wanted to continue to work in Duncan and so looked for work in her field. She quickly found a new job but at a rate of $10 per hour. She was earning $17 per hour at Baker Industries. She argues that she should be compensated for any loss she suffered as a result of taking the lower paying job. The loss was incurred for at least three years as her hourly rate did not increase as quickly as it should have because of her anxiety and inability to focus. She also blames her three failed attempts to pass the Interprovincial Exams on her continuing symptoms. She seeks $30,000 for past wage loss.

**118**  The defendants argue that Ms. J.C. failed to mitigate her loss. They say she chose to remain in Duncan and did not attempt to find employment at a higher level of compensation. They challenge her assertions that she has not performed well at her job. They note that Ms. J.C. did not call evidence from her current employer. Mr. Watkins, a current co-worker confirmed that she was laid off because of work shortage and not job performance. The defendants also argue that her failure on the Interprovincial Exams is likely related to Ms. J.C.'s own aptitudes, comprehension, or test-taking abilities. The defendants say the past income loss claim should be approached as a constructive dismissal claim. On that basis, Ms. J.C. should only receive a modest amount equivalent to one month's notice.

**119**  There is no dispute about the underlying principle applicable to income loss claims. A plaintiff should be placed in the position she would have been in had the tort not occurred. Approaching the past income loss as a constructive dismissal claim would not do that. Ms. J.C. had a good job in Duncan which she was anxious to keep. She left the job because of the Assaults. Her decision to do so was reasonable and, indeed, the only logical course available to her. Baker Industries is a small family company and Mr. Shaw held a prominent position in the company and was the stepson of the owner. In these circumstances, her loss of the Baker Industries job was a foreseeable consequence of the Assaults for which Mr. Shaw is liable.

**120**  Ms. J.C.'s decision to take the position in Duncan soon after leaving Baker Industries was also reasonable. She wanted to continue to work at her chosen occupation in her home community. There was no suggestion that she could have found other plumbing work in Duncan. Given her vulnerability after the Assaults, it is reasonable and understandable that she would stay at the new job once she settled in. Accordingly, I do not accede to the defendants' argument that Ms. J.C. failed to mitigate her loss in the period after she left Baker Industries.

**121**  Ms. J.C.'s annual income from 2005 to 2010 was:

|  |  |  |
| --- | --- | --- |
| 2005 - | $20,559 |  |
| 2006 - | $23,668 |  |
| 2007 - | $29,044 |  |
| 2008 - | $22,227 |  |
| 2009 - | $37,012 |  |
| 2010 - | $40,561 |  |

**122**  It is difficult to determine how much she would have earned had she stayed at Baker Industries. Her income was based on hours worked which depended on the work available. Ms. J.C.'s suggestion that she could have earned $40,000 per year starting in 2006 seems unrealistic. If she worked a 35 hour week at $17 per hour while at Baker Industries she would have earned approximately $31,000 per year. That is only $7,500 more than she earned at her new job. I will assume for the purpose of calculating her past loss that her income lagged behind what she would have earned at Baker Industries for three years. I also assume that by 2009 her hourly rate had increased to a level similar to what it would have been at Baker Industries. Accordingly, I award $22,500 to Ms. J.C. for past income loss.

**123**  I have not included in this award any amount arising from Ms. J.C.'s failure to pass the Interprovincial Exams to obtain her ticket as a journeyman plumber. There are many possible reasons why she did not pass the Interprovincial Exams. She may have lacked the required technical knowledge or lacked proficiency in writing exams. She may have difficulties with comprehension that are unconnected to her emotional trauma. It does seem unusual that someone who has worked as a plumber for six years is not able to pass the Interprovincial Exams. However, it would be pure speculation to conclude that her failure is related to the Assaults. She did not present evidence of her scholastic abilities or achievement in high school or at Malaspina College. None of her current supervisors gave evidence regarding her plumbing skill, aptitude or knowledge. There was no evidence regarding the normal failure rate on the Interprovincial Exams. Without such evidence, I must conclude that Ms. J.C. has failed to prove that her inability to pass the Interprovincial Exams was caused by the Assaults. Accordingly, I am not awarding any amount for past income loss that is predicated upon her failure to obtain her plumbing qualification.

Future Income Loss

**124**  Ms. J.C. also seeks damages for a loss of future earning capacity. This claim is based primarily on her failure to pass the Interprovincial Exams. She argues that she will continue to earn less than she would have because she has not obtained the journeyman qualification. She blames the failure on the restrictions imposed on her employment given her emotional and psychological needs.

**125**  There are two reasons why this claim cannot succeed. First, it is based primarily on Ms. J.C.'s continuing failure to pass the Interprovincial Exams. I have already concluded there is no causal connection between that failure and the Assaults. Second, I have concluded that Ms. Corfield's ongoing vulnerability to suffering intense emotional affect from stressful events is a pre-existing condition caused by the Childhood Abuse. To the extent that Ms. J.C. is susceptible to having future stressful events which might impact her ability to earn income, it is very likely that will be caused by the pre-existing vulnerability. Accordingly, I decline to make any award for loss of future earning capacity.

**Punitive Damages**

**126**  Ms. J.C. argues that Mr. Shaw's conduct is deserving of additional punishment over and above the award of compensatory damages. She says that his actions were malicious and should be considered offensive by the court. Further, Mr. Shaw has not been subject to criminal sanctions and has failed to demonstrate remorse. In these circumstances, she says an award of $40,000 is appropriate.

**127**  The defendants argue that no punitive damages should be awarded as the non-pecuniary damage award must include an appropriate amount to compensate Ms. J.C. for any aggravating factors. They argue that Mr. Shaw did not breach any trust, and that the Assaults were not as invasive as those in cases where punitive damages have been awarded. In short, they argue that there is no need in the circumstances of this case for further punishment.

**128**  Punitive damages are to be awarded in exceptional circumstances for the purposes of denunciation, deterrence and retribution: *Whiten v. Pilot Insurance Co.*, [*[2002] 1 S.C.R. 595*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4BS-00000-00&context=) and *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=). In *Hill*, the Court set out the proper approach to punitive damages at para. 196:

Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

**129**  In *Pawlett*, the Alberta Court of Appeal reduced the trial award of punitive damages in the amount of $50,000 to $5,000. However, the non-pecuniary damage award was $25,000 for assaults that had some similarity to the assaults here. In *B.P.B.*, the Court of Appeal upheld the trial judge's refusal to award punitive damages. Other courts have declined to award punitive damages for sexual assaults: *W.R.O. v. P.A.M.*, [*2003 BCSC 1677*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FGRY-B0KJ-00000-00&context=); *W.M.Y. v. Scott*, [*2000 BCSC 1294*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B175-00000-00&context=); and *T.S. v. J.W.P.*, [*[1999] B.C.J. No. 709*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JS5Y-B1G2-00000-00&context=) (S.C.).

**130**  Many of the factors that would support an award of punitive damages in a sexual assault case must be considered as aggravating factors in the assessment of non-pecuniary damages. As a result, courts considering a claim for punitive damages must be careful to avoid any duplication in the award. The best approach is to consider whether there are grounds for punitive damages only after pecuniary and non-pecuniary damages have been assessed. If the conduct of the defendant calls for punishment over and above the requirement to pay pecuniary and non-pecuniary damages, punitive damages may be appropriate. However, as noted by the Court of Appeal in *Huff v. Price* [*(1990), 51 B.C.L.R. (2d) 282*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F2P-NNM1-JCRC-B52T-00000-00&context=), at 300: "[t]he award of punitive damages should not try to do again what has been done by the compensatory damages".

**131**  The question I must consider is whether the combined award of non-pecuniary damages and aggravated damages is sufficient to appropriately punish Mr. Shaw and deter him and others from similar behaviour. The factors to consider include: Mr. Shaw's moral culpability; the amount he has been ordered to pay for compensation; his ability to pay the compensatory award and any punitive damage award; the amount he has profited by his wrongdoing; whether a criminal penalty has been imposed; and whether he will be penalized professionally or personally in any other way as a result of the finding of liability in this case.

**132**  When I apply those factors to Mr. Shaw's situation, I conclude that the compensatory damage award combined with the publication of these reasons for judgment provides sufficient punishment and deterrence in the circumstances of this case. I have arrived at this conclusion primarily because I have attempted by way of the non-pecuniary damage award to express how the court's sense of decency has been offended by the aggravating factors set out in para. 114 above. These are the same circumstances for which punishment and deterrence is required. An additional award of punitive damages would thus duplicate that award.

**133**  Mr. Shaw has not received any criminal penalty as no prosecution was initiated by Ms. J.C.. However, Mr. Shaw did not and will not profit in any way from his actions. More likely, he will always regret those actions. This is particularly the case given the publication of these reasons for judgment.

**134**  The final factor I have considered is Mr. Shaw's means to pay any award of damages. I have not been provided with direct evidence on his financial situation. However, as a plumber working in a small family business in Duncan, it is unlikely that his income is substantial. I can infer that the damage award will be a significant burden on him. When I take all of these factors into account, I conclude that the non-pecuniary damage award serves the purpose of denunciation, deterrence and retribution and so I decline to award an additional amount as punitive damages.

**Cost of Future Care**

**135**  Ms. J.C. seeks an award of $10,000 to provide for future counselling. She bases this claim on Dr. Bruce's recommendations. However, as the defendants note, Dr. Bruce recommends 12 further sessions at a cost of $150 and says that an award of $2,000 would thus be sufficient. It is difficult to estimate how many counselling sessions Ms. Corfield will require, but in light of Dr. Bruce's opinion that Ms. J.C.'s condition should respond to treatment, I award the sum of $3,000 for the cost of future care.

**Special Damages**

**136**  The defendants did not take issue with the special damage claim of $1,273.

**Summary**

**137**  In summary, I find that Mr. Shaw sexually assaulted Ms. J.C. on the nine occasions described by Ms. Corfield, and that the emotional and psychological difficulties she has experienced since 2005 were caused or contributed to by the Assaults. Neither Mr. Baker, as the manager of the business, nor the employer, Baker Industries, is directly liable for the actions of Mr. Shaw. Baker Industries is not vicariously liable.

**138**  Ms. J.C. is entitled to the following damage awards:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-pecuniary loss | $60,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Past income loss | $22,500.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Cost of future care | $3,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Special damages | $1,273.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Total** | **$86,773.00** |  |

**139**  Ms. J.C. is also entitled to her costs for the trial. If the parties are unable to resolve the terms of the order as to costs, they may provide me with written submissions on that issue on a schedule to be arranged through trial scheduling.

G.B. BUTLER J.

**End of Document**

[***Druet v. Sandman Hotels, Inns & Suites Ltd., [2011] B.C.J. No. 299***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B18G-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

J.E.D. Savage J.

Heard: October 4-8, 2010.

Judgment: February 25, 2011.

Docket: S071499

Registry: Vancouver

**[2011] B.C.J. No. 299** | 2011 BCSC 232

Between Catherine Ann Druet, Plaintiff, and Sandman Hotels, Inns & Suites Limited, Northland Properties Corporation, Defendants

(107 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Leg injuries — Ankle — Action by Druet for damages for personal injuries allowed in part — Druet slipped and fell in a hotel lobby on a rainy evening, fracturing her ankle — Druet was seeking approximately $305,000 in damages — The floor was a hazard to people wearing shoes with wet soles and the unacceptably slippery surface caused the accident — The defendant hotel did not guard adequately against the hazard and was liable — However, as Druet did not take reasonable care for her own safety, liability was apportioned equally — Druet was awarded 50 per cent of $78,552 in damages.**

**Damages — Types of damages — General damages — For personal injuries — Cost of future care — Retroactive loss of income — Special damages — Expenses and expenditures — Medical — Non-pecuniary loss — Action by Druet for damages for personal injuries allowed in part — Druet slipped and fell in a hotel lobby on a rainy evening, fracturing her ankle — Druet was seeking approximately $305,000 in damages — The floor was a hazard to people wearing shoes with wet soles and the unacceptably slippery surface caused the accident — The defendant hotel did not guard adequately against the hazard and was liable — However, as Druet did not take reasonable care for her own safety, liability was apportioned equally — Druet was awarded 50 per cent of $78,552 in damages.**

**Tort law — *Negligence* — Contributory *negligence* — Apportionment of liability — Equal apportionment — Effect on damages — Action by Druet for damages for personal injuries allowed in part — Druet slipped and fell in a hotel lobby on a rainy evening, fracturing her ankle — Druet was seeking approximately $305,000 in damages — The floor was a hazard to people wearing shoes with wet soles and the unacceptably slippery surface caused the accident — The defendant hotel did not guard adequately against the hazard and was liable — However, as Druet did not take reasonable care for her own safety, liability was apportioned equally — Druet was awarded 50 per cent of $78,552 in damages.**

**Tort law — Occupiers' liability — Particular situations — Floors — Action by Druet for damages for personal injuries allowed in part — Druet slipped and fell in a hotel lobby on a rainy evening, fracturing her ankle — Druet was seeking approximately $305,000 in damages — The floor was a hazard to people wearing shoes with wet soles and the unacceptably slippery surface caused the accident — The defendant hotel did not guard adequately against the hazard and was liable — However, as Druet did not take reasonable care for her own safety, liability was apportioned equally — Druet was awarded 50 per cent of $78,552 in damages.**

|  |
| --- |
| Action by Druet for damages for personal injuries. In March 2005, 46-year-old Druet travelled with friends from her home in Olympia, Washington to Vancouver, British Columbia. In Vancouver, Druet and her friends stayed at the defendant hotel. On a rainy evening, Druet entered the hotel lobby and slipped and fell, fracturing her ankle. The injury required surgeries and Druet had ongoing complaints of stiffness and lack of range of motion. Druet was seeking approximately $305,000 in damages. She took the position that the defendant Sandman Hotels was liable for her damages under the Occupiers Liability Act. The defendant denied causation and liability. The defendant further submitted that Druet herself was negligent.  HELD: Action allowed in part.  The expert evidence established that the floor was a hazard to people wearing shoes with wet soles. Druet therefore established that the cause of her accident was the unacceptably slippery surface. Despite a warning sign and a floor mat, the defendant did not guard adequately against the unacceptably slippery surface and was liable. However, Druet did not take reasonable care for her own safety. As a result, liability was apportioned equally. Druet was awarded 50 per cent of the following damages: $55,000 for non-pecuniary damages, $10,320 for loss of income, $3000 for the cost of future care and $10,232 in special damages. |

**Statutes, Regulations and Rules Cited:**

***Negligence*** Act, [*RSBC 1996, CHAPTER 333, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JBDT-B066-00000-00&context=)

Occupiers Liability Act, [*RSBC 1996, CHAPTER 337, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JKPJ-G0P5-00000-00&context=), s. 2, s. 3

**Counsel**

Counsel for the Plaintiff: S. Morishita, M. Holroyd.

Counsel for the Defendants: G.C. Baldwin, B. Malach.

**Reasons for Judgment**

|  |
| --- |
| **J.E.D. SAVAGE J.** |

**I. Introduction**

**1**  On March 19, 2005 the plaintiff Catherine Druet ("Druet") was staying with girlfriends at the Sandman Inn on Georgia Street (the "Hotel") while visiting Vancouver. It was raining outside. She had just returned from eating dinner with her girlfriends Pat Sumner ("Sumner"), Janelle Bledsoe ("Bledsoe") and Stephanie Smith ("Smith") (collectively referred to as the "Girlfriends") when she slipped and fell in the Hotel's lobby (the "Lobby"), injuring her ankle.

**2**  Druet says that the defendants, Sandman Hotels, Inns & Suites Limited and Northland Properties Corporation (collectively referred to as "Sandman"), are occupiers of the Hotel and liable for her damages pursuant to the *Occupiers Liability Act*, *R.S.B.C. 1996, c. 337* (the "Act").

**3**  Sandman in its omnibus pleading denies causation and liability, says Druet was herself negligent, voluntarily assumed the risks, denies she suffered damage, and if she did, says she failed to mitigate her damages.

**II. Background**

**4**  Druet is a 52 year old nurse who resides in Olympia Washington. At the time of these events she was 46. She met the Girlfriends with whom she travelled to Vancouver through her church. They decided to visit Vancouver and rented rooms at the Hotel.

**5**  After arriving on the evening of March 19, 2005, and checking into the Hotel, Druet and her Girlfriends went out for dinner to a Greek restaurant on foot. They did not drink alcohol at dinner. After dinner they returned to the Hotel. It was raining. It was about 8:30 p.m. when they returned.

**6**  Druet went into the Lobby and looked at a computer which listed activities the group could do in the city.

**7**  She was there about five minutes.

**8**  Druet realized that two of her Girlfriends had not entered the Hotel and went back outside where they were smoking. She spoke to Sumner and Bledsoe in the area of the covered entranceway and then re-entered the Hotel. At the entrance was a sandwich board warning sign. She crossed a mat and then stepped onto the tile floor. She was wearing two month old running shoes which were wet from being outside.

**9**  Druet slipped on the floor (the "Accident"). Her friends attended on her. They say that the floor squeaked under foot as they walked on it. Druet thought she slipped on water but acknowledges that she did not see any water. She was immediately in pain and could see from the unnatural angle of her right ankle that she was injured.

**10**  A floor manager attended on her as did Lorenzo Jensen, and Peter Riesen, the Hotel's employees. An ambulance was called. Druet was taken to Vancouver General Hospital. Her ankle was immobilized. The next day she returned to Olympia, Washington.

**11**  Druet suffered a bimalleolar ankle fracture. She had open reduction surgery. The break was fixed with metal screws. The metal screws were removed by a further operation. She had ongoing complaints of stiffness and lack of range of motion. She had a lack of dorsiflexion and could not invert or evert her right hindfoot very well. In June 2008 she had scar tissue surgically debrided and a gastrocnemius recession was performed.

**12**  By 2009 Druet's condition was stabilized, but she had stiffness and arthrofibrosis of her right ankle, related to her bimalleolar ankle fracture. She is not considered at high risk for future injuries, provided she stays within reasonable restrictions.

**13**  She walks with a slight limp and can no longer run as she once did, but can walk significant distances, which she does with walking partners. She has some concerns about the work she does as a nurse, but is still able to perform the work required to the satisfaction of her current employer.

**III. Causation**

**14**  In *Snell v. Farrell,* [*[1990] 2 S.C.R. 311*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-655K-00000-00&context=) at 326, [*72 D.L.R. (4th) 289*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-655K-00000-00&context=), the Supreme Court of Canada defined causation as:

... 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.

**15**  In *Snell*, the defendant doctor continued to perform eye surgery on the plaintiff despite observing bleeding in her eye. Experts agreed that the proper course of action in the circumstances was to stop the surgery and that the defendant's decision to continue was one, but not the only, possible cause of the plaintiff's subsequent blindness in that eye.

**16**  Writing for the Supreme Court of Canada, Sopinka J. supported a less rigid application of the traditional approach to causation at 328:

I am of the opinion that the dissatisfaction with the traditional approach to causation stems to a large extent from its too rigid application by the courts in many cases. Causation need not be determined by scientific precision. It is, as stated by Lord Salmon in *Alphacell Ltd. v. Woodward,* [1972] 2 All E.R. 475, at p. 490 [(H.L.)]:

... essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory.

Furthermore, as I observed earlier, the allocation of the burden of proof is not immutable. Both the burden and the standard of proof are flexible concepts. In *Blatch v. Archer* (1774), 1 Cowp. 63, 98 E.R. 969, Lord Mansfield stated at p. 970:

It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.

**17**  At 330, Mr. Justice Sopinka wrote that while the burden of proof does not shift to the defendant:

... evidence adduced by the plaintiff may result in an inference being drawn adverse to the defendant. Whether an inference is or is not drawn is a matter of weighing evidence.

**18**  In summary, Mr. Justice Sopinka said, at 330:

The legal or ultimate burden remains 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. If some evidence to the contrary is adduced by the defendant, the trial judge is entitled to take account of Lord Mansfield's famous precept [quoted above]. ...

**IV. The Cause of Druet's Accident**

**19**  It is not possible to determine what caused Druet to slip with scientific precision. She asks that I infer from scientific and eyewitness evidence that the condition of the floor of the Lobby caused her Accident.

**20**  The defence says that even if I find the Lobby was in an unsafe condition, the plaintiff must prove that that condition caused her injuries.

**21**  The Accident occurred inside the entrance to the Hotel just off the Lobby. At this entrance is a mat which the Sandman witnesses identified as an "absorptive" mat. There is a small area of dark tile larger than the mat at the entrance. There is then a larger area of light tile which extends to near a stairwell. The stairwell and a small area around it are of dark tile. There is a rail on the stairwell which descends a few steps to the Lobby which is also tiled.

**22**  I accept Druet's evidence that she slipped, as opposed to stumbling, while on the tile surface just past the mat at the entryway to the Hotel off Georgia Street. She could not identify which of two tiled surfaces she slipped on. While she testified that she slipped on water, she acknowledged that she did not see any water at or near the location of the slip.

**23**  The question arises whether Druet slipped on the dark tile or the light tile. There is only a small area of dark tile not covered by mat. That coupled with Druet's explanation of where she fell, make it more probable than not that she slipped on the light tile.

**24**  Granville Airton ("Airton") is a professional engineer. Airton testified about the entrance, the tile surfaces, and the slip resistance of the tile surfaces under wet and dry conditions. He was accepted as an expert witness qualified to give the results of his tests and the opinions expressed in his report.

**25**  Airton used a Slip Test Mark II slip resistance tester (the "Mark II Tester") to determine a coefficient of friction for the tile surfaces on site. The Mark II Tester was developed by Dr. Robert Brungraber, an American slip resistance testing expert. A friction coefficient of .35 is considered acceptable. A higher coefficient is better. A lower coefficient of friction is not considered acceptable. The defence did not challenge the .35 cutoff.

**26**  Airton did *in situ* tests using rubber, leather and neolite test blocks, representing a variety of shoe soles. As he did the test *in situ* at or near the surface where the Accident occurred, he tested the surfaces with whatever sealer and/or polish had been applied to the surface. No evidence was adduced to suggest that the sealer or polish at the time of testing was different than that used at the time of the Accident.

**27**  The light coloured tile produced acceptable coefficients while dry for all test blocks but produced "unacceptable" results for all test blocks while wet. The dark tile produced results which were acceptable for leather and neolite when dry but which showed that that surface was unacceptably slippery for dry rubber and for all test blocks while wet. The results are as follows:

**Tests done with the tiles dry**

**Light coloured tile**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | **Test block** | **Result** | **Comments** |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | Rubber | .44 |  | Acceptable |  |
|  | Leather | .50 |  | Acceptable |  |
|  | Neolite | .69 |  | Acceptable |  |

**Dark coloured tile**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | **Test block** | **Results** | **Comments** |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | Rubber | .24 |  | Much lower than .35 |  |
|  |  |  |  | therefore unacceptably |  |
|  |  |  |  | "slippery" |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | Leather | .49 |  | Acceptable |  |
|  | Neolite | .57 |  | Acceptable |  |

**Tests done with the tiles sprayed with water**

**Light coloured tile**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | **Test block** | **Result** | **Comments** |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | Rubber | .03 |  | Very low therefore |  |
|  |  |  |  | unacceptably |  |
|  |  |  |  | "slippery" |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | Leather | .04 |  | Very low therefore |  |
|  |  |  |  | unacceptably |  |
|  |  |  |  | "slippery" |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | Neolite | .29 |  | Much higher than the |  |
|  |  |  |  | rubber and leather but |  |
|  |  |  |  | still about 17% lower |  |
|  |  |  |  | than .35 so |  |
|  |  |  |  | unacceptably |  |
|  |  |  |  | "slippery" |  |

**Dark coloured tile**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | **Test block** | **Result** | **Comments** |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | Rubber | .02 |  | Very low therefore |  |
|  |  |  |  | unacceptably |  |
|  |  |  |  | "slippery" |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | Leather | .02 |  | Very low therefore |  |
|  |  |  |  | unacceptably |  |
|  |  |  |  | "slippery" |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | Neolite | .32 |  | Very low therefore |  |
|  |  |  |  | unacceptably |  |
|  |  |  |  | "slippery" |  |

**28**  I accept Airton's evidence that the light tile surface was unacceptably slippery for the test blocks tested when wet. Although the precise substance of the soles of Druet's running shoes was not identified, I find it more likely than not that the same result -- unacceptably slippery when wet -- would have been achieved if her shoes had been tested. That was the result for the broad range of sole types tested; I cannot find the result would have been any different for the precise shoe soles she wore. The defence produced no expert evidence critiquing the results or providing other results, although Airton was cross-examined.

**29**  While Airton did the "wet" tests by spraying the tile with water, his report specifies that the results he achieved would be the same whether the moisture came from the tile itself or the soles of the shoes worn on it. Therefore the further question arises whether either the surface of the light tiles where Druet slipped or the soles of her shoes were wet. There is some evidence of actual water being in the location where she slipped. The defendants' duty manager, Peter Riesen ("Riesen"), testified that there were two or three drops the size of a dime in that location. But by the time he noticed these Druet had been attended on by her friends and staff, had been given blanket, etc. Therefore it is not possible to determine whether that water was present when she slipped or whether it was brought to the scene by those attending her or, for that matter, whether those attending her picked up water on their clothing.

**30**  Druet's Girlfriends testified that they saw standing water in another location on the tile floor. After the fall that water was towelled dry. Airton testified that when he attended at the scene to do his test it had been raining and there was water pooling at the entrance in two locations. Photographs of the scene taken the morning after these events also showed pooled water at the entrance. The drains were not effective to remove the water and seemed to have been installed as an afterthought.

**31**  The evidence of all the witnesses is that it had been raining on and off throughout the day and was raining when Druet and her friends were returning from their restaurant meal. Druet testified that her shoes were wet. Sumner and Bledsoe testified that their shoes squeaked on the tile surface when they walked.

**32**  The defendants say that I should not infer that the plaintiff slipped on water on the tile floor. They say there is no evidence of water, that claims that there was water at the relevant place are speculation and that, following the reasoning in *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=), I should be cautious about inferring such a hazard.

**33**  In that case, this Court held that it could not presume ***negligence*** because the plaintiff suffered an injury. The plaintiff did not observe water on the floor, but assumed that water had accumulated, causing her fall. There was no evidence of a hazard and therefore no evidence that a hazard caused the plaintiff's accident.

**34**  *Black's Law Dictionary*, 9th ed. defines "speculation" as "[t]he act or practice of theorizing about matters over which there is no certain knowledge". Speculation should be distinguished from inference. "Infer" is defined as "to conclude from facts or from factual reasoning".

**35**  On the evidence before me, although there is evidence that there was some water on the floor, to find that there was water on the floor that caused the slip is speculative. The facts indicate that there was also some water on the floor in other areas of the Lobby. After several people attended Druet there were very small spots of water found in her vicinity. This is insufficient to lead me to conclude that the water on the floor of the Lobby in the location where Druet slipped caused her Accident.

**36**  However, Airton's evidence persuades me that the floor itself was a hazard to people wearing shoes with wet soles. There is no suggestion here that Druet was doing anything untoward at the time. Her footwear, two month old Asics running shoes, are not, in my opinion, inappropriate, unusual, or unexpected footwear for a visitor to be wearing on such occasion. In my opinion the plaintiff has established on a balance of probabilities that the cause of her Accident was the unacceptably slippery surface of the white tiles when wet or when walked upon by wet shoes.

**V. Occupiers' Liability**

**37**  Section 3(1) of the Act places on an occupier a duty of care "... that in the all the circumstances of the case is reasonable to see that a person ... on the premises ... will be reasonably safe in using the premises". The defendants admit that they are occupiers.

**38**  The relevant statutory provisions are as follows:

|  |  |  |  |
| --- | --- | --- | --- |
| 1 |  | In this Act: |  |

"**occupier**" means a person who

1. is in physical possession of premises, or
2. has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises,

and, for this Act, there may be more than one occupier of the same premises ...

...

|  |  |  |  |
| --- | --- | --- | --- |
| 2 |  | Subject to section 3(4), and sections 4 and 9, this Act determines the care that an occupier is required to show toward persons entering on the premises in respect of dangers to them, or to their property on the premises, or to the property on the premises of persons who have not themselves entered on the premises, that are due to the state of the premises, or to anything done or omitted to be done on the premises, and for which the occupier is responsible by law. |  |
| 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.
5. Despite subsection (1), an occupier has no duty of care to a person in respect of risks willingly assumed by that person other than a duty not to
6. create a danger with intent to do harm to the person or damage to the person's property, or
7. act with reckless disregard to the safety of the person or the integrity of the person's property.

...

**39**  The Act does not create a presumption of ***negligence*** on the part of an occupier. Druet must prove some act or failure to act that constitutes ***negligence*** or a breach of the Act: *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=) at 127, (C.A.), *Lansdowne v. United Church of Canada et al.*, [*2000 BCSC 1604*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G27W-00000-00&context=).

**40**  Where the plaintiff establishes a *prima facie* case of ***negligence***, the occupier may rebut its alleged breach of the standard of care with evidence that at the time of the Accident it had a reasonable system of cleaning and inspection in place and that it was being followed: *Bjerregaard v. Westfair Foods Ltd.*, [*2003 BCSC 1755*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60P3-00000-00&context=) at para. 14; *Atkins v. Jim Pattison Industries Ltd.* (1998), [*(1999) 61 B.C.L.R. (3d) 183*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JX8W-M2W3-00000-00&context=), [*146 B.C.A.C. 83*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JX8W-M2W3-00000-00&context=).

**41**  The test is one of reasonableness, not perfection: *Carlson v. Canada Safeway Limited* [*(1983), 47 B.C.L.R. 252*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-F2TK-22G9-00000-00&context=) (C.A.), and *Thuveson v. Robert H. Ash & Associates*, [*[1997] B.C.J. No. 1177*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JP4G-613B-00000-00&context=), (21 May 1997), Courtenay S4348 (B.C.S.C.).

**VI. Sandman's Liability**

**42**  I have found that the floor of the Lobby was unacceptably slippery when wet or when walked on with wet shoes and that the combination of this slipperiness and the moisture on the soles of the plaintiff's shoes caused her injury. Therefore the question of whether Sandman is liable for the plaintiff's injuries is one of whether having a floor which is slippery when wet is a breach of the Act.

**43**  As I have said, in slip and fall cases, such as the one before me, courts undertake a traditional ***negligence*** analysis. However once a *prima facie* case of ***negligence*** has been established, the occupier has an opportunity to rebut the evidence that it breached the applicable standard of care.

**44**  This approach permits an occupier to demonstrate that it took reasonable steps to discharge its duty to the plaintiff and that, as a result, it should not be held liable for the plaintiff's injuries.

**45**  In my view Druet has established a *prima facie* breach of the Act by Sandman. Sandman had a floor which was unacceptably slippery for a variety of shoe soles when the floor was wet, or when walked on by wet shoes.

**46**  Rain and wet weather is commonplace in Vancouver, particularly at the time of year when these events occurred. People coming and going in and out of the rain at a hotel entrance, such as this, is also commonplace. It was Saturday night.

**47**  A consideration of the condition of the premises, the activities on the premises, and the conduct of third parties on the premises in my opinion supports the view that having an unacceptably slippery floor, when wet or when walked on with wet shoes, is *prima facie* negligent. That is, such is *prima facie* a breach of the duty required of occupiers to ensure persons will be reasonably safe when using the premises.

**48**  Where there is evidence of a *prima facie* breach of the *Act*, an occupier, such as Sandman, may rebut the breach of duty by leading evidence that it had put into place a reasonable system of care, inspection and maintenance that was being followed at the time of the Accident.

**49**  I must now consider whether Sandman had a reasonable system in place that was being followed to guard against this hazard. The burden is on the defendants to adduce this evidence.

**50**  The hazard here is the combination of the floor tile and moisture, either on the floor itself or on the soles of shoes. I note that the test which permits the occupier to rebut a *prima facie* case that it has breached its duty is of limited assistance in circumstances such as these as Sandman controls only one of the variables.

**51**  Sandman placed a large mat just inside the door entrance. Sandman's witnesses referred to this as an "absorptive mat". The mat nearly covered the area of dark tiles at the entrance. The dark tile area was found by Airton to be unacceptably slippery with all but one shoe type when *either* wet or dry. Sandman also placed common yellow "sandwich" board warning signs inside the door entrance and outside the door entrance when it rained.

**52**  With respect to maintenance Sandman's witnesses testified that the duty manager, bellman, and other staff were instructed to be on the lookout for wetness or other hazards on the floor at all times. In other words, there was no systematic or scheduled recorded inspection of the premises by any person or group of persons. In *Coulson v. Canada Safeway Limited* (1988), [*[1989] 2 W.W.R. 264*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JP9P-G1KG-00000-00&context=), [*(1989) 32 B.C.L.R. (2d) 212*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JP9P-G1KG-00000-00&context=) (C.A.), Hutcheon J.A. found such a system inadequate.

**53**  After these events staff towelled dry the area, although they indicated little water was found, and another nearby area which it was admitted had quantities of standing water.

**54**  With respect to the sealer or polish used on the floor, Airton testified that the "Highway One sealer" used at the time is reported to meet the Underwriters Laboratory of Canada UL-410 standard, but such standard pertains only to determining the coefficient of friction tested in dry conditions. Airton concluded that the fact that the sealer used meets such standard is not helpful in determining whether it is appropriate for use in conditions here. Airton was cross-examined. Sandman introduced no evidence of its own regarding the floor sealer or polish and its suitability or lack thereof in wet conditions or where peoples' shoes were wet.

**55**  In my view, despite the mat and warning signs, Sandman did not have a reasonable system for monitoring the condition of its floors at the entrance to the Hotel. The un-contradicted evidence of Airton was that the Lobby floor was unacceptably slippery for a variety of shoe types when wet or walked on with wet shoes. By placing the signs and mat it is clear that Sandman knew the floor was slippery in such circumstances. There was no system of regular systematic inspection of the area or mat.

**56**  However, even if Sandman had a regular system of monitoring and inspection, such a system could not guard adequately against a floor surface that was unacceptably slippery when walked upon with wet shoes. In my opinion Sandman is liable.

**VII. Contributory *Negligence***

**57**  Sandman says that Druet had an obligation to keep a proper look out for her own safety and to be aware of her surroundings. Had she done so she would have observed their warning signs at the entrance and inside the entrance.

**58**  Sandman says there was an absorptive mat at the entrance. Druet had been walking in the rain. Druet knew or ought to have known her footwear was wet. She could have taken extra care on entering the premises. For example, she could have dried her feet on the mat. The defendants' witnesses testified that the mat was dry.

**59**  In this case Druet entered the premises after walking in the rain from a restaurant to the Hotel. Although there is some conflict in this, in my view it is likely that there was some pooled water at the entrance, as shown in the photographs taken after the events. So she knew or ought to have known her feet were wet. She went into the Hotel, rejoined her friends outside, then walked in again. She had an opportunity to observe the yellow sandwich board warning signs on both sides of the door as she walked in and out twice within 5-10 minutes.

**60**  Because of the shine on the floors water on the floors would not necessarily have been obvious. It was not reasonable for Druet not to wipe her feet on the mat and not to take extra care in stepping off the mat and onto the floor. Her evidence is that she did neither. In my opinion she did not take reasonable care for her own safety.

**61**  In the result both parties are at fault. The ***Negligence*** *Act*, *R.S.B.C. 1996, c. 333*, requires me to apportion the degree to which each party was at fault. In *Etson v. Loblaw Companies Limited (Real Canadian Superstore),* [*2010 BCSC 1865*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G2KG-00000-00&context=), Fisher J., apportioned liability equally where she found that the plaintiff failed to look out for her own safety. Smith J., as she then was, came to a similar conclusion in *Castillo v. Westfair Foods Ltd.*, [*[1999] B.C.J. No. 1326*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F7ND-G4M0-00000-00&context=), (2 June 1999), New Westminster SO-37569 (B.C.S.C.).

**62**  While the circumstances in the cases are rarely on all fours, in my view these cases are instructive. Further, s. 1 of the ***Negligence*** *Act* says that where it is not possible to establish different degrees of fault, liability must be apportioned equally. In the circumstances I apportion liability equally.

**VIII. Damages**

**A. Non-Pecuniary Damages**

**63**  The parties are significantly at odds with respect to damages. The plaintiff claims approximately $305,000 in damages, including non-pecuniary damages of $85,000. The defendants argue that non-pecuniary damages should be $30,000 and there should be no award under any other head.

**64**  The plaintiff relies on *French v. Hodge*, [*2005 NSSC 44*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-XPX1-FCCX-61MK-00000-00&context=); *Rizzolo v. Brett*, [*2009 BCSC 732*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M2JJ-00000-00&context=), aff'd [*2010 BCCA 398*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B2M8-00000-00&context=); *Wormell v. Hagen*, [*2009 BCSC 1166*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-628P-00000-00&context=); and *Falati v. Smith*, [*2010 BCSC 465*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-62PC-00000-00&context=) in estimating non-pecuniary damages at $85,000. The defendants argue that non-pecuniary damages should be $30,000, relying on *Squires v. Badesha*, [*[1995] B.C.J. No. 2784*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G20H-00000-00&context=) (29 December 1995), New Westminster SO-8166 (B.C.S.C.); *Flentje v. Nichols*, [*[2006] O.J. No. 3836*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDV1-JFSV-G4GS-00000-00&context=) (21 September 2006), Doc. 04-CV-26382SR (Ont. S.C.J.); *Levy v. Brampton (City)*, [*[2005] O.J. No. 2487*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDR1-JJSF-21TG-00000-00&context=) (15 June 2005), Doc. 03-CV-248174SR (Ont. C.J.); *Choromanski v. Malaspina University College*, [*2002 BCSC 771*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-FJTD-G2KW-00000-00&context=); and *Ball v. Moorman,* [*2002 BCSC 395*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F900-G0MG-00000-00&context=).

**65**  In my opinion the cases on which the plaintiff relies involve either more serious injuries or more substantial sequelae to the injuries suffered.

**66**  I have described the injuries above. As a result of those injuries the plaintiff had three surgeries, although two were in succession. She had implantation of a plate, a rod and surgical screws in March 2005 which were removed in September 2005. Her ankle was debrided in June 2008.

**67**  Druet missed a total of three months of work as a licenced practical nurse arising from the injuries and surgeries. She walked with crutches for a short time after the Accident while recuperating. She had limited physiotherapy in 2005 but not since. She wears orthotics.

**68**  Druet has substantially resumed her previous activities, except running. She now walks two miles a day, five days a week. She did substantial walking during a vacation to Europe in 2006 and a holiday in New York in 2008. She can walk five kilometres. She participates in 5K walks and completes them 10 to 15 minutes slower than when she ran.

**69**  Druet relies primarily on *French* and *Falati* with respect to quantum. In *French* the plaintiff suffered an ankle injury as well as soft-tissue injuries. The plaintiff was hospitalized for two weeks. The plaintiff had two operations performed within that period, including the insertion of a plate and screws. He was in physiotherapy for more than a year. His prognosis was for an ankle fusion, and he developed post-traumatic osteoarthritis, as well as neck and back soft-tissue injuries. The plaintiff in *French* was disabled from working in his previous employment and was required to take a sitting or sedentary job which would require retraining. Recreation such as fishing, walking with his children, and playing catch were either not possible or his enjoyment greatly diminished. The accident exacerbated his pre-existing anxiety disorder.

**70**  In *Falati* the plaintiff had a crush injury to his left tibia and fracture of the fibula. He was hospitalized and underwent surgical stabilization of his fractures with indermedullary nailing. Four days were spent in hospital. Five months after discharge his physician recommended he refrain from standing for more than 30 minutes, not walk for more than 100 metres, and not climb ladders or stairs. The plaintiff was left with some element of permanent left ankle disability. The hardware in his ankle was not removed but might be removed in the future. The plaintiff had a fairly significant anxiety reaction and "reactive depression". He had symptoms suggestive of post-traumatic stress disorder but not enough to be classified as "full PTSD syndrome".

**71**  Both of these cases involve, in my opinion, more significant sequella and elements of significant psychological impacts. The cases cited by the defendants, however, involve less serious injuries. In my opinion non-pecuniary damages fall between the two parties' positions. I award $55,000 under this head.

**B. Loss of Income**

**72**  Druet claims loss of past income because of time she was required to take off work. She was off work from March 21, 2005 until May 31, 2005 immediately after the fall. She missed work from September 19, 2005 to September 22, 2005 when the hardware was removed. She missed work from June 20, 2008 until July 6, 2008 when her ankle was debrided. I accept the plaintiff's calculation of this wage loss at $8,944.74.

**73**  Druet also used up "sick days" to allow for salary continuance during some of the time she was off work. Had she not used up sick days she would have received one-half of the salary she was entitled to for not using these days. I accept the plaintiff's calculation of these at $527 and $849.24 for a total of $1,376.24.

**74**  Druet does not alleged that she was out of pocket for all of these losses. Her benefit plans provided short term disability coverage for some of these losses.

**75**  In *Ratych v. Bloomer*, [*[1990] 1 S.C.R. 940*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-6549-00000-00&context=), [*69 D.L.R. (4th) 25*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-6549-00000-00&context=), the Supreme Court of Canada applied the general principle that damages in tort should seek to compensate the victim for her loss while avoiding over-compensation in the context of the "private insurance exception" and an award for lost earnings.

**76**  The "private insurance exception" permits a plaintiff to recover twice: once from the tortfeasor and once from the proceeds of private insurance. The exception is applied if the plaintiff can show some evidence that she contributed to funding the plan: *Ratych* at 972-73.

**77**  In *Kask v. Tam* [*(1996), 21 B.C.L.R. (3d) 11*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G2CN-00000-00&context=) at para. 23, [*72 B.C.A.C. 133*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G2CN-00000-00&context=), our Court of Appeal reviewed the jurisprudence since *Ratych* and found that the evidentiary requirement is low; "some evidence" of negotiation to give up something for the insurance coverage is sufficient.

**78**  Druet gave evidence that this coverage was provided as part of her wage package and that the benefits she received from her insurance were taxable.

**79**  Pursuant to the Supreme Court of Canada decision in *Cunningham v. Wheeler,* [*[1994] 1 S.C.R. 359*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3CD-00000-00&context=), [*113 D.L.R. (4th) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3CD-00000-00&context=). This is sufficient evidence that she contributed to her private insurance plan to permit her insurance benefits to fall within the private insurance exception. Writing for the majority, Cory J. said, at 407:

Generally speaking, any of the following examples, by no means an exhaustive list, provide the sort of evidence that could well be sufficient to establish that the employee paid for the benefit:

...

1. Evidence of some money foregone by the employee in return for the benefits. For example if the employees gave up the return of a percentage of their Unemployment Insurance Plan premiums in return for the benefits.

...

**80**  Druet paid tax on the money she received from her insurance company. She therefore paid something to receive them and is entitled to recover the insured amounts from the defendants.

**C. Loss of Future Earning Capacity**

**81**  There is a claim for loss of earning capacity. Garson J. 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=) recently affirmed the approach that one must first enquire into whether there is a substantial possibility of future income loss before embarking on methods to assess a loss. A future or hypothetical possibility is only considered if it is a real and substantial possibility and not a speculation: *Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=), [*140 D.L.R. (4th) 235*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=).

**82**  Dr. Mankey in his report of June 2009 opined that Druet's prognosis is that her condition is fixed and stable, and not considered to deteriorate or improve significantly from this point. She is not at high risk for future injury.

**83**  Druet has considered upgrading her qualifications from those of a licenced practical nurse to become a registered nurse. Counsel argues that Druet is now foreclosed from doing so, as most registered nurses work in hospitals, which involves much more walking and physical work than she presently does.

**84**  Druet maintains her pre-Accident employment, six years post-Accident. She is now 52. She does substantial walks five times a week for exercise and recreation in addition to any walking done during her full-time employment. While she has concerns regarding her future employment, these are not, in my view, substantiated by the medical evidence. In my opinion she has not shown that there is a real and substantial possibility of an event leading to a future income loss.

**85**  I would not make any award under this head.

**D. Cost of Future Care**

**86**  Under this head the plaintiff claims the cost of orthtics, some pain killers and Tylenol, podiatrist visits and orthopedic surgeon visits. The orthotics cost $398 per pair and last a couple of years. She requires different orthotics for work and dress shoes.

**87**  The claims for podiatrist and orthopedic visits seem inconsistent with her fixed and stable prognosis. I accept that there will be an occasional need for consultation, but not with the regularity asserted by counsel.

**88**  Under this head I would award the plaintiff a total of $3,000.

**E. Loss of Future Housekeeping Capacity**

**89**  The plaintiff argues that she may have to incur housekeeping expenses in the future, to assist her where her mother currently provides some assistance. In my view the evidence falls short of establishing this head of damage.

**F. In Trust Claim**

**90**  Druet claims in trust on behalf of her mother, Vera Taylor, for the gratuitous services of Ms. Taylor in caring for Ms. Druet upon discharge from hospital. Ms. Taylor did assist her daughter post-Accident. In my opinion, however, applying the tests set out in *Eggleston v. Watson*, [*2010 BCSC 890*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-22CX-00000-00&context=), the help provided falls within the usual "give and take" of family members.

**G. Special Damages**

**91**  In her statement of claim, the plaintiff alleges that she has incurred medical expenses because of the defendants' ***negligence*** and seeks to recover those costs.

**92**  The majority of the plaintiff's medical expenses were incurred in the United States and were paid directly by one of several private insurance companies (the "Insurers"). At trial, an itemized list of the plaintiff's claim for special damages was tendered. Among the damages claimed are expenses incurred by the Insurers.

**93**  The only case relied upon by the parties in respect of the Insurers' costs is *Ratych,* cited above. That case involved a claim in which a police officer alleged that he should recover the value of lost wages against a tortfeasor, though his employer had continued to pay him during his period of disability. At the end of its analysis, the Court said, at 983:

These comments should not be taken as extending to types of collateral benefits other than lost earnings, such as insurance paid for by the plaintiff and gratuitous payments made by third parties. Those issues are not before the Court and must be left for another day.

**94**  However *Ratych* was applied in *Napoleone v. Sharma,* [*2008 BCSC 1746*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JS5Y-B37C-00000-00&context=) outside the context of wage loss indemnity. The plaintiff sought recovery of the portion of her special expenses which had been reimbursed to her under insurance provided through her husband's employer. There was no evidence that the plaintiff's husband had contributed to funding the benefits and therefore they did not fall within the private insurance exception.

**95**  I do not find these cases of assistance in the matter before me. This is not a case in which the plaintiff seeks to recover twice so that she may have the benefit of private insurance she funded through her own forethought. Instead she asks this Court to reimburse her for amounts expended by third parties, her Insurers, on her behalf. She says if such an award is made, she will be required to repay her Insurers; she therefore asks us to make an award for the benefit of third parties who are not joined in this action.

**96**  No authority was put before me which would permit me to do so, however the plaintiff did argue that the Insurers have a right of subrogation. On subrogation, the Court in *Ratych* concluded, at 982-83:

[a]s a general rule, wage benefits paid while a plaintiff is unable to work must be brought into account and deducted from the claim for lost earnings. An exception to this rule may lie where the Court is satisfied that the employer or fund which paid the wage benefits is entitled to be reimbursed for them on the principle of subrogation. This is the case where statutes, such as the *Workers' Compensation Act*, R.S.O. 1980, c. 539, expressly provide for payment to the benefactor of any wage benefits recovered. **It will also be the case where the person who paid the benefits establishes a valid claim to have them repaid out of any damages awarded. Absent legislation or a third party claim, the only device available to the Court to effect transference to the third party would be trust. Given that the third party has effective ways apart from trust of enforcing the claim, I would not extend the trust doctrine applied in *Teno*** [*Arnold v. Teno,* [*[1978] 2 S.C.R. 287*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250Y-00000-00&context=)] **and *Thornton*** [*Thornton v. Prince George Boards of School Trustees,* [*[1978] 2 S.C.R. 267*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250X-00000-00&context=) and *Arnold v. Teno,* [*[1978] 2 S.C.R. 287*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250Y-00000-00&context=)] **to collateral benefits in the usual case.** At the same time, I would not rule out that a judge might use this device to transfer payment to a third party where the Judge is satisfied that this is both necessary and appropriate in the interests of justice. Generally speaking, however, some sort of obligation, moral if not legal, to repay the third party would need to be established to permit application of the trust device. [Emphasis added.]

**97**  There is no legislation or third party claim in this case therefore the plaintiff's claim relies on establishing that the Insurers have an in trust claim.

**98**  In closing submissions, plaintiff's counsel pointed to an explanation of benefits from Regence BlueShield as evidence of its right of subrogation. On the form, beside the item lines which detail the services provided and paid for by that insurer on behalf of the plaintiff, is a code which reads T03. The form explains that this code means "Subrogation Case in Process. Payment may be reclaimed."

**99**  This falls short of establishing that this insurer has a right of subrogation and does not assist with the argument that the plaintiff's other insurer has such a right.

**100**  The interests of justice do not require that I award an in trust claim. On these facts, there is no other basis for me to award non-parties a remedy for amounts they paid to fourth parties on behalf of the plaintiff.

**101**  It was open to the Insurers to seek to recover their expenses and they did not do so.

**102**  The plaintiff's claim for special damages that she did not incur is dismissed. I allow her claim for her out of pocket expenses related to this accident in the amounts of CDN$446.31 and USD$9,786.53. I note that the Canadian and US dollars are almost at par today.

**IX. Summary**

**103**  The plaintiff has demonstrated, on a balance of probabilities, that the slipperiness of the light tiles in the Lobby of the Hotel caused her to fall and resulted in injury to her ankle.

**104**  The defendants have demonstrated, on a balance of probabilities, that the plaintiff failed to keep a proper lookout and take reasonable care on re-entering the Lobby with wet shoes and that this failure contributed to her fall and resulting ankle injury.

**105**  I apportion liability equally.

**106**  I award the plaintiff 50% of the following damages:

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Description** | **Amount** |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 1. |  | Non-Pecuniary Damages | 55,000.00 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 2. |  | Loss of Income | 10,320.98 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 3. |  | Cost of Future Care | 3,000.00 |  |
| 4. |  | Special Damages (US) | 9,786.53 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 5. |  | Special Damages (CAD) | 446.31 |  |

**107**  As success has been divided, unless there is something of which I am not aware that impacts costs, the parties shall bear their own costs.

J.E.D. SAVAGE J.

**End of Document**

[***Evans v. Metcalfe, [2010] B.C.J. No. 1000***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-221C-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

S.R. Romilly J.

Heard: By written submissions.

Judgment: May 26, 2010.

Docket: 08 1095

Registry: Victoria

**[2010] B.C.J. No. 1000** | [*2010 BCSC 745*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F81W-23WG-00000-00&context=) | 92 C.P.C. (6th) 387 | [*189 A.C.W.S. (3d) 669*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F81W-23WG-00000-00&context=) | [*2010 CarswellBC 1326*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F81W-23WG-00000-00&context=)

Between Tania Nikole Evans, Plaintiff, and Benjamin Eastwood Metcalfe, Defendant

(56 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Trials — Jury trials — Jurors — Judgments and orders — Drawing up and settling — Amendment, rescission and variation — Before judgment entered — Courts — Jurisdiction — Provincial and territorial courts — Superior courts — Trial courts — Inherent jurisdiction — Application by the defendant to have the jury's verdict entered as the Court's judgment in an assessment of damages trial — Verdict awarded the plaintiff damages of $17,300 but reduced them by 15 per cent because of her failure to mitigate — Jury also substantially reduced the special damages that the plaintiff claimed — Application dismissed — Trial judge used his inherent jurisdiction to set aside the mitigation finding — He could not set aside the reduction of special damages due to lack of evidence — Judgment was therefore issued for $17,300 — This amount would not be reduced by the failure to mitigate — Trial judge reached the limits of his remedial powers with respect to corrections of the jury verdict — This was an appropriate case for appellate review.**

**Damages — Proceedings — Practice and procedure — Courts — Jurisdiction — Orders — Variation or amendment of orders — Application by the defendant to have the jury's verdict entered as the Court's judgment in an assessment of damages trial — Verdict awarded the plaintiff damages of $17,300 but reduced them by 15 per cent because of her failure to mitigate — Jury also substantially reduced the special damages that the plaintiff claimed — Application dismissed — Trial judge used his inherent jurisdiction to set aside the mitigation finding — He could not set aside the reduction of special damages due to lack of evidence — Judgment was therefore issued for $17,300 — This amount would not be reduced by the failure to mitigate — Trial judge reached the limits of his remedial powers with respect to corrections of the jury verdict — This was an appropriate case for appellate review.**

|  |
| --- |
| Application by the defendant Metcalfe to have the jury's verdict entered as the Court's judgment in this action. This application followed a jury trial on the assessment of damages suffered in a motor vehicle accident by Evans due to Metcalfe's ***negligence***. Metcalfe admitted liability. The jury found Evans' total damages to be $17,200. This included $6,000 for special damages, which had been reduced from $25,051. The jury reduced the $17,200 by 15 per cent to $14,705 because of Evans' failure to mitigate. Judgment on this verdict had not yet been entered. Evans claimed that the jury verdict was legally unreasonable regarding the failure to mitigate. She asked the trial judge to set aside the verdict and to set the matter for retrial.  HELD: Application dismissed.  The jury could find a failure to mitigate in two scenarios. They were that Evans failed to follow the treatment recommendations of her health professionals or that her efforts to return to work were unreasonable. The jury answered all of the questions available to it. None of the answers were conflicting such that the judgment could not be entered. The trial judge could reject the jury verdict if there was no evidence to support the jury's findings or where the jury gave an answer to a question which could not, in law, provide a foundation for judgment. These options stemmed from the inherent jurisdiction of the trial judge with respect to questions of law. These powers were supplemented by the Rules of Court. Regarding the trial judge's inherent jurisdiction two findings of the jury were problematic. They were the finding of a failure to mitigate and the reduction of special damages. There was no evidence for the jury to make these findings. Since the judgment had not yet been entered the trial judge struck the failure to mitigate finding. He could not set aside the finding regarding the special damages because he was not provided with remedial assistance on this particular point. The trial judge would not substitute his assessment for that of the jury. The jury was discharged and a redirection would be futile. Judgment was therefore issued for $17,300. This amount would not be reduced by the failure to mitigate. The trial judge reached the limits of his remedial powers with respect to corrections of the jury verdict. This was an appropriate case for appellate review. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 41(2)

Court of Appeal Act, [*RSBC 1996, CHAPTER 77, s. 9*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FM1-FGJR-217R-00000-00&context=), s. 9(1), s. 9(2)

**Counsel**

Counsel for the Plaintiff: Barri A. Marlatt.

Counsel for the Defendant: Sean Finn.

**Reasons for Judgment**

|  |
| --- |
| **S.R. ROMILLY J.** |

**A. Issue**

**1**  This application follows a trial on the assessment of damages suffered in a motor vehicle accident by the plaintiff, Tania Nicole Evans (Ms. Evans), due to the ***negligence*** of the defendant, Benjamin Eastwood Metcalfe (Mr. Metcalfe). Liability was admitted by the defendant and the trial on the assessment of damages was heard by myself sitting with a jury.

**2**  The issues at bar arise out of the jury verdict and assessment of damages. At the end of this trial the jury found the total damages for the plaintiff to be $17,200. The jury further reduced this figure by 15% for a failure to mitigate. Judgment on this verdict has not yet been entered.

**3**  The defendant applies to have the jury's verdict entered as the Court's judgment in this action. The plaintiff submits that the jury's verdict is legally unreasonable with respect to the finding of a failure to mitigate and that I should therefore set aside the verdict and set the matter for retrial.

**B. Background**

**4**  During the trial, counsel for Mr. Metcalfe argued that Ms. Evans did not take reasonable steps to mitigate the losses she allegedly suffered as a result of the accident. The most important evidence on this point was that of Dr. Rocheleau. In his first report (from 27 August 2007), he stated that:

The effects of this accident should have diminished to the point where she could return to part-time employment within two to three months and full-time employment in four to six months.

**5**  In his second report (from 11 January 2010), Dr. Rocheleau opined that, although Ms. Evans had been out of the workforce for three and one- half years at that point (apart from limited or short term employment), and although he "did not expect her to be symptom free as she was not symptom free before the accident, there is a reasonable expectation that she would be able to perform at a higher level of physical ability than what has occurred." At the time of his writing this second report Dr. Rocheleau was of the opinion that Ms. Evans was fit for at least "sedentary to light employment".

**6**  Dr. Rocheleau also testified that Ms. Evans followed the advice of her caregivers to her own detriment. Dr. Rocheleau was of the opinion that the treatments Ms. Evans underwent may have actually aggravated her injuries and extended the recovery period. There was no evidence that Ms. Evans failed to follow any medical advice.

**7**  In my charge to the jury I addressed the subject of mitigation, the relevant portion of which reads:

In this case Counsel for Mr. Metcalfe suggests that Ms. Evans did not take reasonable steps to mitigate or reduce the loss allegedly suffered as a consequence of the accident. When a plaintiff is wronged, he or she is required to act reasonably to mitigate or lessen the loss. No damages are recoverable for any loss that Ms. Evans could have avoided through reasonable action. In relation to this issue you will want to consider the extent to which Ms. Evans followed the treatment recommendations made by her health professionals. You will also want to consider whether Ms. Evans's efforts to return to work were reasonable ...

On this issue the burden of proof rests upon Mr. Metcalfe. Mr. Metcalfe must prove on a balance of probabilities that Ms. Evans did not act reasonably. Merely suggesting some other course that Ms. Evans might have followed is not good enough. Criticism of Ms. Evans's conduct by Mr. Metcalfe must be viewed with caution, as it was Mr. Metcalfe who caused the damages in the first place. Ms. Evans is not held to a high standard of conduct in mitigation. The law is satisfied if Ms. Evans takes steps that a reasonable person would take in the circumstances to reduce the loss ...

[Emphasis added.]

**8**  The jury pronounced its verdict on March 22, 2010. The jury answered in the affirmative to the question of whether the plaintiff had "suffered injury or loss as a result of the April 4, 2006 motor vehicle accident." With respect to quantum the jury found as follows under the specific heads of damages:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-pecuniary Loss: | $ 1,000 |  |

Pecuniary Loss:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Special Damages: | $ 6,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Past loss of income: | $10,300 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Cost of future care: | $0 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Loss of future earning | $0 |  |
|  | capacity: |  |  |

**9**  In total this amounted to a finding of $17,300 total damages. However, in response to the question of whether the plaintiff had failed to mitigate her damages the jury again answered in the affirmative and fixed that deduction at 15%. This meant that the total damages to the plaintiff were to be reduced by $2,595 to $14,705.

**10**  Of note is that the award for special damages was reduced from $25,051.96.

**11**  Having set out the relevant background to my decision, I will now canvass the law that I must apply.

**C. Law**

1. Mitigation

**12**  A recent and clear statement of the test for failure to mitigate can be found in the judgment of Justice Rice in ***Jopling v. Brodowich***, [*2009 BCSC 653*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M2KK-00000-00&context=) at para. 44:

[44] The test for failure to mitigate by refusing to undergo medical treatment is summarized in ***Fox v. Danis***, [*2005 BCSC 102*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S119-00000-00&context=) (aff'd [*2006 BCCA 324*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1T2-00000-00&context=), [*228 B.C.A.C. 164*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1T2-00000-00&context=)), at paras. 35-37:

[35] There is no dispute that every plaintiff has a duty to mitigate his/her damages, and that the burden of proving a failure to fulfil that duty rests with the defendant, the standard of proof being the balance of probabilities: *Janiak v. Ippolito*, [*[1985] 1 S.C.R. 146*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2361-00000-00&context=).

[36] In this case, the Defendant submits that the Plaintiff failed to mitigate her loss in that she failed to exercise as recommended by her family doctor.

[37] To succeed in proving these submissions, the Defendants must establish, on the balance of probabilities, that the Plaintiff failed to undertake this recommended treatment; that by following the recommended treatment she could have overcome or could in the future overcome the problems; and that her refusal to take that treatment was unreasonable: *Janiak v. Ippolito*, *supra* and *Maslen v. Rubenstein* [*(1993), 83 B.C.L.R. (2d) 131*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-FD4T-B0MF-00000-00&context=) (C.A.).

**13**  This reasoning accords with my charge to the jury which I will restate here:

In relation to this issue you will want to consider the extent to which Ms. Evans followed the treatment recommendations made by her health professionals. You will also want to consider whether Ms. Evans' efforts to return to work were reasonable ...

**14**  Therefore, the jury could find a failure to mitigate in two scenarios:

1. Where Ms. Evans failed to follow the treatment recommendations of her health professionals, or:
2. Where Ms. Evans' efforts to return to work were unreasonable.

The onus to prove either of these is borne by the defendant.

2. Powers of the Trial Judge

**15**  The leading case in this area is ***LeBlanc v. Penticton (City)*** [*(1981), 28 B.C.L.R. 179*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-FJTD-G1NW-00000-00&context=) (C.A.), leave to appeal ref'd [*[1981] S.C.C.A. No. 38*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SG1-JWBS-651F-00000-00&context=). In ***LeBlanc***, Taggart J.A. canvassed the principles governing the powers of a trial judge to reject a jury verdict in a civil proceeding. Justice Taggart held (at 184) that "a trial judge may refuse to accept the verdict of a jury only where he concludes that there is no evidence to support the findings of the jury; or where the jury gives an answer to a question which cannot, in law, provide a foundation for judgment." These options stem from the inherent jurisdiction of the trial judge with respect to questions of law.

**16**  These powers are also supplemented by the Rules of Court:

RULE 41 -- ORDERS

...

1. Where, after any redirection the court thinks appropriate, a jury answers some but not all of the questions directed to it, or where the answers are conflicting, so that judgment cannot be pronounced on the findings, the action shall be retried.

Justice Taggart found that this provision meant that, for a jury verdict to be rejected, not only must the answers be conflicting, but they must be so conflicting that "judgment cannot be pronounced on the findings". Ultimately, and most importantly, Taggart J.A. held at 189:

Having read and re-read the 1976 Rules and compared them with the 1961 Rules and with the general principles governing trial judges in their acceptance or rejection of juries' verdicts, to which I have referred above, I have reached the conclusion that the new rules do not restrict the ability of a trial judge to reject the verdict of a jury, but that the principles I have endeavoured to set out continue to have application and must be applied in conjunction with the provisions of R. 41. Thus, in my consideration of the reasons given by the trial judge for rejecting the jury's verdict, I propose to be guided by the principle that a trial judge may refuse to accept the verdict of a jury where he concludes that there is no evidence to support the findings of the jury, or where the jury gives an answer to a question which cannot, in law, provide a foundation for judgment; and to be guided by the provisions of R. 41 and especially by the provisions of subr. (2) relating to conflicting answers.

[Emphasis added.]

In ***LeBlanc***, Justice Taggart ordered the jury verdict restored (at 193). However, the Court of Appeal went on to find the jury's verdict to be unreasonable and varied the award: [*(1981), 28 B.C.L.R. 205*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-DY89-M2PX-00000-00&context=) (C.A.). The power to remedy an award of unreasonable quantum is one that exists on appeal only.

**17**  Scrutiny of a jury verdict is limited; the powers of a trial judge are not the same as those granted on appellate review. Mackenzie J.A., in the latter case of ***Balla v. I.C.B.C.***, [*2001 BCCA 62*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JJD0-G14N-00000-00&context=) at paras. 9-10, [*85 B.C.L.R. (3d) 70*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JJD0-G14N-00000-00&context=), clarified that, whereas Rule 41(2) or an error of law could be used to scrutinize a verdict at the trial level, the "***Nance test***" could be applied by the Court of Appeal. This test - from ***Nance v. British Columbia Electric Railway Company Ld.***, [*[1951] A.C. 601*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-WC31-F5KY-B4VS-00000-00&context=) (P.C.) - applies on appellate review to assess "whether the sum awarded is inordinately low or inordinately high." The remedies available from application of the ***Nance test*** (by virtue of s. 9 of the ***Court of Appeal Act***, *R.S.B.C. 1996, c. 77*) are broader than those available to the trial judge. For example, at para. 13 of ***Balla***, Mackenzie J.A. stated that on a successful application of the ***Nance test*** the Court of Appeal may "substitute an award for the jury's verdict that has been set aside."

**18**  The Court of Appeal in ***Balla*** followed reasoning from ***Stewart v. Shimpei*** [*(1995), 65 B.C.A.C. 113*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JNJT-B1YR-00000-00&context=). In both cases there had been a finding of injury to the plaintiff but "nil" was awarded for non-pecuniary damages. Such an error was held to be an error of law such that the trial judge had jurisdiction to correct it. To illustrate this point, in ***Balla*** at para. 12, Mackenzie J.A. stated:

[12] In my respectful view, the learned trial judge was in error in his conclusion that the findings of the jury were not in conflict. The trial judge distinguished the decision in ***Stewart*** as "case specific". With respect I do not agree. It is illogical to conclude that a plaintiff was injured and suffered out of pocket expenses but did not sustain any pain, suffering and loss of enjoyment, however transitory, as a result of the injury. The finding of injury and the award for special damages cannot be reconciled. Without any award for non-pecuniary damages, the answers present a clear conflict. The reasoning in ***Stewart*** is not distinguishable.

**19**  Whereas in ***Stewart*** the ***Nance test*** was applied and a different award was substituted for that of the jury, in ***Balla*** the Court of Appeal declined to utilize its broader discretion under s. 9 of the ***Court of Appeal Act*** and instead directed a new trial (I note that this is the only remedy available under Rule 41(2)).

**20**  I will depart here from the discussion of the Court of Appeal (which I leave to a subsequent section) and will return to the powers of the trial judge.

**21**  The tests available to a trial judge were clearly laid out in Justice Southin's reasons in ***Johnson v. Laing***, [*2004 BCCA 364*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X44P-00000-00&context=) at para. 14:

1. Where there is no evidence to support the finding of the jury.
2. Where the jury gives an answer to a question which cannot, in law, provide a foundation for judgment.
3. Where the jury answers some but not all of the questions directed to it.

[Rule 41(2)]

1. Where the answers are conflicting, so that judgment cannot be pronounced on the findings.

[Rule 41(2)]

**22**  In ***Johnson***, Southin J.A. extensively canvassed the history of the powers of the Supreme Court. Justice Southin retraced the law from days prior to Matthew Baillie Begbie's oaths of office as the first judge of the Supreme Court of British Columbia in 1858 (see para. 50). According to Justice Southin, the first reported case where a jury verdict was set aside occurred in ***Gray v. Macallum*** [*(1892), 2 B.C.R. 104*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6N1-FH4C-X23J-00000-00&context=). At para. 85 of her judgment, Southin J.A. quoted (from ***Gray***) the words of Begbie C.J. writing then for the Divisional Court (at 106):

As regards the consideration of the weight of evidence, it is surely unnecessary to do more than barely recall the fact that it is peculiarly the office of the jury, and not of this Court, to weigh the evidence, and that we could not on this ground set aside the verdict unless it were wholly unsupported by evidence, or were contrary to such a body of evidence, or rested on so slight a foundation as to make it obvious that the jury were perverse or invincibly prejudiced.

This passage is interesting on more than a purely historical level. On my reading of the jurisprudence, these principles continue to underlie the current state of the law: a trial judge may not substitute his or her own assessment of damages for that of the jury (see ***Johnson*** at paras. 121-127).

**23**  The tests from ***LeBlanc*** and ***Johnson*** were cited by Justice Macaulay in the trial decision of ***Ramcharitar v. Gill***, [*2007 BCSC 561*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-2493-00000-00&context=) at para. 8. In that case, Justice Macaulay denied an application to have the verdict of the jury set aside on the basis that the jury's answers conflicted (with respect to different uses of the term '***negligence***'). Macaulay J. also held that, with respect to the argument that there was "no evidence" for the jury to conclude that the injury at issue was not caused by the defendant, at paras. 22-23:

... As the sole finder of fact, the jury is entitled to accept all, none or part of the evidence put forward on behalf of the plaintiff. It is obvious that the jury rejected the evidence of the plaintiff and his witnesses in its entirety. Whether it was reasonable for the jury to do so in the circumstances is a question potentially for the Court of Appeal but, in my view, a trial judge may not reject such a finding.

[23] This is not a case of a jury making a finding that has no evidentiary basis which would be subject to correction by a trial judge exercising his or her inherent jurisdiction. In substance, the plaintiff's complaint is that the jury should not have answered the second question in the negative, at least having regard to the apparently undisputed evidence before it. In my view, no trial judge could ever intervene or reinstruct a jury in such a circumstance without saying, in effect, that his or her view of the reliability of some, or all, of the evidence should prevail over the view of the jury.

**24**  Justice Sigurdson, in ***Horita v. Graham***, [*[1997] B.C.J. No. 2880*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M2DY-00000-00&context=) (S.C.), also rejected an argument that there was no evidence for a particular finding of the jury. In ***Horita*** this argument was advanced with respect to contributory ***negligence***. Sigurdson J. held that the burden of proof was a necessary consideration in scrutiny of a jury's verdict. Sigurdson J. perhaps puts it best himself, beginning at para. 44:

**44** In these circumstances, I can only interfere and refuse to accept the verdict of the jury if there is no evidence to support it. The law on this subject is clear and I have referred to it earlier.

**45** In determining whether there is any evidence that could be said to support the verdict of the jury, I think that it is necessary to consider where the burden of proof on the issue in question lies. For example, the burden of proof on the issue of contributory ***negligence*** is on the defendants (the party that asserted that proposition) whereas the burden of proof on the issue of non-pecuniary damages is, of course, on the plaintiff.

**46** From an analytical and theoretical perspective, therefore, the question of whether the plaintiff has proven its non-pecuniary loss is a different situation than that facing MacDonald J. in McElroy v. Embleton. In that case, the burden was on the defendant to prove contributory ***negligence*** on the part of the plaintiff and it was decided by the jury that burden had been discharged. MacDonald J. held that there was no such evidence and the defendant simply could not have and did not discharge the burden upon it. It would have been quite a different situation if the jury had found that there was no contributory ***negligence*** and the trial judge was asked to reject that verdict on the basis that there was no evidence to support it.

**47** If a jury refuses to find in favour of a party that has the burden of proof on an issue, it might be suggested that it is an unreasonable verdict. However, it cannot be said to be a verdict for which there was no evidence when it is open to the jury to reject the evidence of the party on whom the burden of proof rests. As the burden of proof with respect to non-pecuniary damages is on the plaintiff and it is always open to a jury to reject some, all or part of a witness' evidence, it is difficult to see how a jury award of zero for non-pecuniary damages could be said to be based on no evidence.

**25**  In this passage Justice Sigurdson mentions the judgment of MacDonald J. in ***McElroy v. Embleton*** [*(1993), 81 B.C.L.R. (2d) 328*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F4NT-X2JV-00000-00&context=) (S.C.). In that case, with respect to another automobile collision, the jury found the plaintiff contributorily negligent in the amount of 15%. The evidence in support of this conclusion was argued by the defendant to be that of the positioning of the plaintiff's headrest at the time of the collision. At para. 16, MacDonald J. held that while it was true that there was some uncertainty as to whether the head rest was "low" at the time of collision, the defendant had not called any evidence that the positioning of the headrest in the "low position would not provide adequate protection to the plaintiff against the type of injury she incurred in this accident." The fact that there was "no reasonable evidence" to support this finding was fatal (see para. 17). The verdict of the jury was entered, but the portion of the jury verdict finding contributory ***negligence*** was struck.

**26**  This reasoning found support on appeal: Justice Southin, in *obiter,* characterized the decision of MacDonald J. as a "sound conclusion" before rejecting the appeal as to the general amount of damages: [*(1996), 19 B.C.L.R. (3d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M3DD-00000-00&context=) at para. 7, [*74 B.C.A.C. 304*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M3DD-00000-00&context=). In his concurring reasons, at para. 15, McEachern C.J.B.C. also stated his agreement with the judgment of MacDonald J. as to contributory ***negligence***.

**27**  The critical point to be made with respect to scrutiny of a jury's verdict by the trial judge is the avoidance of interference with the proper function of the jury. Trial judges are rightfully cautious when exercising their inherent powers to scrutinize the verdict of a jury. In most cases such an argument may be - in actuality - that the damages granted were inordinately low: see, for example, ***Wright v. Hohenacker***, [*2009 BCSC 536*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M244-00000-00&context=), *per* B. Fisher J; and ***Ciolli v. Galley***, [*2010 BCSC 115*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X0P4-00000-00&context=), *per* Loo J. Unreasonable awards of damages by juries (apart from the tests in ***LeBlanc*** and ***Johnson***) are matters for the Court of Appeal and outside of the jurisdiction of the trial judge even where they refer to failure to mitigate. The reasoning of Joyce J. in ***Loughlin v. Nichol***, [*2002 BCSC 1523*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-FH4C-X376-00000-00&context=) at para. 16, supports this:

[16] The question as to the extent by which the plaintiff's damages should be reduced by reason of her failure to mitigate is a matter within the province of the jury. As the trial judge I do not have any jurisdiction to intrude into that finding or refuse to accept that finding simply because I might have come to a different conclusion on the evidence.

3. Retrial

**28**  Retrial is the only remedy available under Rule 41(2). However, through exercise of inherent jurisdiction at the trial level, or, by virtue of the ***Court of Appeal Act*** at the appellate level, other remedies are available. For example, at the appellate level these include substitution of the judgment by the Court of Appeal (***Stewart, Balla***) and remittance to the trial judge for re-assessment (***Johnson***).

**29**  The following passage from Justice Southin's judgment in ***Johnson*** contains some important considerations:

[158] Important though the right of trial by jury in civil cases is thought to be, the Court must be mindful not only of the cost of a new trial by jury but also both of the inconvenience to the witnesses, both expert and lay, and the reproach the administration of justice rightly suffers from delays its procedures inflict on litigants. It is now some seven years since the accident and five years since this action was brought and the sooner it is ended the better.

Understandably, the defendant opposes the expense and effort of a new trial.

4. Appellate Intervention

**30**  With respect to the unreasonableness of a jury's verdict, much broader remedial powers are granted at the appellate level by virtue of the ***Court of Appeal Act***. For example, s. 9 reads in part:

1. On an appeal, the court may
2. make or give any order that could have been made or given by the court or tribunal appealed from,
3. impose reasonable terms and conditions in an order, and
4. make or give any additional order that it considers just.
5. The court or a justice may draw inferences of fact.

...

See also the above examples from ***Balla***, ***Johnson***, and ***Stewart***.

**31**  With respect to scrutiny of the verdict of a civil jury, these powers are exercised on application of the ***Nance test***. In ***Stewart*** at para. 10, Prowse J.A. quoted the following passage from ***Nance*** at 613-614:

... Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then, before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage [...]. The last named case further shows that when on a proper direction the quantum is ascertained by a jury, the disparity between the figure at which they have arrived and any figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone. The figure must be "wholly out of proportion" [Citations omitted].

[Emphasis the same as that of Prowse J.A.]

**32**  In ***Boota v. Dhaliwal***, [*2009 BCCA 586*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-24TR-00000-00&context=), Justice Garson explored the application of this test and the limits upon it. Garson J.A. stressed the disparity necessary to justify appellate interference, relying on reasoning that the award must not simply be "inordinately high" or "inordinately low" but (at para. 9) "wholly out of all proportion", "wholly disproportionate" or "shockingly unreasonable".

**33**  Returning to ***Johnson***, Justice Southin held that the trial judge's opinion on the measure of damages was helpful in the appellate court's assessment. This passage was quoted in ***Boota*** and commented on by Garson J.A., beginning at para. 58:

[58] I turn now to the trial judge's reasons in which she concluded that the jury's findings on the issue of past income loss was an error of law and the balance of the verdict was inordinately low. The appellant sought the trial judge's "opinion on the reasonableness of the jury's verdict" in reliance on the dicta of Madam Justice Southin in *Johnson v. Laing*, [*2004 BCCA 364*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X44P-00000-00&context=), [*242 D.L.R. (4th) 48*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X44P-00000-00&context=) at paras. 140-143, 157, 159 which I now reproduce:

[140] ... On an appeal, where the court is faced with a jury verdict that contains an error of law, and the trial judge has declined to remedy the error or has erred in applying a remedy, what steps may the court of appeal take to remedy the situation? May the court:

1. remedy the apparent error by substitution of an assessment of damages for the jury's verdict;
2. remit the matter to the trial judge for reconsideration and assessment of damages in accordance with directions; or
3. order a new trial on a limited issue (for example, assessment of damages).

[141] This question only arises if this Court concludes that the jury's verdict was "unreasonable" or, in the words of Duff C.J. in *McLean v. McCannell*, [*[1937] S.C.R. 341*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-FC6N-X1FS-00000-00&context=), *supra*, "that no jury reviewing the evidence as a whole and acting judicially could have reached it."

[142] The learned trial judge did not put it so but that is what I infer he meant when he said at para. 4, *supra* para. 13:

... it would have been difficult to conclude on the evidence that the back injury did not amount to a loss of employability that would sustain an assessment of future wage loss. The evidence would also indicate that the assessment of general damages was inordinately low.

[143] I have found it most helpful to have the learned trial judge's opinion on the reasonableness of the verdict which the Court would not have had but for the appellant's opposition to the motion for judgment. I do not know why it is that when a question of the reasonableness of the verdict arises, this Court does not make a practice of consulting the trial judge. Lindley L.J. followed that course in *Allcock v. Hall*, [1891] 1 Q.B. 444, *supra* para. 104, obviously without any qualm as to its propriety. That the trial judge's opinion could not bind the court does not deprive it of utility.

...

[157] I have concluded, although not without some hesitation, that s. 9(1)(c) [Court of Appeal Act, *R.S.B.C. 1996, c. 77*] does empower this Court to remit a cause to the trial judge to assess the damages on the evidence at the trial before him in circumstances such as these, and that, in this case, the Court should do so. The learned trial judge has the great advantage of having seen the witnesses, especially the appellant.

...

[159] I would therefore allow the appeal accordingly. The appellant shall have the costs of the appeal. The costs of the first trial and of the assessment of the damages are remitted to the learned trial judge.

...

[59] The trial judge obliged the appellant by providing her views. Counsel for the appellant asked this Court to express its view on the propriety of reasons for judgment expressing the trial judge's views on the verdict. Such views if stated would be *obiter dicta*, as they were in *Johnson v. Laing*. I prefer to say nothing further on this point as no live issue respecting the issue is before us, and we did not hear argument on the question. Neither counsel suggested that the trial judge's opinion was in any way binding on us.

[60] It may be helpful to counsel to note that the issue has been considered by at least three judges in the Supreme Court of British Columbia, aside from this case. On each occasion the trial judge declined to offer the opinion sought. See *Muis v. Alekson* (1965), 53 W.W.R. 255 (Nemetz J. in Chambers); *Force v. Gibbons* [*(1978), 9 B.C.L.R. 144*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6S1-F8SS-62F2-00000-00&context=), [*93 D.L.R. (3d) 626*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6S1-F8SS-62F2-00000-00&context=); and *Doell v. McKay*, [*2004 BCSC 1502*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G0GC-00000-00&context=), [*34 B.C.L.R. (4th) 191*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G0GC-00000-00&context=). I found the trial judge's opinion, concerning the fairness of the trial, useful. However, I do not suggest that it is incumbent on a trial judge to provide such reasons.

**34**  In ***Boota***, the trial judge had acceded to the request for an opinion, [*[2008] B.C.J. No. 534*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JN6B-S1GC-00000-00&context=). On appeal, Justice Garson took into account the trial judge's opinion that the jury's award contained errors of law, was inordinately low and deliberated over too small an amount of time for consideration of the medical evidence (at para. 6). Notwithstanding this, Garson J.A. stressed that the question to be answered was:

[12] Consequently the task of this Court is to review the evidence in order to determine whether the jury acting judicially could have taken the view it did of Mr. Boota's claim of injury, pain, and suffering, past disability from employment, and future loss of earning capacity.

On this ground of appeal, Garson J.A. ultimately concluded that:

[36] I therefore respectfully disagree with the trial judge's opinion no jury could have reached the verdict the jury reached. It may not be in accordance with the trial judge's view of the evidence, but the jury was the trier of fact, and it is the jury's view that is important. I emphasize that this Court's appellate function is not to weigh the evidence, but to ascertain if the jury reviewing the evidence as a whole and acting judicially could have reached its verdict. After reviewing the evidence as a whole, I conclude there was evidence capable of supporting the verdict.

**35**  As a result of ***Boota*** it is likely that - although it possesses broad powers of intervention - the Court of Appeal will intervene in jury awards rarely, and only in situations where the disparity and unfairness is blatant and obvious: where the award is "wholly out of all proportion" or "shockingly unreasonable".

**D. Discussion**

**36**  To reiterate: the tests available for scrutiny of a jury verdict by a trial judge are limited to the following:

1. Where there is no evidence to support the finding of a jury.
2. Where the jury gives an answer to a question which cannot, in law, provide a foundation for judgment.

3) Where Rule 41(2) applies because either:

1. the jury answers some but not all of the questions directed to it; or,
2. the answers are conflicting, so that judgment cannot be pronounced on the findings.

**37**  Any other powers to scrutinize the verdict of a jury are available only at the appellate level by virtue of the test from ***Nance***.

**38**  In the case of Ms. Evans, the jury answered all the questions available to it and none of these answers can be said to be conflicting such that judgment cannot be entered (per Taggart J.A.'s reasoning in ***LeBlanc***). It would not be perverse in the logical sense - as Southin J.A. used the term at para. 18 of ***Johnson*** - to say that damages can be reduced by a failure to mitigate. Such a finding is quite common. As a result, Rule 41(2) is inapplicable.

**39**  As regards the inherent jurisdiction of a trial judge, two findings of the jury are problematic: the finding of a failure to mitigate and the reduction of special damages. The question I will address is whether there was evidence for the jury to make these findings (1 above).

1. Failure to Mitigate

**40**  It can be inferred from the verdict that the jury accepted Dr. Rocheleau's opinion that Ms. Evans could have returned to work within a few months. This is reflected in the damages awarded for past loss of income.

**41**  However, the jury's holding of a "failure to mitigate" beyond this rests on an uncertain evidentiary foundation. On the basis of my charge (with which no issue has been taken), for this finding to accord with the law it must reflect that Ms. Evans either failed to follow the "treatment recommendations made by her health professionals" or failed to make "reasonable" efforts to return to work. The burden of proof in this respect lies with the defendant.

**42**  The most damning evidence in regard to this issue comes from Dr. Rocheleau. That evidence is that Ms. Evans could have returned to part-time work within two to three months and full-time within four to six months. It was not open to the jury to conclude that Ms. Evans could have returned to work immediately; no evidence was led in that regard. However, it was open to the jury to conclude that she could return in a short period of time, and that is essentially what they did: $10,300 represents a short period of time out of work.

**43**  However, I reiterate that there was no evidence that Ms. Evans could have returned to work any sooner than a few months. That said, Ms. Evans could not have mitigated by working at a time when even the most positive medical assessment felt her unable to do so. Such a finding is contrary to the evidence.

**44**  A finding of liability for an amount of time which would accord with the $10,300 figure was the worst case scenario for Ms. Evans. No reasonable efforts could have returned her to work prior to when she was able. There was no evidence that Ms. Evans was able to work prior to (at the earliest for full-time work) four months after the accident: the defendant did not produce evidence of a failure to mitigate within this period.

**45**  Returning to my charge, to make a finding of a failure to mitigate, the jury was to consider "the extent to which Ms. Evans followed the treatment recommendations made by her health professionals." Dr. Rocheleau gave evidence that the treatments Ms. Evans underwent may have been detrimental to her recovery. However, no evidence was before the jury that Ms. Evans did not follow the directions and treatment orders prescribed by her health professionals. The reduction in special damages is questionable on this basis as well.

**46**  The jury clearly did not accept much (if any) of the plaintiff's evidence as to her damages; this cannot be scrutinized at the trial level. However, the defendant bore the onus to prove a failure to mitigate and did not do so for the period in question (the time even Dr. Rocheleau accepted the plaintiff could not work). Put bluntly, the jury's findings on quantum of liability appear to have reached a punitive level against Ms. Evans. However, while it is open to the jury to disbelieve a plaintiff and their evidence, it is not open to the jury to make findings contrary to the evidence before it.

**47**  After the jury has issued its verdict but before judgment has been entered, it is within my inherent jurisdiction to correct the finding of a failure to mitigate if it is based upon no evidence: ***LeBlanc***, ***Johnson***, ***Ramcharitar***. In this respect I am offered remedial guidance by the judgment of MacDonald J. in ***McElroy*** (and by subsequent treatment by the very learned panel of the Court of Appeal). I will therefore strike the jury's finding of a failure to mitigate from the judgment to be entered.

2. Special Damages

**48**  The basis for the reduction in special damages awarded to Ms. Evans also suffers from a lack of evidence in support. No evidence was led that any of these expenses were unreasonable such that they should not be compensated by the defendant. I have not encountered remedial assistance on this particular point. Whereas I would enter an award for the whole of those damages claimed, I cannot substitute my assessment for that of the jury.

**49**  The jury has been discharged and I am of the opinion that a redirection would be futile in any event. My remedial powers at this stage are limited; as a result I feel that this matter is better left to the Court of Appeal.

3. Retrial

**50**  I do not think that this is an appropriate matter for retrial. I recognize that had I found Rule 41(2) to be applicable this would be the only remedy available. In my view, on the basis of the law as I understand it, the remedy of retrial is available to correct errors through inherent jurisdiction. However, I do not think it wise to subject the parties to the expense and effort of another trial, given the logistics and expense of securing expert witnesses and a new jury. I decline to order the matter retried.

4. The Court of Appeal

**51**  Although it has not been specifically requested of me, I feel it necessary to comment on the reasonableness of the jury's verdict. In doing so I am taking in mind both the utility of such comments expressed by Southin J.A. in ***Johnson***, and the limits to them as stated by Garson J.A. in ***Boota***.

**52**  In my opinion, as a long-time member of the bench, the jury's award in this case has surpassed the level of "shockingly unreasonable". The amount of damages awarded for non-pecuniary damages represents a fraction of what was sought. Whatever the reason, the jury felt the need to punish Ms. Evans in a way that does not accord with the law. In my judgment I have already discussed some failures of the jury to appropriately apply the law to the actual evidence; I believe that these failures (and more) are further manifest in their wholly disproportionate award. No jury reviewing the evidence as a whole and acting judicially could have reached the verdict issued in these proceedings; the evidence cannot support the verdict.

**E. Ruling**

**53**  Judgment will be issued for the plaintiff in the amount of $17,300. This amount represents the following findings of the jury:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-pecuniary Loss: | $ 1,000 |  |

Pecuniary Loss:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Special Damages: | $ 6,000 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Past loss of income: | $10,300 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Cost of future care: | $0 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Loss of future earning | $0 |  |
|  | capacity: |  |  |

**54**  These amounts will not be reduced by a failure to mitigate.

**55**  I have reached the limits of my remedial powers with respect to corrections of the jury verdict though I believe this to be an appropriate case for appellate review.

**56**  I understand the parties may desire to make submissions with respect to costs.

S.R. ROMILLY J.

**End of Document**

[***Holland v. American Dental Association, 2013 CCLG para. 25-371***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-0C71-JPGX-S1DD-00000-00&context=)

Canadian Commercial Law Guide

British Columbia Supreme Court

Before: Leask J

Decision: December 31, 2012.

Docket No. 0916471

***Canadian Commercial Law Guide*  > *Cases* > *2010s* > *2012***

**2013 CCLG para. 25-371** | [*[2012] B.C.J. No. 2766*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JJ1H-X36R-00000-00&context=) | [*2012 BCSC 1975*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JJ1H-X36R-00000-00&context=)

Zsuzanna Holland nee Hegedus Plaintiff v. American Dental Association, Canadian Dental Association, The British Columbia Dental Association, College of Dental Surgeons of British Columbia, College of Physicians and Surgeons of British Columbia, and John Doe Dentist Defendants

**Case Summary**

**Product liability — In 1982, the plaintiff's teeth were filled with amalgam fillings during dental treatments — In 2005, the plaintiff's fillings were removed — Plaintiff allegedly suffered from adverse health reactions caused by mercury in amalgam fillings — Plaintiff's first action in 2007 against defendant dental associations framed in *negligence* and dismissed — Plaintiff's second action against same defendants framed essentially in terms of the Business Practices and Consumer Protection Act — Defendant dental associations applied to strike the plaintiff's statement of claim and dismiss the second action — Application granted — Business Practices and Consumer Protection Act,** [***SBC 2004, c. 2, s. 1***](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-F5KY-B22P-00000-00&context=) **"consumer transaction", "supplier" — Rule 9-5, Supreme Court Civil Rules, *BC Reg. 168/2009*.**

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| **Facts:** In 1982, the then-minor plaintiff's teeth were filled with amalgam fillings during dental treatments. In 2005, those fillings were removed. The plaintiff claimed that she suffered adverse health reactions caused by the mercury in her amalgam fillings. In 2007, the plaintiff sued for ***negligence***, but that action (the "First Action") was dismissed. In this action, the plaintiff, who was self-represented, sued several defendants, including the three dental associations named as defendants to the First Action. Her statement of claim contained allegations under four headings: (a) the *Business Practices and Consumer Protection Act* (the "BPCPA"); (b) the *Health Care Costs Recovery Act* (the "HCCRA"); (c) the doctrines of full faith and credit and comity and the application of the doctrine of *res ipsa loquitur;* and (d) unclean hands and bad faith. The dental association defendants applied to strike the statement of claim against them and dismiss the action against them.  HELD: The application was granted.  The province had no intention of making claims under the HCCRA, which deals with recovery of costs paid by the government; thus, the plaintiff's claim did not fall under the HCCRA. As to the doctrines of full faith and credit and comity, there was no basis in the law of British Columbia or Canada for accepting the plaintiff's submissions that the Court accept and apply certain decisions of courts in the United States. *Res ipsa loquitur* is sometimes applicable in ***negligence*** actions. However, all of the plaintiff's allegations of ***negligence*** were disposed of by the dismissal of the First Action. In addition, the doctrines of unclean hands and bad faith were not independent causes of action in Canadian law. The real issue was whether the plaintiff had a potential case under the BPCPA. The plaintiff's dealings with her dentist in 1982 may have been a "consumer transaction" within the meaning of the BPCPA, but there was no possibility of categorizing the defendant dental associations as "suppliers" under the BPCPA. The plaintiff had no dealings with these defendants, one of which was not even in existence in 1982. Also, the plaintiff's argument that the installation of her fillings in 1982 was a continuing delict until the fillings were removed in 2005 was untenable. Thus, the plaintiff's statement of claim against the three dental association defendants was struck out and the action against them dismissed. |

**Counsel**

The plaintiff on her own behalf; B.S. Buettner for the defendants American Dental Association and the British Columbia Dental Association; S. Sangha for the defendants Canadian Dental Association.

**Reasons for Judgment**

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| **P.D. LEASK J.** |

**1**   This is an application by the three defendants, The American Dental Association, the Canadian Dental Association, and the British Columbia Dental Association, pursuant to Rule 9-5 of the *Supreme Court Civil Rules* to strike the statement of claim and dismiss the action against them.

**2**  This is the second action brought against these defendants dealing with injuries allegedly suffered by the plaintiff as a result of some dental treatments she received in 1982 when she was 17 years old. At that time she was taken to a dental clinic where the dentist drilled and filled sixteen posterior and one anterior tooth with amalgam fillings. In September 2005 the plaintiff had her amalgam fillings removed. In her pleadings she claims to have suffered a number of adverse health reactions which she believes was caused by the mercury in her amalgam fillings.

**3**  Her first court action dealing with these issues was commenced in the Williams Lake Registry on July 25, 2007 and names all the present defendants as parties as well as a number of ministries and government agencies of both British Columbia and Canada.

**4**  The government defendants brought an application to strike the first statement of claim against them pursuant to Rule 19(24) of the former *Supreme Court Civil Rules*. Their application was heard and granted by Meiklem, J. *Holland v. British Columbia*, [*2008 BCSC 965*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M2Y2-00000-00&context=). His judgment was affirmed on appeal. *Holland v. British Columbia*, [*2009 BCCA 305*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S092-00000-00&context=).

**5**  The current defendant associations also brought a Rule 19(24) application in the first action. It was granted by Rice, J. *Holland v. HMTG and Others*, Williams Lake Reg. 07-16199, November 26, 2008. That judgment was also affirmed on appeal. *Holland v. British Columbia*, [*2009 BCCA 601*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X0NR-00000-00&context=).In the penultimate paragraph of her judgment, Newbury, J.A. said:

**10** As far as the *Business Practices and Consumer Protection Act* is concerned, this issue was properly not dealt with by the chambers judge because it had not been pleaded. Ms. Holland has evidently commenced a new action in Supreme Court against some or all of these defendants and others. I therefore will not comment on the applicability of the statute notwithstanding Mr. Buettner's submissions. They will have to await another day. Referring to the present appeal, it would not be appropriate at this late stage to permit Ms. Holland to amend her pleadings to include a "statutory tort" under the *Act*, if it does create a private cause of action.

**6**  In her original pleadings in this action, the plaintiff joined two additional parties, the College of Dental Surgeons of British Columbia and the College of Physicians and Surgeons of British Columbia. On November 22, 2011 I granted their Rule 9-5 applications to dismiss the action.

**7**  The dismissal of the plaintiff's first action by Rice, J. and the affirmation of that dismissal in the Court of Appeal disposed of any allegations of ***negligence*** against the current defendants. The plaintiff's current statement of claim makes allegations under four headings:

1. *Business Practices and Consumer Protection Act*, *S.B.C. 2004, c. 2*
2. *Health Care Costs Recovery Act*, *S.B.C. 2008, c. 27*
3. Doctrines of Full Faith and Credit & Comity; Application of Doctrine of *res ipsa loquitur*
4. Unclean Hands and Bad Faith

**8**  Because the Court of Appeal in *Holland v. British Columbia*, [*2009 BCCA 601*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X0NR-00000-00&context=) expressly declined to deal with the *BCPC Act* I will deal with that cause of action last. As far as the *Health Care Costs Recovery Act* is concerned, the Court of Appeal in Holland v. HMTQ, [*2009 BCCA 305*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S092-00000-00&context=) said this:

**8** After the hearing Ms. Holland forwarded additional submissions to the Court raising, for the first time, the provisions of the *Health Care Costs Recovery Act*, *S.B.C. 2008, c. 27*. In the material filed, Ms. Holland claims that the Province cannot oppose the appellants' claims given the wording of the *Health Care Costs Recovery Act.*

**9** However, the *Health Care Costs Recovery Act* does not, on its face, seem relevant to the appellants' claim as it deals with the recovery from a person who has caused injury, of the costs that have been or will be paid *by the government* for certain health care services (see the definition of "health care services" and s. 2 of the Act). Any amount recovered for those services in an action is designated to go to government (see s. 20 of the Act). Ms. Holland's claim against the Province is not a subrogated claim brought for the benefit of the government or its agencies. It is not a claim under *Health Care Costs Recovery Act*.

**9**  Between the Court hearings on November 22, 2011 and December 22, 2011 the plaintiff corresponded with representatives of the provincial government. She received, and provided to the Court, a letter from counsel declaring that the province had no intention of making claims under the *Health Care Costs Recovery Act* in this case. In the circumstances, I am satisfied that there is no need for the Court to give further consideration to that statute.

**10**  As to the doctrine of full faith and credit and comity, the plaintiff appears to be urging the court to accept and apply certain decisions of courts in the United States. There is no basis in the law of this province or this country for accepting these submissions and I respectfully decline to do so.

**11**  As to *res ipsa loquitur,* it is a doctrine sometimes applicable in tort actions for ***negligence***. Any claims the plaintiff may have had in ***negligence*** against these defendants were dismissed by Rice, J. whose judgment was affirmed by the Court of Appeal in *Holland v. British Columbia*, [*2009 BCCA 601*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X0NR-00000-00&context=). There is no present opportunity for the plaintiff to revive those claims; the attempt to do so would be an abuse of process.

**12**  As to the plaintiff's claims of unclean hands and bad faith, I find myself in respectful agreement with the written submissions of counsel for the British Columbia and American Dental Associations:

1. The doctrine of "unclean hands" is not recognized as an independent cause of action at Canadian law. Rather, the doctrine applies at equity to disentitle relief to those who have engaged in deceit or fraud for personal benefit. Those portions of the second statement of claim which purport to allege "unclean hands" ought to be struck as disclosing no cause of action.

*Hong Kong Bank of Canada v. Wheeler Holdings Ltd,* [*[1993] 1 S.C.R. 167*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-609K-00000-00&context=)

1. Similarly, the doctrine of "bad faith" is not recognized as a tort in Canadian law. This issue was addressed in *Berscheid v. Ensign,* [*[1999] B.C.J. No. 1172*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F7ND-G48N-00000-00&context=), where the court commented as follows:

The plaintiff has also attempted to plead a tort of bad faith. The plaintiff alleges that the defendant Environment's conduct, either alone or vicariously through its servants, constitutes a tort creating liability for damages.

In my view, there is no such tort. While bad faith on behalf of public officers may be evidence of the tort of misfeasance of public office, bad faith alone is insufficient to create Crown liability.

1. In *Heckendorn v. Canada (Revenue Agency),* Mr. Justice Meiklem cited *Berscheid v. Ensign* and struck a statement of claim which alleged bad faith as disclosing no cause of action. This remedy is also appropriate in the case at bar.

*Heckendorn v. Canada (Revenue Agency),* [*2009 BCSC 952*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S0G6-00000-00&context=) at para. 47

**BCPCA**

**13**  The real issue in this application is: does the plaintiff have a potential case under the *Business Practices and Consumer Protection Act*? To start with, her pleadings do not properly identify such a claim. I agree with the written submission of counsel for the B.C. and American Dental Associations:

"... the second statement of claim does not allege that the applicants fall within the definition of "suppliers" set out in s. 1 of the BPCPA, does not allege that the applicants entered into a "consumer transaction" with the plaintiff as defined in s. 1 of the BPCPA, and does not indicate which provisions of the BPCPA that the applicants allegedly contravened."

**14**  These faults are a sufficient basis for striking the relevant portions of her statement of claim. However, the Court must decide whether appropriate amendments could salvage the plaintiff's claim. In my view, the plaintiff's case cannot be saved by amendments to her pleadings. Her claim is bound to fail.

**15**  My reasons for coming to this conclusion are based on the facts alleged by the plaintiff in her pleadings and her submissions to the Court. In 1982 a dentist filled seventeen of her teeth with amalgam fillings containing mercury. At that time she did not know what substance was being placed in her teeth. She did not know that it was called amalgam nor that it contained mercury. She had no dealings whatsoever with the present defendants. She had no idea what views the defendants may have had about amalgam. Her dealings with her dentist might well have been a "consumer transaction" but there is no possibility of categorizing the current defendants as "suppliers". There is no evidence that the American Dental Association had any presence in B.C. in 1982. The British Columbia Dental Association did not come into existence until sometime after 1995. I am also in respectful agreement with Rice, J.'s finding concerning the remoteness of these defendants from any real legally significant connection to the facts of the plaintiff's case.

**16**  In submissions the plaintiff characterizes her situation as a continuing delict which commenced with the installation of her fillings in 1982 and continued until they were removed in 2005. I am completely unpersuaded by her submission. There may be some legal situations that can properly be characterized as continuing delicts. I do not believe that such an analysis has any place in construing the application of the BPCPA to the present defendants in this case.

**Conclusion**

**17**  The applications by the defendants are granted. The statement of claim against them is struck out, the action against them is dismissed, and they are entitled to their costs on Scale B.

P.D. LEASK J.

**End of Document**

[***Ince v. Jane Doe, [2010] B.C.J. No. 1226***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-22B4-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

W. Ehrcke J.

Heard: May 25, 2010.

Judgment: June 22, 2010.

Docket: S074865

Registry: Vancouver

**[2010] B.C.J. No. 1226** | 2010 BCSC 872 | 190 A.C.W.S. (3d) 284 | 2010 CarswellBC 1521

Between Suzanne Patricia Bradley Ince, Plaintiff, and Dr. Jane Doe, Dr. Barry H. Sanders and BC Women's Hospital & Health Centre, being an agency of the Provincial Health Services Authority (PHSA), Defendants

(36 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Judgments and orders — Summary judgments — To dismiss action — Claim by plaintiff for damages for alleged *negligence* arising out of a hysteroscopy procedure summarily dismissed — The plaintiff failed to appear and thus adduced no evidence that the defendants failed to meet the standard of care required of them — Alternatively, the claim was statute-barred for having been commenced after the expiry of the relevant limitation period.**

**Civil litigation — Limitation of actions — Expiry of limitation periods — Claim by plaintiff for damages for alleged *negligence* arising out of a hysteroscopy procedure summarily dismissed — The plaintiff failed to appear and thus adduced no evidence that the defendants failed to meet the standard of care required of them — Alternatively, the claim was statute-barred for having been commenced after the expiry of the relevant limitation period.**

**Health law — Health care professionals — Liability — *Negligence* — Claim by plaintiff for damages for alleged *negligence* arising out of a hysteroscopy procedure summarily dismissed — The plaintiff failed to appear and thus adduced no evidence that the defendants failed to meet the standard of care required of them — Alternatively, the claim was statute-barred for having been commenced after the expiry of the relevant limitation period.**

**Professional responsibility — Self-governing professions — Professions — Health care — Claim by plaintiff for damages for alleged *negligence* arising out of a hysteroscopy procedure summarily dismissed — The plaintiff failed to appear and thus adduced no evidence that the defendants failed to meet the standard of care required of them — Alternatively, the claim was statute-barred for having been commenced after the expiry of the relevant limitation period.**

**Tort law — Practice and procedure — Evidence — Burden of proof — Claim by plaintiff for damages for alleged *negligence* arising out of a hysteroscopy procedure summarily dismissed — The plaintiff failed to appear and thus adduced no evidence that the defendants failed to meet the standard of care required of them — Alternatively, the claim was statute-barred for having been commenced after the expiry of the relevant limitation period.**

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| Claim by plaintiff against the defendants Dr. Sanders and Provincial Health Services Authority for damages for alleged ***negligence*** arising out of a hysteroscopy procedure. The defendants applied to have the action heard by means of a summary trial. The court rejected the plaintiff's fourth adjournment request and proceeded with the summary trial in the plaintiff's absence.  HELD: Claim dismissed against all defendants.  The plaintiff had ample opportunity to file evidence for consideration on this summary trial but failed to do so. In an action for alleged medical malpractice, the onus was on the plaintiff to prove the defendant doctor's conduct fell below the required standard of care. While the defendant had adduced evidence that the standard of care had been met, and the plaintiff adduced no evidence to the contrary, the plaintiff's claim must fail. Here, the plaintiff adduced no evidence that the defendants failed to meet the standard of care required of them, and the action was to be dismissed as against all the defendants. Moreover, the claim was statute-barred. As all the elements of the cause of action were in existence on Nov. 29, 2004, the plaintiff ought to have commenced her action no later than Nov. 29, 2006. The plaintiff provided no evidence to support a finding that the running of time under the Limitation Act was postponed. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 18A

Limitation Act, RSBC 1996, CHAPTER 266, s. 3(2), s. 6(3), s. 6(4), s. 6(5), s. 6(6)

**Counsel**

No one appearing for the Plaintiff.

Counsel for the Defendants Sanders and BC Women's Hospital & Health Centre: B. Stock.

Counsel for the Provincial Health Services Authority: D. Bell, R. Scollard.

**Reasons for Judgment**

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| **W. EHRCKE J.** |

**1**   By writ of summons filed on July 18, 2007, the plaintiff commenced this action against Dr. Sanders and BC Women's Hospital & Health Centre for damages for alleged ***negligence*** arising out of a hysteroscopy procedure performed on her on November 29, 2004. Counsel has pointed out that BC Women's Hospital is not a legal entity and that the defendant is properly described as the Provincial Health Services Authority ("PHSA").

**2**  By notices of motion filed and served on the plaintiff in October 2009, both Dr. Sanders and PHSA applied to have the action heard by way of summary trial pursuant to Rule 18A of the *Rules of Court*. The materials on which the defendants sought to rely were also served on the plaintiff in October 2009.

**3**  The summary trial was first set for hearing on November 23, 2009, but was adjourned at the plaintiff's request. The matter was reset for January 11, 2010, but was again adjourned at the plaintiff's request to April 26, 2010. On that date it was adjourned a third time at the plaintiff's request. When the matter came on before me for hearing on May 25, 2010, the plaintiff did not appear, but counsel for the defendants produced to me a copy of an email the plaintiff had sent to them around 8:00 a.m. that same morning. In that email, the plaintiff sought a fourth adjournment. In oral reasons delivered on May 25, 2010, I rejected that adjournment request, and proceeded with the summary trial. At the end of the hearing, I reserved judgment. These are my reasons for judgment on the Rule 18A summary trial.

**4**  The defendants rely on the affidavit of Dr. Sanders sworn October 19, 2009, an affidavit of Nurse Catherine Maurer sworn September 25, 2009, an affidavit of Lorri Luxford attaching exhibits and excerpts from the plaintiff's examination for discovery, and an expert report written by Dr. Duncan Price.

**5**  The plaintiff has not filed any affidavits or other material to be considered as evidence on this summary trial. In *Harrison v. British Columbia (Children and Family Development)*, [*2010 BCCA 220*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-630S-00000-00&context=), our Court of Appeal observed at para. 41:

[41] When an application under R. 18A is made, it is the obligation of the parties to take every reasonable step to put themselves in the best possible position and adduce all evidence they believe is necessary for judgment: *Everest Canadian Properties Ltd. v. Mallmann*, [*2008 BCCA 275*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G34D-00000-00&context=) at para. 34.

**6**  I find that the plaintiff has had ample opportunity to file evidence for consideration on this summary trial, but has failed to do so.

**7**  The fact that the Rule 18A application was brought by the defendants does not change the normal onus of proof at this summary trial. The onus remains on the plaintiff to establish her case on a balance of probabilities: *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=); *Miura v. Miura* [*(1992), 66 B.C.L.R. (2d) 345*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F5KY-B14K-00000-00&context=) (C.A.).

**8**  I have read the evidence filed by the defendants. I do not propose to reproduce it in exhaustive detail here, in light of the fact that the onus is on the plaintiff. In summary form, the evidence is as follows.

**9**  The plaintiff was born on January 19, 1955. She was referred to Dr. Sanders by Dr. Timothy Rowe, an obstetrician and gynaecologist, on September 9, 2004. In his referral letter, Dr. Rowe noted that Ms. Ince had an appointment with Dr. Sanders in late October for a hysteroscopy. Dr. Rowe indicated that he had seen Ms. Ince over the previous year because of irregular bleeding sometimes associated with menstrual migraine. He had tried to manage Ms. Ince medically, but she continued to have headaches and irregular bleeding. He noted that Ms. Ince was interested in undergoing endometrial ablation if this would reduce her menstrual blood loss. An endometrial ablation is a procedure which uses a lighted viewing instrument (a hysteroscopy) and other instruments to destroy (ablate) the uterine lining, or endometrium. Dr. Rowe noted that Ms. Ince appeared to be chronically iron deficient and that her last hemoglobin test level from July was low.

**10**  Ms. Ince was booked for an appointment with Dr. Sanders at the Hysteroscopy Program at BC Women's Hospital. Dr. Sanders saw Ms. Ince for the first time on November 29, 2004 at BC Women's Hospital in the clinic where he sees patients with abnormal uterine bleeding and other uterine abnormalities. The clinic is a teaching clinic with a gynaecology resident in attendance. Ms. Ince was initially seen by the gynaecology resident physician who was working with Dr. Sanders at the time.

**11**  During the November 29, 2004 appointment, Ms. Ince complained of considerable headaches associated with her menstrual cycle. She had been started on Danazol, then Provera, but had been unable to tolerate these medications. She had also tried birth control pills, but these exacerbated her headaches. She used intermittent Gravol and Demerol for the headaches. Ms. Ince reported very irregular and sometimes prolonged menstrual cycles. Her most recent period had been on October 23 and had lasted for ten days with clots. She had been referred for consideration of endometrial ablation. Recent pap smears had been normal. She had undergone hysteroscopy and laparoscopy at Royal Columbian Hospital about two years prior and had an adverse reaction to it. There had been two previous pregnancies resulting in vaginal births. Dr. Sanders determined that she was an appropriate candidate for hysteroscopy in order to investigate her complaints and as a first step before endometrial ablation would be considered.

**12**  It was and still is the standard practice in the Hysteroscopy Program that a registered nurse engage the patient in the initial discussion regarding the nature of the procedure and its associated risks.

**13**  Nurse Catherine Maurer graduated from nursing school in England in 1978. She is a registered nurse. She has been employed by BC Women's Hospital & Health Centre since 1985. She has worked with Dr. Sanders in the Hysteroscopy Program at BC Women's Hospital since 2001. She was working on November 29, 2004 when Ms. Ince came in for the procedure. The procedure, its risks and the reasons for conducting it were explained to Ms. Ince by both Nurse Maurer and Dr. Sanders, and Ms. Ince signed a consent form for the procedure.

**14**  Nurse Maurer deposed that while she does not have any specific recollection of Ms. Ince or of her discussions with Ms. Ince, it is her usual practice to discuss the procedure with a patient, and she has no reason to believe that she followed anything other than her usual practice with Ms. Ince. Nurse Maurer deposed that it is her usual practice to discuss the risks associated with hysteroscopy with the patient, and that she would have done so with Ms. Ince. Nurse Maurer's usual practice consists of telling patients that it is normal to have slight vaginal bleeding and that if bleeding occurs, it usually occurs for only a few days after the procedure. She tells patients that if bleeding persists for more than a few days or if there is an excessive amount of bleeding, they should contact the clinic or their own doctor. Nurse Maurer also tells patients that they can expect to have some cramping, but if this is excessive, they should contact the clinic or their own doctor. She explains that there is an extremely small risk of damage to the uterus, such as perforation of the uterus or a slight risk of infection. Nurse Maurer tells patients to call their doctor or the clinic if they have any fever or chills. Nurse Maurer deposed that she has no reason to believe that she deviated from her usual, standard practice when she discussed the risks with Ms. Ince.

**15**  Dr. Sanders deposed that it is his standard practice to personally review the teaching which had been done by a registered nurse, in this case, Nurse Maurer, regarding the risks of the procedure and what to expect during the procedure with the patient as well as to answer any questions or address any concerns the patient may have. Dr. Sanders believes he followed his standard practice in this case.

**16**  Ms. Ince then underwent a hysteroscopy and endometrial biopsy by, or under Dr. Sanders' direct supervision. Generally, Dr. Sanders' resident performs the hysteroscopy in his presence, and Dr. Sanders takes over the procedure if there are any difficulties. Dr. Sanders does not recall any difficulties with Ms. Ince's hysteroscopy.

**17**  Dr. Sanders recorded the results of the physical examination of Ms. Ince, noting that on examination, she was in no acute distress but was somewhat pale. Pelvic examination showed a uterus that was seemingly in a retroverted orientation and appeared to be of normal size and shape. No obvious abnormality of the adnexa was noted. The upper vagina and cervix was prepped with Poviodine and topical Renzocaine was used as a local anaesthetic. The diagnostic hysteroscope was advanced through the cervix which was somewhat tortuous and entered in the endometrial cavity which demonstrated an entirely normal configuration. The uterine fundus was normal, as were the cornua and tubal ostium. The anterior, posterior and lateral side walls were also normal. The procedure was uncomplicated and uneventful. Dr. Sanders noted that Ms. Ince had a history of abnormal uterine bleeding and a normal-appearing endometrial cavity and that they would await the biopsy results. If the biopsy was normal, Ms. Ince would be a candidate for endometrial ablation, given her failure to respond to medical treatment alone. Dr. Sanders asked Ms. Ince to return to see him in two to three weeks, at which time he would have the biopsy results, and if normal, they could then consider planning an endometrial ablation.

**18**  According to the notes made by Nurse Maurer, Ms. Ince tolerated the procedure well and was discharged home in stable condition at 11:30 a.m. According to the December 3, 2004 surgical pathology report regarding the endometrial biopsy, the microscopic description showed mucoid material, fragments of endocervix with stroma and portions of endometrium from the lower uterine segment with dense compact stroma and scant glands. The remaining fragments of endometrium were small and consisted mostly of stroma. The biopsy was considered insufficient for diagnosis.

**19**  Nurse Maurer deposed that she would have charted any complications, and there is no such charting in this regard. She deposed that if there had been excessive bleeding or pain out of keeping with what was expected, she would have kept Ms. Ince at the clinic in the recovery room for a longer period of time, monitored her, and made a chart note of this. Furthermore, Nurse Maurer deposed that the procedure would have been stopped if Ms. Ince had complained and asked for the procedure to be stopped, and that she would have charted this. There is no such charting.

**20**  Ms. Ince was seen in follow-up by Dr. Sanders in his office on December 16, 2004, at which time she reported that she had on-going right lower quadrant pain for which she was using Demerol. There was minimal bleeding, normal gastrointestinal function, no significant fever and no discharge. Dr. Sanders performed an examination and noted that the abdomen was soft, there was minimal tenderness, and no masses. There was no blood from her vagina. Dr. Sanders arranged for Ms. Ince to undergo an ultrasound in order to rule out abnormality, and asked her to return for further follow-up after she returned from a trip to Jamaica. This was the last time that Dr. Sanders saw Ms. Ince. Ms. Ince did not return to see Dr. Sanders as requested.

**21**  An ultrasound of the pelvis/endovaginal scan was performed on December 17, 2004. There was no acute abnormality seen to account for Ms. Ince's symptoms.

**22**  Ms. Ince telephoned Dr. Sanders' office and spoke with his Medical Office Assistant, Ms. Sandra Martin, who is now retired, on February 25, April 4 and December 29, 2005, complaining of pain. Dr. Sanders expects that Ms. Martin would have offered Ms. Ince an appointment with him so that he could follow-up, but Ms. Ince did not avail herself of this.

**23**  The defendants rely on an expert opinion report of Dr. Duncan Price, an obstetrician and gynaecologist who has been in practice for more than 30 years. For the last 15 years, he has been the head of the Department of Obstetrics and Gynaecology at Surrey Memorial Hospital. According to Dr. Price, Ms. Ince was a candidate for a hysteroscopy procedure, and she was managed well by her family physician who made an appropriate referral to Dr. Rowe who in turn made an appropriate referral to Dr. Sanders. Dr. Price stated in his report that women in the perimenopause who present with irregular bleeding should be investigated with endometrial biopsy of some sort in order to rule out any premalignant condition.

**24**  Dr. Price stated that the risks of the procedure are very low and that it would be "... extremely difficult to perforate the uterus without knowing as the instrument doing the perforation is also the one with a camera attached."

**25**  Dr. Price described the performance of the hysteroscopy in this way:

It is clear that a careful assessment of the uterine cavity was made; both tubal ostia were visualized indicating that the whole uterus had been properly assessed. ... Perforation of the uterus with endometrial biopsy is fairly easy to detect as the uterine cavity in this particular case was 9 cm and the instrument would have disappeared more than 9 cm through the cerix. Again, hysteroscopy is considered a low risk procedure with a high degree of effectiveness in evaluating the uterine cavity. It would have been entirely appropriate for a resident to perform the hysteroscopy under the supervision of an expert.

**26**  In addition to opining that Dr. Sanders met the standard of care expected of him, Dr. Price also offered the opinion that nothing Dr. Sanders did or did not do caused or contributed to Ms. Ince's conditions or complaints:

In my opinion, the development of right lower abdominal pain immediately after this procedure would have to have been coincidental as subsequent evaluation clearly indicates there was no evidence of perforation of the uterus or the development of any anterior abdominal wall pathology. Subsequent laparoscopic hysterectomy and laparoscopy again confirms this.

**27**  In an action for alleged medical malpractice, the onus is on the plaintiff to prove that the defendant doctor's conduct fell below the required standard of care. The plaintiff must provide evidence to support her allegations. Where a defendant has adduced evidence that the standard of care has been met, and the plaintiff has adduced no evidence to the contrary, the plaintiff's claim must fail: *ter Neuzen v. Korn*, [*[1995] 3 S.C.R. 674*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3KJ-00000-00&context=) at paras. 33-34; *American Pyramid Resources Inc. v. Royal Bank of Canada et al.* [*(1986), 2 B.C.L.R. (2d) 99*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3J0-00000-00&context=) (S.C.), at p. 105; *Steeves v. Air Canada*, [*[1996] B.C.J. No. 2879*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JGHR-M1YR-00000-00&context=) (S.C.); *Pushee v. Roland*, [*2002 BCSC 1771*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-FH4C-X3R9-00000-00&context=), at paras. 16-21.

**28**  In this case, the plaintiff has adduced no evidence, expert or otherwise, that Dr. Sanders, Nurse Maurer, or the hospital failed to meet the standard of care required of them. The action must therefore be dismissed as against all the defendants.

**29**  Moreover, I agree with the defendants' submission that the plaintiff's action is statute barred.

**30**  Whether or not a claim is statute barred in not a discretionary matter. The sole question is whether the claim falls within the statute: *Grayson v. Canada Safeway Limited*, [*[1981] 2 W.W.R. 321*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-FJTD-G17T-00000-00&context=) (B.C.C.A.), at p. 323.

**31**  The limitation period for a cause of action in respect of personal injury is found in s. 3(2)(a) of the *Limitation Act*, [*R.S.B.C. 1996, c. 266*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-FC1F-M0TW-00000-00&context=), which provides:

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

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

**32**  The medical treatment that the plaintiff complained of was provided on November 29, 2004. In her examination for discovery, Ms. Ince is very clear that she immediately felt pain, which has been unrelenting ever since. All the elements of her cause of action were in existence on November 29, 2004, and she therefore ought to have commenced her action no later than November 29, 2006. The writ of summons was filed on July 18, 2007, almost eight months after the expiration of the limitation period.

**33**  Section 6 of the *Limitation Act* sets out circumstances in which the running of time for the commencement of an action may be postponed. The relevant portions of ss. 6(3), 6(4), 6(5) and 6(6) provide:

6(3) 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 personal injury;

...

1. for professional ***negligence***.
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.

**34**  As noted, s. 6(6) of the *Limitation Act* provides that the burden of proving that the running of time has been postponed is on the person claiming the benefit of the postponement, in this case, Ms. Ince. She has provided no evidence to support a finding that the running of time under the *Limitation Act* is postponed.

**35**  Accordingly, I find that her claim against all defendants is statute barred, and must for that reason as well be dismissed.

**36**  The plaintiff's action is dismissed against all defendants.

W. EHRCKE J.

**End of Document**

[***Jackson (Litigation guardian of) v. Okanagan Similkameen School District No. 53, [2013] B.C.J. No. 229***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JGHR-M3C9-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Kelowna, British Columbia

L.W. Bernard J.

Heard: November 9, 2012.

Judgment: February 8, 2013.

Docket: 34863

Registry: Penticton

**[2013] B.C.J. No. 229** | 2013 BCSC 203

Between Tylor Jackson, an Infant by his Litigation Guardian, Janice Fargey, Plaintiff, and Board of Trustees of School District No. 53, (Okanagan Similkameen), Defendant

(44 paras.)

**Case Summary**

**Civil litigation — Civil procedure — Disposition without trial — Dismissal of action — Trials — Summary trials — Application by defendant School District for summary dismissal of plaintiff's *negligence* claim allowed — Hall had punched Jackson in head while on school property, causing Jackson to fall and hit his head, sustaining a traumatic brain injury — Court found plaintiff failed to establish that if defendant had imposed harsher punishment on Hall for an earlier altercation, incident with Jackson would never have happened — Plaintiff failed to establish disciplinary actions imposed for earlier incident were inappropriate — Even if harsher measures ought to have been imposed, plaintiff failed to establish nexus between that failure and subsequent assault on him.**

**Education law — Civil liabilities — Of school boards and schools — Injuries and property damage — On school premises — Physical injuries — Practice and procedure — Application by defendant School District for summary dismissal of plaintiff's *negligence* claim allowed — Hall had punched Jackson in head while on school property, causing Jackson to fall and hit his head, sustaining a traumatic brain injury — Court found plaintiff failed to establish that if defendant had imposed harsher punishment on Hall for an earlier altercation, incident with Jackson would never have happened — Plaintiff failed to establish disciplinary actions imposed for earlier incident were inappropriate — Even if harsher measures ought to have been imposed, plaintiff failed to establish nexus between that failure and subsequent assault on him.**

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| Application by the defendant School District for summary dismissal of the plaintiff's ***negligence*** claim. The plaintiff, Jackson, was punched in the head by another student, Hall, while at school. The blow caused Jackson to fall backwards and strike his head on a window. He sustained a traumatic brain injury from the blow that left him mentally and physically compromised. The essence of the alleged ***negligence*** was that the School District fell below the standard of care of a prudent and careful parent when it failed to discipline Hall in accordance with the School District's Progressive Discipline Model for an altercation which occurred seven months earlier prior to the assault in question. The earlier incident involved Hall punching another student for spilling juice on him. The vice-principal who investigated the earlier incident characterized the punch as "physical intimidation" rather than as an assault, and gave Hall a one-half day "in school" suspension. The plaintiff's position was that the discipline for the earlier incident should have been, at a minimum, a three- to five-day suspension pursuant to the school's Progressive Discipline Model. The plaintiff argued that if such a punishment had been imposed, the desired rehabilitative and deterrent effects of the discipline would likely have prevented the assault on Jackson. The defendant argued that the plaintiff failed to prove there was a breach of the standard of care or, in the alternative, failed to establish a causal link between the earlier incident and the one in question.  HELD: Application allowed.  The Court found that the plaintiff did not establish that the earlier incident involved a serious and violent act by Hall, one for which the disciplinary measures taken were either inadequate or contrary to school policy or the Progressive Discipline Model. Moreover, even if significantly harsher disciplinary measures than those taken ought to have been employed for the earlier incident, the plaintiff did not establish the requisite nexus between that failure and the subsequent assault on him. The plaintiff's claim was thus dismissed. |

**Statutes, Regulations and Rules Cited:**

Supreme Court Civil Rules, Rule 9-7

**Counsel**

Counsel for the Plaintiff: M.D. Brooke.

Counsel for the Defendant: C.L. Forth.

**Reasons for Judgment**

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| **L.W. BERNARD J.** |

**1**   On October 5, 2006, after classes at South Okanagan Secondary School ("the school") had ended for the day, Makwalla Hall assaulted Tylor Jackson in a school corridor. The two boys were in the ninth grade at the time. The assault consisted of a single punch to the left side of Tylor's head, causing him to fall backwards and strike his head on a window. Most unfortunately, Tylor sustained a traumatic brain injury from the blow and it has left him mentally and physically compromised.

**2**  The assault was preceded by a threat uttered by Makwalla to Tylor in the final class of the day. When Tylor asked Makwalla if he could borrow a pencil from him, Makwalla said "maybe I should kick your white ass".

**3**  In July 2010 Makwalla Hall died in a rodeo accident.

**4**  In July 2011 Tylor Jackson, through his litigation guardian, filed a Notice of Civil Claim against the Okanagan Similkameen School District (the "School District"), alleging ***negligence*** and seeking damages for his injuries.

**5**  The essence of the alleged ***negligence*** is that the school district fell below the standard of care of a prudent and careful parent when it failed to discipline Makwalla Hall, in accordance with the School District's Progressive Discipline Model, for an altercation with another student which occurred seven months prior to the assault in question. As a consequence for that earlier incident Makwalla was given a one-half day "in school" suspension and written notification of the incident was sent to Makwalla's parent.

**6**  The plaintiff's position, in brief, is that the discipline for the earlier incident ought to have been, at a minimum, a three-to-five day suspension; that such was required by the Progressive Discipline Model (the "PDM"); that if such had been imposed, then the desired rehabilitative and deterrent effects of the discipline would likely have prevented the assault upon Tylor; that instead, Makwalla was emboldened by the lack of proper discipline; and, that if a three-to-five day suspension had been imposed then it is likely that such would have become known to Tylor (as a student of the same school) and he would, thus, have known to take seriously and report the threat uttered by Makwalla - instead, he "blew off" Makwalla's threat as idle and took no steps to avoid Makwalla.

**7**  The sole defendant is the Board of Trustees for the Okanagan-Similkameen School District (the "Board"). The Board is the applicant herein. It seeks summary dismissal of the claim, pursuant to Rule 9-7 of the *Supreme Court Civil Rules*. The Board submits that the plaintiff has failed to prove that there was a breach of the standard of care. Alternatively, it submits that the plaintiff has failed to establish a causal link between the earlier incident and the one in question.

**8**  The existence of a duty of care is conceded by the defendant, and the nature, extent and cause of Mr. Jackson's injuries are not in question.

**9**  By the date of the instant application, all examinations for discovery had been completed and documents had been exchanged. A trial date had not been set.

**10**  The plaintiff's primary position in relation to the instant application is that the Court should be able to find the facts necessary, on the evidence presented, to grant judgment in favour of the plaintiff; however, if the Court is unable to do so then it urges the Court to dismiss the application on the basis that the matter is not suitable for resolution by summary trial because of the seriousness of the injuries to the plaintiff.

**B. Evidentiary Synopsis**

**11**  In October 2006 Tylor Jackson and Makwalla Hall were grade nine students at the school. Tylor Jackson is now a 20-year-old man and Makwalla Hall is deceased.

**12**  In his affidavit, Mr. Jackson described the events of October 5, 2006 as follows: that during the last class of the day, he asked Makwalla if he could borrow a pencil from him and Makwalla replied with the words "maybe I should kick your white ass"; that he "blew off" the threat as not being serious; that after class, in the school corridor, he heard his name called, looked in the direction of the voice, and saw Makwalla standing in front of him; that without warning, Makwalla pushed him into a window and punched him in the head; and, that he briefly lost consciousness and woke up on the floor of the hall. Other evidence establishes that later the same day he went to hospital where he was diagnosed with a brain-bleed.

**13**  Mr. Jackson said he sustained a severe traumatic brain injury from Makwalla's assault; that it has resulted in permanent significant mental and physical disabilities which affect all aspects of his daily life; that he suffers from foot-drop, balance problems, cardiovascular challenges, neck and back pain, difficulty negotiating stairs, difficulty in running, difficulty in moving the right side of his body, cognitive difficulties, memory loss, difficulty in speaking, and emotional difficulties including depression and suicidal thoughts. He says that his injuries have prevented him from completing high school or securing "decent" employment.

**14**  Mr. Jackson described Makwalla as an acquaintance prior to the assault. He said he knew Makwalla to be "a rowdy kid who got into fights" but not one who, without warning or provocation, "jumped people". Mr. Jackson said he was not aware that Makwalla had assaulted another student during the eighth grade. He said that if Makwalla had been suspended for that assault then word of it would have spread quickly around the school. He said if he had known about the prior assault then he: (a) would not have tried to borrow a pencil from Makwalla; (b) would have taken seriously Makwalla's threat; (c) would have immediately reported the threat to a teacher or school administration; and, (d) would have "watched his back" for Makwalla. Mr. Jackson said he was aware that the school policy was to take violence and threats of violence seriously.

**15**  Marty Lewis was the principal of the school in October 2006, and had been so employed for the previous six years. In his affidavit he said he learned of the assault on Tylor the following morning when Tylor's step-mother reported it (and Tylor's significant injury) to him. He said he immediately spoke to Makwalla who admitted the assault. He said he then reported the assault to the RCMP and, in accordance with the district's PDM, he issued an indefinite suspension to Makwalla and referred the matter to the District Discipline Committee.

**16**  Mr. Lewis said that, at the time in question, the School District had a policy to promote and contribute to a safe and secure school environment. It required that students not bring weapons into the school, not act in a violent manner, and not intimidate other students. In addition, the school had its own Code of Conduct which demanded that students not engage in loud and aggressive language, rudeness, vulgarity, swearing, fighting, bullying, or horseplay. Mr. Lewis said that the consequences for breaches of the policy or the code varied depending on the severity and number of breaches. He said that an assault would typically result in a three-to-five day suspension, notification to parents, and a conference. If the assault was serious, then the RCMP would be notified, anger management counselling would be required, and there could be a referral to the Superintendent or District Discipline Committee.

**17**  Mr. Lewis stated that the School District had a written PDM in place which identified various infractions and the corresponding recommended disciplinary measures. Mr. Lewis said that it was his practice to employ this disciplinary model at the school. The PDM identifies "assault" as an "infraction" and defines it as follows:

A violent physical or verbal attack on another person(s). An act that threatens or causes physical harm to a person(s).

**18**  The PDM provides that, for a first offence of assault, the discipline is:

Long term (3-5 days) out-of-school suspension. Parents notified by phone and in writing by Administrator. Parent conference, RCMP notification. Possible referral to Superintendent/Designate or District Discipline Committee. Possible anger management counselling.

**19**  The PDM does not list "physical intimidation" as an infraction; however, there is an infraction of "intimidation/bullying" which is defined as follows:

Derogatory comments/actions which imply violence or threats causing the offended to be fearful for personal safety.

**20**  The discipline for a first offence of intimidation/bullying is as follows:

Short term or long term in or out-of-school suspension depending on severity. Parents notified by phone and in writing by Administrator. Parent conference. Possible RCMP notification. Possible referral to Superintendent/Discipline Committee. Subject to interpretation based on severity.

**21**  Mr. Lewis said assaults and consensual fights were uncommon at the school. He could recall only three or four in the seven years he was the school's principal. He said students who wanted to fight often did so "off school grounds"; however, if they were caught then they were subject to school discipline. Mr. Lewis said he treated all assaults or fights as serious events which attracted disciplinary measures. He said the Superintendent would be notified for acts of violence that threatened or caused physical harm. If the assault was serious the student would usually be referred to the District Discipline Committee.

**22**  Mr. Lewis said he was not aware of Makwalla prior to the assault on Tylor. He concludes from this that there had not been any previous behaviour or disciplinary concerns about him, because such matters would come to the attention of the principal and the student would be "red-flagged".

**23**  After the assault on Tylor, Mr. Lewis obtained Makwalla's Record of Discipline and said that the incidents listed on it "do not support a finding that Mr. Hall has a violent record" or that "intervention was required". He noted that there was an entry about a March 2, 2006 incident in which Makwalla "punched another student" and a half-day in-school suspension was imposed. He said the "suspension document" described the incident as one of "physical intimidation". Mr. Lewis said he was not aware of this incident because his vice-principal, Philip Rathjen, dealt with it; however, he said that a half-day in-school suspension would be "reserved for non-significant conduct".

**24**  Philip Rathjen was the vice-principal of the school in the 2005/2006 school year and for the immediately preceding six school years. He was the administrator who investigated the March 2, 2006 incident involving Makwalla. Mr. Rathjen completed a standard "Student Referral Form" in relation to this incident, which he signed and dated March 2, 2006. Under the section "Brief Description for Referral" he wrote: "Makwalla punched another student for spilling juice on him". Under "Reason for Referral" he checked a box next to "severe behaviour". Under "Action Plan" options, he checked boxes next to "conference", "letter home", and "in-school suspension". Under "comments" above his signature, he wrote: ".5 day in-school suspension March 3, 2006 [for] physical intimidation".

**25**  On March 2, 2006, Mr. Rathjen also wrote a letter to Makwalla's father, in which he informed Mr. Hall about the suspension and described the reason for it as "physical intimidation", without any further description of the incident.

**26**  Mr. Rathjen does not purport to have an independent recollection of the March 2 incident and of his investigation in relation to it; however, he infers from the punishment he imposed that the incident was "not serious" and was "likely to have involved more of a shove or a threatening gesture than a hard punch". He noted that he labelled the incident as one of "physical intimidation" rather than "assault", and said that physical intimidation is "different and less serious" than assault.

**27**  Mr. Rathjen said that the March 2 incident was not one which required the involvement of the school principal. He said the news of the subsequent assault upon Tylor came as a complete surprise to him because Makwalla was not known as a trouble-maker in the school.

**C. Positions of the Parties**

**28**  The plaintiff's position is that the defendant failed to follow school policy and the PDM in relation to the March 2 incident involving Makwalla. It submits that by these failures, the defendant fell below the requisite standard of care and caused the later assault upon Tylor.

**29**  The plaintiff argues that "if the first assault had been taken seriously then the second assault would not have occurred". The plaintiff submits that the defendant's response to the March 2 incident was "woefully inadequate" discipline which failed to achieve the desired deterrent and rehabilitative goals; moreover, it resulted in the earlier assault not coming to the attention of the student body, in particular Tylor, who could, and would, have taken steps to prevent the assault upon him if he had known of Makwalla's violent past.

**30**  The defendant's primary position is that the evidence relied upon by the plaintiff does not establish that the defendant failed to follow school policy and the PDM in relation to the March 2, 2006 incident. Alternatively, the defendant says that even if there were such failures, they are too remote from the October 2006 assault to have caused the plaintiff's loss.

**31**  In relation to the March 2, 2006 incident, the defendant relies upon the evidence which shows that that the act was categorized as "physical intimidation" rather than "assault"; thus, it was less serious than an assault and the defendant's response was neither inappropriate nor inconsistent with school policy or the PDM.

**32**  In relation to causation, the defendant submits that even if the disciplinary measures for "assault" under the PDM had been imposed, it is a matter of speculation, rather than reasonable inference, that such would have prevented the much later assault upon Tylor, either through its deterrent/rehabilitative effects or its notoriety.

**D. Findings and Analysis**

**33**  It is common ground that: (a) the standard of care required of the defendant is that of a careful and prudent parent: see *Myers v. Peel (County) Board of Education*, [*[1981] 2 S.C.R. 21*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M21F-00000-00&context=), [*17 C.C.L.T. 269*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M21F-00000-00&context=); (b) a careful and prudent parent is one who will not expose his or her child to an unreasonable risk of foreseeable harm (*Yasinowski (Guardian ad litem) v. Gaudry et al,* [*[1995] B.C.J. No. 1513*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FG12-62T9-00000-00&context=) (S.C.); and, (c) causation is established by application of the "but for" test: see *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.

**34**  The plaintiff's ***negligence*** claim rests principally upon the narrow question of whether the March 2, 2006 incident was a violent act by Makwalla; that is, one which the vice-principal wrongly characterized as "physical intimidation" rather than "assault" and, thus, one for which the disciplinary measures taken were inadequate and inconsistent with the PDM. There is, however, a relative dearth of evidence in relation to the March 2, 2006 incident, from which to determine this question.

**35**  Neither the complainant nor the reporter of the March 2 incident is known, and the school's records of the incident are limited to a standard form "Student Referral Form" and a copy of a letter sent to Makwalla's father. On the Student Referral Form under the heading "Brief Description for Referral", Mr. Rathjen (to whom the incident was reported) wrote "Makwalla punched another student for spilling juice on him". Mr. Rathjen has no present recollection of his involvement in relation to the incident and, thus, cannot say anything more about the matter from his memory. For example, he cannot say whether, upon receiving the referral, he spoke to the complainant, or to Makwalla, or to anyone who witnessed the incident; thus, he cannot now explain his basis for ultimately characterizing the incident as one of physical intimidation.

**36**  It is known that the March 2 incident was reported to Mr. Rathjen as a punch, and then characterized as "physical intimidation" in both the Student Referral Form and the letter to Makwalla's father. In this regard, it is noteworthy that Mr. Rathjen specifically stated that he investigated the incident. Although it seems likely that he is inferring such either from standard practice or from the fact that his determination differs from the complaint, I am satisfied that such an inference is a reasonable one to draw, in all the circumstances, and I accept it as an established fact. It makes little sense that Mr. Rathjen would have categorized a reported punch as an act of physical intimidation without having first made some sort of inquiry.

**37**  Similarly, Mr. Rathjen infers, from both the disciplinary action he took and his decision not to involve the school principal, that the incident was not a serious one - more likely, in his words, a shove or threatening gesture by Makwalla, rather than a hard punch. I am satisfied that this, too, is a reasonable and reliable inference to draw, in all the circumstances. In this regard, it is significant that there is no evidence to the contrary. The report of a punch was, in essence, an allegation or complaint which required investigation in order to determine what actually occurred. It is reasonable to infer that an investigation revealed details which led Mr. Rathjen to (a) regard the incident as a matter which was more properly characterized as an act of physical intimidation, rather than an assault; and, (b) take disciplinary measures consistent with the PDM for "intimidation/bullying" as a first offence.

**38**  In light of the foregoing, I am unable to conclude that the plaintiff has shown that the March 2, 2006 incident was one which involved a serious and violent act by Makwalla; one for which the disciplinary measures taken were either inadequate or contrary to school policy or the PDM. As this is the foundation of the plaintiff's case, I must conclude that the plaintiff's case cannot succeed.

**39**  In reaching this conclusion, I note that it is not the plaintiff's position that the disciplinary measures imposed for an act of physical intimidation, as a first offence, were either inadequate or inconsistent with the PDM or school policy.

**40**  Even if, however, the evidence established that the incident ought to have been categorized as "assault" under the PDM, there is an absence of detail relating to the assault and, therefore, an inability to determine whether the act warranted the imposition of disciplinary measures at the upper end of the continuum for a "first offence" as provided by the PDM. There is no evidence from which one could reasonably conclude that the incident was a serious assault. For example, there is neither evidence that the complainant sustained any sort of injury - a surprising absence if such were the case - nor is there is anything in Makwalla's documented history which might reasonably have informed the school administration of the need to address the incident of March 2, 2006 with any degree of elevated response.

**41**  In such circumstances, it would not be reasonable to conclude that the longest available suspension and all the other available disciplinary measures for "assault", under the PDM, would likely have been employed. This is significant not only because it undermines the plaintiff's position that the disciplinary measures were "woefully inadequate", but also because it substantially weakens the plaintiff's argument that the disciplinary measures for "assault" would have: (a) brought Makwalla's reputation for violence to the attention of Tylor, as a student at the same school; and, (b) deterred and rehabilitated Makwalla, rather than emboldened him.

**42**  Even if, however, significantly harsher disciplinary measures than those taken ought to have been employed for the March 2 incident, I am unable to conclude that the plaintiff has established the requisite nexus between that failure and the subsequent assault upon him. In this regard, it is noteworthy that seven uneventful months transpired between the two incidents; that the incidents occurred in separate school years and at a time when children and their behaviours are changing rapidly; that it makes little sense that Tylor's state of mind about Makwalla would have turned on his awareness of the discipline imposed on Makwalla rather than of the details of the incident itself; and, that it would require considerable speculation to conclude either that Makwalla would have been sufficiently deterred or rehabilitated such that the assault upon Tylor would probably not have occurred, or that the assault occurred because Makwalla was emboldened by the inadequacy of the discipline.

**E. Conclusions**

**43**  For all the foregoing reasons, I conclude:

1. that, in this instance, the question of the liability of the defendant is a matter which is amenable to resolution by means of summary trial;
2. that the evidence relied upon by the plaintiff falls well short of proving his claim of ***negligence*** against the defendant, with no reasonable prospect that such will change in the foreseeable future; and,
3. that the claim against the defendant is not unsuitable for resolution by summary trial merely because the plaintiff sustained serious injuries at the hand of a now deceased assailant who was impecunious while he was alive.

**D. Disposition**

**44**  The application of the defendant is allowed. If the parties cannot resolve the matter of costs, then they are at liberty to make written submissions.

L.W. BERNARD J.

**End of Document**

[***Jamieson v. Whistler Mountain Resort Limited Partnership, [2017] B.C.J. No. 1160***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5NVG-FX31-K054-G13F-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

N. Sharma J.

Heard: December 8, 9 and 13, 2016.

Judgment: June 16, 2017.

Docket: S115407

Registry: Vancouver

**[2017] B.C.J. No. 1160** | 2017 BCSC 1001 | 40 C.C.L.T. (4th) 119 | 280 A.C.W.S. (3d) 295 | 2017 CarswellBC 1626

Between Blake Jamieson, Plaintiff, and Whistler Mountain Resort Limited Partnership and Gravity Logic Inc., Defendants

(151 paras.)

**Case Summary**

**Commercial law — Consumer agreements — General considerations affecting commercial agreements — Waiver of rights and remedies — Application by defendant for summary judgment enforcing signed waiver and release and dismissing action allowed — Plaintiff commenced action after suffering spinal cord injury in mountain bike accident at defendant's park — Waiver and release was clear, broad and comprehensive and did not have to specify every possible injury and its mechanism — Any person who could read English would understand waiver, and plaintiff was highly educated with experience at park and as first responder — Plaintiff knowingly and willingly signed release — Defendant did not breach court disclosure order, and there were no other accusations of fraud or misrepresentation.**

**Commercial law — Deceptive marketing — Consent agreements — Application by defendant for summary judgment enforcing signed waiver and release and dismissing action allowed — Plaintiff commenced action after suffering spinal cord injury in mountain bike accident at defendant's park — Waiver and release was clear, broad and comprehensive and did not have to specify every possible injury and its mechanism — Any person who could read English would understand waiver, and plaintiff was highly educated with experience at park and as first responder — Plaintiff knowingly and willingly signed release — Defendant did not breach court disclosure order, and there were no other accusations of fraud or misrepresentation.**

**Tort law — *Negligence* — Duty and standard of care — Duty of care — Standard of care — Evidence and proof — Application by defendant for summary judgment enforcing signed waiver and release and dismissing action allowed — Plaintiff commenced action after suffering spinal cord injury in mountain bike accident at defendant's park — Waiver and release was clear, broad and comprehensive and did not have to specify every possible injury and its mechanism — Any person who could read English would understand waiver, and plaintiff was highly educated with experience at park and as first responder — Plaintiff knowingly and willingly signed release — Defendant did not breach court disclosure order, and there were no other accusations of fraud or misrepresentation.**

**Tort law — Defences — Voluntary assumption of risk (volenti non fit injuria) — Knowledge and appreciation of risk — Waiver of right of action — Application by defendant for summary judgment enforcing signed waiver and release and dismissing action allowed — Plaintiff commenced action after suffering spinal cord injury in mountain bike accident at defendant's park — Waiver and release was clear, broad and comprehensive and did not have to specify every possible injury and its mechanism — Any person who could read English would understand waiver, and plaintiff was highly educated with experience at park and as first responder — Plaintiff knowingly and willingly signed release — Defendant did not breach court disclosure order, and there were no other accusations of fraud or misrepresentation.**

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| --- |
| Application by the defendant for summary judgment enforcing the signed waiver and release and dismissing the action against it. The plaintiff was seriously injured while mountain bike riding at a park owned by the defendant. At the time of the accident, the plaintiff had completed two years of medical school, was an avid skier, had helped build trails at the park, and had worked as a first responder. The plaintiff signed a release and waiver in order to use the mountain bike trails. The plaintiff claimed he was rushed through the process and nothing alerted him to the risk of falling over the handlebars and the possibility of spinal cord injury. The defendant filed affidavits from two agents who deposed they were trained to tell patrons the release and wavier of liability was a legal document and confirm the patrons understood the document before witnessing their signature. The plaintiff's accident occurred on a black diamond trail with a rock drop feature. The trail had a sign warning of the difficulty level, an option to go to an easier trail and an option to ride around the rock drop feature. The plaintiff's tire caught on part of the rock drop feature and he was thrown over his handlebars and suffered a spinal cord injury that confined him to a wheelchair. The patrollers who responded testified the plaintiff said he attempted a pre-jump, which was an expert level maneuver that, if not completed correctly, carried a risk of the rider's back tire catching the lip of the rock and sending them over the handlebars. The plaintiff argued the defendant failed to warn him of the risks involved and engaged in deceptive and unconscionable acts and practices that vitiated the waiver and violated consumer protection legislation.  HELD: Application allowed.  The parties adduced evidence on risks and injury frequency, and the plaintiff asserted that differences in the evidence were the result of the defendant not keeping accurate records and not complying with the disclosure order. The plaintiff's allegations did not rise above the level of speculation, and there were not significant contradictions or conflicts in the evidence. This was not a complex case and could be properly decided on summary trial. The plaintiff's argument was that the release was invalid because it did not alert patrons to being thrown over the handlebars as a known mechanism of injury, or to the frequency of injury and possibility of spinal cord injury. However, the waiver and release signed by the plaintiff contained an exclusion of liability clause, so identification of specific risks was not generally required. The plaintiff was highly educated, experienced at the park and as a first responder so, on the balance of probabilities, knew that spinal injuries were a possible outcome. Any person who could read English would understand from the release that the risks were very serious and, that by signing, they waived the right to sue the defendant. The release of liability and waiver of claims was highlighted, and the patron had to initial that they read the release carefully. The risk of injury was stated repeatedly through the document, and patrons were urged to avoid challenging terrain if not sufficiently skilled. The signs posted in the park were consistent with the content of the release. The release was comprehensive, clear and blunt, and explicitly stated the it was a waiver of all liability for any loss for any cause. It was not accepted that the plaintiff would not understand the release. The release was valid and none of the exceptions applied. The defendant did not breach the court order, and there was no accusation of any other fraud or misrepresentation. The release provided adequate warning, even if the plaintiff was correct in his assertion there was a considerable risk of being thrown over the handlebars and suffering a spinal injury. The release was broad and did not have to detail the specific risks. The plaintiff knowingly and willingly signed the release so he could use the park. The defendant's actions were not unconscionable. |

**Statutes, Regulations and Rules Cited:**

Business Practices and Consumer Protection Act, [*S.B.C. 2004, c. 2, s. 4*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-F5KY-B23W-00000-00&context=)(5), s. 8

Occupiers Liability Act, [*R.S.B.C. 1996, c. 337, s. 4*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JKPJ-G0P9-00000-00&context=)(1)

**Counsel**

Counsel for Plaintiff: J.S. Stanley, P. Bosco, K. Gurlay.

Counsel for Defendant, Whistler Mountain Resort Limited Partnership: R.B. Kennedy, Q.C.

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| **N. SHARMA J.** |

**I. OVERVIEW**

**1**  The plaintiff, Dr. Blake Jamieson, was seriously injured while mountain bike riding at a park owned and operated by the defendant Whistler Mountain Resort Limited Partnership ("Whistler")[**1**](#Forward_fnref_fnr-1). He sues Whistler for compensation for his personal injuries. He claims that Whistler failed to warn him of the risks involved in mountain bike riding in Whistler's bike park (the "Park"). He also alleges Whistler engaged in deceptive and/or unconscionable acts and practices, which both vitiate the waiver of liability he signed and violate consumer protection legislation.

**2**  Whistler denies the plaintiff's claims and says the plaintiff signed a release agreement waiving any legal recourse he had against Whistler for the injuries he suffered. Whistler also denies it engaged in any conduct that would preclude its reliance on the release agreement or make it liable under legislation.

**3**  Whistler brings this application seeking to enforce that release agreement and submits I should dismiss this action. The plaintiff opposes the application both because he says it is not suitable for summary judgment, and because the wavier of liability he signed does not preclude his action.

**II. FACTS**

**4**  Unless indicated otherwise, the following paragraphs constitute my findings of fact. The plaintiff was injured while riding in the Park on August 28, 2009. He described the accident: his tire got caught briefly in some terrain at the top of a feature of the park called the "A-Line Rock Drop", causing him to be thrown over the handlebars. Unfortunately, he suffered a spinal cord injury; he is confined to a wheelchair.

**5**  The plaintiff had completed two years of medical school at the time of the accident and had an undergraduate degree in English Literature and Integrated Science. He has since completed his education and is presently a radiologist.

**6**  Dr. Jamieson was an "avid skier" and ski-racer in his youth. He participated in ski racing at the provincial and national levels. At his examination for discovery, he said he was "incredibly proficient" at that activity. He continued to ski recreationally at Whistler Blackcomb into adulthood.

**7**  Dr. Jamieson also participated in heli-skiing. The former owner and employee of Whistler Heli-Skiing Ltd., John Hetherington, confirmed Dr. Jamieson was a customer and skied with the company on Feb. 18, 2004. The company had a strict requirement that patrons sign a standard release form. The forms used in 2004 are no longer in existence but Mr. Hetherington attached to his affidavit the release form used in the 2006/2007 season that he said it was "close to identical" to those used in 2004.

**8**  Dr. Jamieson helped build trails at the Park in exchange for a season's pass. He was also a volunteer patroller at the Park in the 2004, 2005 and 2006 seasons. Patrollers at the Park are responsible to respond to accidents, perform first-aid assessment of injured riders, provide appropriate first-aid treatment and if necessary, communicate and cooperate with emergency health personnel. That first aid treatment could include performing precautionary cervical spine procedures using a "C-Spine" board and cervical collars.

**9**  Whistler contests the facts in this paragraph. Dr. Jamieson deposed he "could not tell if [injured patrons he attended to] were seriously injured or not even though spine precautions were taken with some of the injured guests". He stated that employees at the Park "trivialized injuries sustained in the Park" and did not say or do anything to acknowledge that some guests were sustaining serious injuries. He deposed this left him with the impression that injuries sustained in the Park were not serious (para. 6):

My time as a patroller in no way put me in a position to understand the risks of mountain biking in the Park. On the contrary, my time as patroller led me to believe that the risks of serious injury associated with mountain biking in the Park were minimal. I had no idea that a spinal cord injury was possible and specifically that going over the handlebars was a common mechanism of injury. Moreover, I did not know that experiencing a serious injury was a possible outcome of mountain biking [in] the park. Had I known this, I would not have ridden in the park.

**10**  Whistler questions the reliability of Dr. Jamieson's professed ignorance about the possibility of spinal injuries by pointing to his experience as a patroller. It also relies on Brian Finestone's evidence. Mr. Finestone is the current manager of the Park in addition to being supervisor of the winter terrain parks used by skiers and snowboarders on Whistler and Blackcomb mountains. He affirmed an affidavit on August 31, 2015. In it, he described the duties of patrollers that I have summarized above, and added that patrollers are required to fill out an incident form on which they record details about the accident and any treatment administered after responding to an injured patron. The patrollers attending the incident sign the incident form. Attached to his affidavit are incident forms which were either personally completed by Dr. Jamieson, or on which he was listed as an assistant "first aider".

**11**  The information on those forms includes:

1. injured patron's description of the accident as recorded by patroller: "Turned + left foot fell off hit front brake + endo";
2. injured patron's description of the accident as recorded by patroller: "Went over handle bars + hit abdomen on the handle bars"; the patrollers employed "rapid transport to clinic"; accident occurred at "Big Jump in Joy Ride Jump Park";
3. injured patron's description of the accident as recorded by patroller: "Over handle bars + heard crack"; the treatment recorded was "Palpated Spine - No pain - ... exposed broken collar bone - slung arm - transported patient to clinic";
4. injured patron's description of the accident as recorded by patroller: "landed jump Front end slipped landed on left side by pelvis then skidded on Head"; this accident occurred on the "Bottom 1/3 of A-Line Zone 3"; next to the words "First Aid Exam: LOR/ Cspine" is written "checked + ruled out";
5. on one form, the patron could not recall the mechanics of the accident and the possible injuries were listed to be to the brain, skull, cervical spine, and upper right back. Spinal injury precautions were employed. That accident occurred at the "EHS check pt. #3 on A-Line";
6. injured patron's description of the accident as recorded by patroller: "fell off wall ride" and with regard to treatment, Mr. Jamieson's notations state "Ruled out spinal".

**12**  At his examination for discovery, Dr. Jamieson agreed that he attended a number of incidents where spinal precautions were employed. By spinal precautions, he meant immobilizing the patron and putting them on a stretcher and taking them off by ambulance.

**A. The Release and Signs at the Park**

**13**  Like all patrons, Dr. Jamieson signed an agreement as a condition of using the Park: the "Whistler Blackcomb Mountain Biking Waiver of Claims Assumption of Risk and Indemnity Agreement Release" (the "Release").

**14**  The Release is four pages printed on standard 8 1/2 x 11 inch sized paper. I reproduce here one of the clauses most relevant to the issues in this application. It appears on the upper third of the last page, in a box that is about 2 inches in height, outlined in red and highlighted in yellow, with the following black text:

1. TO WAIVE ANY AND ALL CLAIMS I have or may in the future have against the RELEASEES AND TO RELEASE THE RELEASEES from any and all liability for any loss, damage, expense or injury, including death, that I may suffer or that my next of kin may suffer, as a result of my participation in Mountain Biking, DUE TO ANY CAUSE WHATSOEVER, INCLUDING ***NEGLIGENCE***, BREACH OF CONTRACT, OR BREACH OF ANY STATUTORY OR OTHER DUTY OF CARE, INCLUDING ANY DUTY OF CARE OWED UNDER THE OCCUPIERS LIABILITY ACT, ON THE PART OF THE RELEASEES, AND FURTHER INCLUDING THE FAILURE ON THE PART OF THE RELEASEES TO SAFEGUARD OR PROTECT ME FROM THE RISKS, DANGERS AND HAZARDS OF MOUNTAIN BIKING REFERRED TO ABOVE;

**15**  There were signs in the Park, including at the entrance and exit points where the plaintiff rode that day. Those signs had "***STOP - READ THIS***!" written on the top. Underneath was text, including: "Use of the Bike Park involves the risk of injury. You control the degree of risk you will encounter using the trails and features in the Bike Park" and "WHISTLER MOUNTAIN'S LIABILITY FOR ANY INJURY OR LOSS IS EXCLUDED BY THE TERMS AND CONDITIONS ON YOUR TICKET OR BIKE PARK PASS RELEASE OF LIABILITY".

**16**  At the beginning of the A-Line Trail is a sign with the title "WARNING" in large yellow letters printed on a red background. Beneath that in red text on a yellow background is the following: "THIS IS AN ADVANCED TRAIL. THIS FIRST FEATURE IS A REFLECTION OF THE SKILL NEEDED TO RIDE THIS TRIAL. IF YOU ARE HAVING TROUBLE NOW, YOU SHOULD NOT START". Beside that sign is something known as a "filter feature" which is meant to reflect the skill level required to ride A-Line Trail. The filter feature is a wooden ramp at a steep angle. Riders can ride the filter feature to determine if it is too difficult for their skill level, in which case, there are less difficult trails they can choose, specifically an alternate route on A-Line Trail accessible at that point.

**17**  Dr. Jamieson deposed that he purchased a ticket to use the Park and further:

I was not aware if it contained a waiver or not. I was not told anything about the contents of the waiver, only that I needed to sign it. I was rushed through the signing process as I was in a line-up of people when I bought a ticket. There was nothing in the ticket that alerted me that using the Park was a high risk activity that was associated with the potential to sustain serious injuries including a spinal cord injury.

**18**  Whistler questions the credibility and reliability of the preceding paragraph for a number of reasons, which I discuss later in this judgment.

**19**  In addition to its filed affidavits, Whistler relies on portions of the plaintiff's examination for discovery that took place on June 4, 2013 and October 14, 2014. I find the following extracts to be relevant:

1. Dr. Jamieson rated his ability level as a mountain biker, after he completed his volunteer position at the Park, to be competent. Specifically, in the summer of 2009 he felt he was capable of riding some of the double black diamond trails in the Park.
2. Dr. Jamieson rode some portion of the A-Line Trail in his first year in the Park but did not attempt the rock jump when he was a patroller. He agreed the rock jump was a difficult and challenging feature and that it was steep.
3. He had gone over the A-Line Rock Jump prior to the accident, although he cannot recall how many times. He recalls stopping and looking over the edge the first time he rode the rock jump. He did not fall the first time he rode over the rock jump. On subsequent occasions, he believed he slowed his speed but continued in motion up to the edge and over the rock drop. He never had any difficulty doing that.
4. Dr. Jamieson was aware that mountain biking carries with it a considerable risk of falling off and possibly striking one's head, which is why a helmet is necessary.
5. He understood in broad terms that the release had "something to do with your right to sue the mountain." As an English major, he knew the meaning "to sue" had something to do with a lawsuit.
6. He believed he could not sue if the accident was his fault. But if it was Whistler's fault, he thought he could sue. But when that description was re-stated to him, he stated:

Yes. I mean, I think I would challenge the dichotomy that there would be an injury that was either fully my fault or fully Whistler Blackcomb's fault. I think my understanding of the document would have been that, if there were contributions on my behalf, those weren't contributions I could sue for.

**20**  Whistler produced two affidavits that explain what employees told patrons when buying tickets to the Park: the December 17, 2014 affidavit of Valerie Bergeron and the December 18, 2014 affidavit of Amy Ritchie. Both women had been Guest Services Agents working at the Park.

**21**  One of the responsibilities of a Guest Services Agent was presenting and witnessing patrons' signatures on the Release when someone purchased a season's pass for the Park. Both were trained to say the following to each guest every time they presented the Release:

This is a release of liability and waiver of claims. It is a legal document, so you should make sure you read through it and understand what you are signing. I will be your witness.

**22**  They gave the person time to read the Release and before witnessing it would always ask: "Have you read and understood what you have signed?". They would not witness the patron's signature unless the patron answered yes to that question.

**23**  They denied that they felt pressure to rush customers through reading the Release. Ms. Ritchie's initials appear next Dr. Jamieson's signature on a Release dated June 28, 2009; she witnessed his signature, although she had no specific recollection of her interaction with him. She deposed she was "certain that I would have presented" the agreement in the manner described above and that she "always follow[ed] the exact same procedures" and said the same introduction. She deposed she is "certain" she would have done so with Dr. Jamieson.

**24**  Similarly, Ms. Bergeron "fully believe[d]" she would have followed "the exact same procedures and would always make the same introductory statement" as described above. In addition, Ms. Bergeron was responsible for presenting and witnessing season's passes issued to employees of Whistler Blackcomb as a condition of employment at the park. She has administered the release agreements in the various positions she has held at Whistler for 14 years. She witnessed the Release signed by Dr. Jamieson on June 30, 2006, when he obtained his season's pass in 2006 for the Park. He agreed at his examination for discovery that his signature also appears on a Release dated June 11, 2005, which he obtained prior to working at the Park.

**25**  The plaintiff admits he signed the Release relevant to this action.

**B. The A-Line Rock Drop**

**26**  The Park operates from approximately May to October each year. In 2009, there were approximately 50 different trails in the Park. There are designations on each trail indicating its degree of difficulty. In order of increasing difficulty, those designations are green circle, blue square, black diamond and double black diamond. There was a fifth level of difficulty known as "Pro-Line" which included considerably higher levels of difficulty and risk. Pro-Line trails were intended for use only by "professional mountain bike riders or those with expert riding skills". The definitions of each of these designations were printed on a Park map and at the base and top of all lifts in the Park.

**27**  The accident occurred on a portion of the A-Line Trail, which was designated as black diamond. The definition of a black diamond trail was as follows: "These trails and skills centre have a mixture of long steep descents, loose trail surfaces, numerous natural and manmade obstacles, including: jumps, ramps, elevated features, berms, drops, rocks, and other terrain variations".

**28**  There are two sections to the A-Line Trail, Upper and Lower. Entrance to Upper A-Line is immediately downhill from the top chairlift station. There is a fork in the Upper- A-Line Trail that allows riders to continue either onto Lower A-Line or onto a green circle trail. The rock drop is about two thirds of the way down the Lower A-Line. Before you reach it, there are signs indicating a "drop" is coming up. There were also signs directing riders to an alternative "ride around" route that allows riders to bypass the rock drop. The ride around is less challenging than the rock drop.

**29**  The rock drop is a granite slab angled at about 45-50 degrees. A rider can roll the rock drop (meaning neither bike tire leaves the ground) and there is no requirement to become airborne to successfully descend it.

**C. Trail Inspection**

**30**  Consistent with Whistler's inspection policy, the A-Line Trail was inspected on the morning of August 28, 2009. Dominique Balik, a bike patroller for the Park, swore an affidavit on December 17, 2014. He had been a bike patroller for 11 years. He described his responsibilities as a patroller as including a daily work run or trail check. There is a sign-up sheet for daily work runs when the patrollers arrive for a shift each morning at the Park and Mr. Balik's name is on the sheet for the day of the accident.

**31**  On a work run, patrollers check the trails before the Park opens to ensure the trails are in good condition and properly maintained. A patroller would ride down his or her designated trail, sometimes more than once, stopping and getting off as necessary to assess the condition of the trail including signage, fencing and drainage.

**32**  Mr. Balik had no specific recollection of performing the work run on the A-Line Trail that morning. However, he stated that his standard practice was to do a visual check of the A-Line Rock Drop. He would not descend the rock drop itself. Instead, he used the ride around that bypasses the rock drop. After he is at the end of the ride around, the trail merges with the exit trail from the rock drop. He typically stopped and did a visual check of the face of the rock drop from a downhill position looking back up. He deposed:

If there were any significant issues that were visible at the rock drop on August 28, 2009, such as any irregular obstacles or substantial holes or divots in the approach or exit trail, I would have identified these during my Work Run and taken steps to have them addressed.

**D. The Accident**

**33**  Mr. Balik was one of the patrollers who responded to Dr. Jamieson's accident. He attached to his affidavit a number of photographs that he took that day and the incident form that he completed. Two other bike patrollers on duty that day who attended the accident filed affidavits: D'arcy McLeish, who was on his third year working as a bike patroller at the Park, and Kira Cailes, who was the Park supervisor and a Park patroller on the day of the accident. She was the Park's safety manager at the time she swore her affidavit.

**34**  Mr. McLeish and Ms. Cailes took a spine board and oxygen therapy kit to the site of the accident in an all-terrain transport vehicle. The accident was initially reported as a neck injury, but shortly thereafter, Mr. Balik reported it as a Code 3, which meant there was a threat to life or limb.

**35**  Mr. McLeish and Ms. Cailes recalled that when they arrived at the accident site, Dr. Jamieson was agitated, although he could speak clearly. Someone asked Dr. Jamieson what happened. They both depose they heard Dr. Jamieson say words to the effect that he tried to "pre-jump" the rock drop.

**36**  A pre-jump is an expert level manoeuvre that only expert level riders are capable completing; it requires expert technical skill and experience. It is a more advanced technique. Its purpose is to reduce the amount of air time and get the wheels back in contact with the ground as quickly as possible because that may save fractions of seconds of time.

**37**  In her affidavit, Ms. Cailes described a pre-jump as follows:

Pre-jumping the rock drop is a very advanced manoeuvre that expert riders may perform in a race situation to cut a fraction of a second from their time. This involves choosing a line of descent that will take the rider towards rider's right of the entrance (i.e. from the perspective of a rider, looking downhill) and over a small rock knoll slightly uphill from the lip of the rock drop. If done correctly, using the bike's shocks the rider will become airborne off the knoll, clear the lip of the rock drop, and land on the dirt landing zone below the rock drop.

**38**  Mr. McLeish's evidence is similar but he added:

If a mountain bike rider does not perform a pre-jump over a rock drop correctly, it is possible that the rear wheel of the bicycle could come in contact with the knuckle or lip of the rock drop, which may cause the front wheel to rotate downwards from the rider's centre of gravity, which may cause the rider to catapult forward and over the handlebars. I assumed at the time that this is what caused the accident.

**39**  I note Mr. McLeigh's assumption of what caused the accident matches the plaintiff's description.

**40**  Dr. Jamieson does not address the evidence that he said he tried to pre-jump the rock drop in his affidavit. At his examination for discovery, Dr. Jamieson agreed that it is possible to ride the rock jump with both tires in contact with the ground. However, he could not recall when he went over the rock jump on the day of the accident if both tires were in contact or if the wheels came off the ground at any point.

**E. The Risks of Mountain Bike Riding**

**41**  Whistler's evidence about accidents at the Park is contained in Matt Laszuk's affidavit, filed September 10, 2015. Mr. Laszuk is a legal assistant who worked with Whistler's counsel on this case. He reviewed a spreadsheet generated by Whistler's IT department listing all reported accidents in the Park. He eliminated any duplicative entries for the same accident. That resulted in a figure of 525 accidents in the electronic records for 2009. He also manually reviewed redacted versions of the accident reports for the period 2004 to 2009; all those records are on Whistler's List of Documents. The figure from that review was 538 accidents for the 2009 season.

**42**  Using those figures, together with the annual number of Park visits (in 2009, 123,985), he then calculated two figures for both the spreadsheet data and the manual review data. The first measure was "Accidents per 1000 Bike Park Visits" That number was 4.23 for the spreadsheet data and 4.34 for the manually reviewed data. The second measure was "Accidents as a percentage of Bike Park Visits", which was 0.423% for the spreadsheet data and 0.434% for the manually reviewed data.

**43**  The plaintiff's evidence about accidents and injuries in the Park was adduced from a number of sources. One purported source is a report titled "*Spinal Column and Spinal Cord Injuries and Mountain Bikers: A 13 Year Review"* published in the 2010 American Journal of Sports Medicine (the "13 Year Study"). That article is discussed in the affidavits by Dr. Marcel DeVorak, a professor at UBC in the Department of Orthopedics and a spinal surgeon, and Dr. Andrea Townson, head of the physical medicine and rehabilitation division at UBC, medical site lead at GF Strong Rehabilitation Centre and a clinical associate professor at UBC. Together with seven other authors, they co-authored the 13 Year Study. They both deposed that they agree with the 13 Year Study's conclusions.

**44**  The purpose of the study was to describe patient demographics, injuries, mechanisms of injury, treatments, outcomes, and resource requirements associated with spinal injuries resulting from mountain bike riding. The study extracted data for the period 1995 to 2007 from a Level 1 trauma centre that serves as the regional referral centre for all spinal injuries in British Columbia. From that, 102 males and 5 females fell within the study's parameters. The estimated population from which the data was extracted was 4,077,301. Mountain bike riding included those whose injures arose from "mountain biking" or "off-road non-motorized cycling".

**45**  The authors calculated the mean risk of spine injury from mountain biking over the 13 years period to be 0.2 per 100,000 residents. The study also suggested that the location of accident was available for 79 of the 107 patient data charts and of those, 69.9% occurred on a trail and 30.4% occurred in a bike park. The study also noted that the risk of injury was greatest in 2001 but had plateaued or possibly dropped off in the following six years. The study also commented that "[h]istorically, the high-risk sports for spinal cord injury have been football, ice hockey, wrestling, diving, skiing, snowboarding, rugby, cheerleading and baseball". The authors suggest mountain biking be included in that list.

**46**  Another source for the plaintiff's evidence about accidents is contained in the affidavit of Dr. Jeff Brubacher, filed August 31, 2015. He is an emergency physician at Vancouver General Hospital. He is one of four authors of a study published in the "Wilderness and Environmental Medicine Journal" titled "*The Epidemiology of Mountain Bike Park Injuries at the Whistler Bike Park, British Columbia (BC) Canada*" (the "Whistler Study"). That study was a "retrospective chart review" for all patients admitted to the Whistler Health Clinic between May 16 and October 12, 2009 for "injuries incurred while riding in the bike park".

**47**  The Whistler Study identified 898 subject visits that fell within the study's parameters. It found that 717 (79.8%) of patients in the study "arrived at the clinic ambulatory", 5 (less than 1%) were carried, 72 (8%) arrived on a stretcher and 104 (11.6%) arrived in a wheelchair. Of the 898 patients, 813 (90.5%) were discharged. The study suggests "free-riding mountain biking is a sport with potentially high morbidity". The Whistler Study noted that no data was available about park usage during that period and that was a limitation of the study.

**48**  In addition to those two studies, the plaintiff relies on one expert report, his own affidavit and affidavits from six individuals. He also produced an affidavit from Lorna Fadden who holds a doctorate in linguistics, specializing in discourse analysis and prosody (the rhythms of poetry). I do not find her opinion helpful to the issues before me, or admissible. It is not helpful because her instructions were to assume that the Whistler Study accurately identifies the level of risk in using the Park, a fact I have not found. It is inadmissible because she opined on a very question before me: the degree to which the Release communicates the level of risk in using the Park.

**F. The Expert Evidence**

**49**  The plaintiff relies on the expert opinion of Geoff Pendrel. He has been a professional mountain bike rider since 1995 and is a former Canada Cup champion. Additionally, he has coached the Canadian National team and has been an instructor and guide.

**50**  Portions of his report are inadmissible because he identified he was being asked to opine on something beyond the scope of his expertise: his opinion on the level of risk of injury from riding at the Park compared to other sports, and his opinion of the rate and severity of injuries sustained when mountain biking on Whistler Mountain.

**51**  Mr. Pendrel opined that there was a gap between the skill levels that mountain bikers perceive they have, and the skill levels they actually possess. In his view, the industry general accepts that gap exists. He stated that while ability classifications (beginner, sport, intermediate, expert and elite) have been in existence for a long time in the sport, they rely on riders to self-assess their ability. He further noted that mountain biking terrain varies widely in different parts of the world, and even within Canada. He opined that a rider in Ontario might race competitively in an expert class, but struggle with an intermediate trail in British Columbia.

**52**  He credited Whistler with designing trails where only limited changes in speed are required to complete obstacles. He stated specifically that the speed one naturally has upon completing one jump is typically the appropriate speed for the next obstacle. However, he opined that design feature might give riders a false sense of their true skill and ability, and a false confidence that terrain will always be predictable.

**53**  He was also asked to express his opinion as to how well mountain bikers appreciate and perceive risks of riding terrain such as that found at the Park, based on information given to them by Whistler Blackcomb. He opined that in general, riders are able to appreciate and perceive the risks associated with downhill mountain biking. But he added that novice or intermediate riders are less likely to understand how quickly things can get out of control, or how difficult it can be to regain control. He noted that the Park has a large amount of fast-moving expert traffic that creates an unanticipated risk. He opined more novice riders might be intimidated and frustrated by this.

**G. Evidence from Individuals**

**54**  In addition to his own affidavit, the plaintiff relies on evidence from five doctors and one other mountain bike rider. The doctors' evidence is not expert evidence.

**55**  In his affidavit, Dr. Jamieson denied knowledge of the content of the Release. However, at his examination for discovery, he implied he believed he maintained the right to sue Whistler if an accident was its fault. Dr. Jamieson was then asked whether it occurred to him that he should read the Release before signing it, given that in at least three places there is wording to that effect. Dr. Jamieson answered no, and when asked to explain that answer, he stated, "are you familiar with the principles of informed consent?".

**56**  He elaborated by saying the following:

... I thought I understood what I was signing, I, as per my knowledge as a, at the time, somebody who had training in medical/legal ethics - not legal ethics, that's the wrong word - medical ethics, and then later would go on and have training as a physician, my understanding of informed consent was that if I was signing something where there were serious risks, specific risks, or if there were risks that were very, very common, they would be brought to my attention.

Just as when I, as a physician, inform somebody and consent them to have a blood transfusion, I cannot hand the machine say "sign this" and expect them to have understood everything that is on that sheet. I will ask them to read it back to me. I will ask them if they understand. I will also make sure that I specifically inform them of the individual consequences of the most specific, or the most dangerous, in the case of a blood transfusion, things like transmission of hepatitis or HIV; or the most common things, like a transfusional reaction, and I would have to specifically inform them of those things. I was under the understanding that, when I was signing this document, if there were things that were specific, they would have been brought to my attention.

**57**  The plaintiff also relies on evidence from Fernando Romero. He suffered a spinal cord injury from a mountain bike accident. It did not take place in the Park, although he had biked in the Park. He has not stopped mountain bike riding and frequently bikes in the Park. He deposed about his personal experience and his personal state of knowledge relating to the Park's warnings before and after his accident. He stated at paragraph 6:

Before my injury, I would have tried anything in the park. I was constantly looking to challenge myself and do what other more advanced riders were doing because it was a thrill to do so. It is only because of my first-hand knowledge that I am now a cautious rider. I know that a lot of people who ride the park do not have this knowledge or perspective.

**58**  I am cautious about the reliability of the last sentence because he does not explain how he knows about other people's knowledge or perspective.

**59**  He did not appreciate that the margin of error was very small. He witnessed what he regarded to be "dangerous behaviour" at the Park, including riders tailgating behind him pressuring him into speeding or moving off the path (I note the term "dangerous" expresses an opinion and so is inadmissible as such, but I treat it as his personal belief). He stated, "I can say from first-hand experience that this behaviour has caused me to ride faster or in an area that I would not have normally done". It is not clear to me how he reconciles his statement that he is more cautious with his admission that he has ridden faster in areas than he would normally have.

**60**  The affidavits from the doctors offer their observations, and in some cases inadmissible opinions. Where possible and reasonable to do so, I have treated those opinions as personal observations or beliefs rather than excluding the evidence.

**61**  Dr. Daniel Wallman filed an affidavit on October 1, 2015. He is an ER doctor at the Whistler Healthcare Centre. He stated he always knew when the bike park opened because he would see an increase in the level of acute and traumatic injuries, a phenomenon he also noted when the Whistler Mountain ski hills opened. He said it was common to see shoulder injuries, skin abrasions, as well as concussions and head injuries. He estimated that during the Park's open season, he saw two or three injuries per day from the Park. He has not biked in the Park and does not allow his children to do so because he sees it as an "extremely dangerous" activity (an opinion I am prepared to accept his personal belief).

**62**  Two doctors who participated in the studies referred to earlier in this judgment, also provide their personal and professional observations. Dr. Andrea Townson has ridden in the Park and uses it about once a year. She does not use any feature that requires her to jump or "take air". She claimed but for her work as a physician working with spinal cord injuries, she "simply would not know of this risk". She then gives opinion evidence about whether the Release is sufficient to warn of risks; that is the very question before me and I find those portions of her affidavit inadmissible.

**63**  Dr. Marcel DeVorak noticed about 10 years ago an increasing number of spinal cord injuries from people who engage in mountain biking, some of which occurred in the Park. He said that trend was comparable to what he noticed when snowboarding became increasingly popular. He expressed his "conclusion" (which is really an opinion, but I shall treat it as a "belief") that mountain biking, including mountain biking at the Park, is an activity that carries with it the risk of spinal cord injury. He deposed that he has this belief only because of his work as a surgeon. He does not mention if he has used the Park or seen the Release.

**III. ISSUES**

**64**  There are two main issues:

1. Is this matter suitable for a summary trial?
2. If so, does the Release bar his action?

**A. Is this Matter Suitable for a Summary Trial?**

**65**  The legal principles involved in deciding suitability are not in dispute, but their application to this case is. Where a court is able to resolve issues of fact, even in the face of conflicting affidavits, a summary trial may be appropriate. The plaintiff submits this case is not suitable because of the evidentiary conflicts, the size and complexity of the claim, and the fact that a summary judgment would end the litigation. In the alternative, if I decide a summary trial is appropriate, he submits there is sufficient evidence for me to conclude that the Release does not preclude his action.

**66**  The controlling issue is whether I can find the facts necessary to decide the issues raised. Even where I can do so, I have a discretion to decline to give judgment if, in my view, it would be unjust to do so. In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd*. [*(1989), 36 B.C.L.R (2d) 202*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-FJDY-X23K-00000-00&context=), Chief Justice McEachern stated at para. 47:

The procedure prescribed by... [the predecessor to Rule 9 - 7] may not furnish perfect justice in every case, but that elusive and unattainable goal cannot always be assured even after a conventional trial and I believe the safeguards furnished by the rule and the common sense of the Chambers Judge are sufficient for the attainment of justice in any case likely to be found suitable for this procedure. Chambers judges should be careful but not timid in using... [the predecessor to Rule 9 - 7] for the purpose for which it was intended.

**67**  The Chief Justice noted a number of factors that the Chambers Judge can take into account when assessing whether summary trial is appropriate, including the amount involved, the complexity of the matter, the urgency, any prejudice likely to arise because of delay, the cost of taking on a conventional trial and the progress of the litigation.

**68**  Furthermore, in *MacMillan v. Kaiser Equipment Ltd.*, [*2004 BCCA 270*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X3JG-00000-00&context=), the Court of Appeal confirmed that the mere fact that there is a conflict in the evidence does not preclude a summary trial. At para. 22, the Court notes that it is only the rarest of cases where there would be complete agreement on the evidence. The determinative issue is whether the court is able to deliver a just and fair result by proceeding summarily (see also *Inspiration Management* at para. 55).

**69**  The plaintiff relies on *Chu v. Lee*, [*2006 BCSC 547*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B1R3-00000-00&context=) at para. 11, where Justice Melnyk stated that if the evidence on "the critical issue" is diametrically opposed, he would conclude that he is unable to find the facts necessary to make a determination. In that circumstance, he concluded deponents should have their credibility tested by cross-examination, either in court or not. Similar reasoning was expressed in *Urban Holdings Ltd. v. MacDuff*, [*2007 BCSC 631*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-24DF-00000-00&context=). In that case, the court notes there is a limit to the type of credibility issues that can be determined on the basis of affidavit evidence.

**70**  Additionally, the Court of Appeal has stated the trier of fact should consider if she would benefit from hearing cross-examination (*Foreman v. Foster*, [*2001 BCCA 26*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JJD0-G10X-00000-00&context=) at paras. 18-19), or if the conflicts in the evidence are such that viewing the demeanour of witnesses would be helpful (*Jutt v. Doehring* [*(1993), 82 B.C.L.R. (2d) 223*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F06F-23K9-00000-00&context=)).

**71**  Whistler does not dispute any of the above propositions, and in my view, the cases cited above are all consistent. The crucial question is whether I can fairly make findings of facts. If on the critical issues, there is evidence diametrically opposed, or observation of a witness' demeanour would be helpful to resolving those conflicts in the evidence, it is improbable that a summary trial would be appropriate.

**72**  The issues that arise, from the perspective of suitability for summary trial, are whether I can find the facts necessary to determine the following:

1. What risks was Dr. Jamieson aware of, or should be assumed to have been aware of, when he signed the Release?
2. Does the Release adequately warn of the risks of riding in the Park?
3. If so, is the Release binding on Dr. Jamieson with the result that this action should be dismissed?

**73**  I examine each in turn but only with regard to the issue of suitability.

**1. Can I find the necessary facts to determine what risks Dr. Jamieson was aware of, or should be assumed to have been aware of, when he signed the Release?**

**74**  There is no contradiction in the evidence relevant to this issue. A contradiction is two statements that cannot be true at the same time. Dr. Jamieson stated, he was not told "anything about the content of the waiver" by Whistler employees. Whistler adduced evidence of what patrons were told when purchasing season's passes. It is not Whistler's position that employees did tell or read the content of the Release to patrons. It relies, in part, on the Release itself, and how it was presented to patrons who were asked to confirm that they read and understood its content. The parties ask me to draw different inferences from these facts but a difference in inferences drawn from evidence is not a conflict in the evidence. I am satisfied I can find the necessary facts on this issue.

**2. Can I find the necessary facts to determine if the wording of the Release was adequate to warn of the risks present in the Park?**

**75**  As a starting point, there is no controversy about the content of the Release or any signs at the Park so those facts do not bar a summary trial. However, two other issues arise and I must determine if I can find the facts necessary to them: the risks of using the park, and whether the Release adequately warns about those risks.

1. **Evidence about risks of using the Park**

**76**  The plaintiff submits there are "significant factual disputes on multiple critical issues" in the case; yet in his written response to the application, he only discusses one. The plaintiff asserts he has demonstrated a fundamental discrepancy in the evidence about the frequency of accidents in the Park. Thus, he submits this matter should not be decided on affidavit evidence.

**77**  There is a difference between the evidence of the plaintiff and Whistler on the number of injuries at the Park. However, the plaintiff does not just rely on that discrepancy; he alleges Whistler is not keeping, or is keeping and not disclosing, accurate statistics of accidents that happen in the Park. The plaintiff goes further because he alleges that Whistler has breached a court order by failing to disclose relevant documents in this litigation.

**78**  On March 31, 2015, Master Taylor granted the plaintiff's application that Whistler produce, among other things: "all internal emails and memos... discussing safety or injuries in the context of... the Park from January 1, 2007 to August 28, 2009 as a result of Whistler conducting a search using the following search terms". What followed was a list of 16 terms including "bike park" or "bike" or "mountain-biking" or "A-Line"; "safety"; "dangerous"; "accident"; "injury"; "spine"; and "spinal". Whistler's counsel assured me that he is satisfied Whistler has complied with that order. I have no basis upon which to doubt that assurance.

**79**  In the face of that, I pressed plaintiff's counsel to confirm that he was accusing the defendant of disobeying a Court order, and by implication, challenging the assurance made by Whistler's counsel. Plaintiff's counsel confirmed that he was and that he understood the gravity of his accusation. In his view, the plaintiff has adduced evidence to justify the allegation.

**80**  I disagree.

**81**  As discussed above, Whistler relies on Mr. Laszuk's affidavit as setting out the number of accidents at the Park. In 2009, there were 525 recorded in its electronic database, and 538 recorded on physical records. I find nothing turns on the small difference between those two numbers. Mr. Laszuk also calculated that in 2009, there were either 4.23 or 4.34 "Accidents per 1000 Bike Park Visits", meaning accident rate of either 0.423% or 0.434%.

**82**  The plaintiff compares those figures against the information in the two studies cited earlier and the affidavit evidence. In the 13 Year Study, the authors calculated the mean risk of spine injury from mountain biking over the 13 year period to be 0.2 per 100,000 residents. The Whistler Study linked 898 patient visits to biking in the Park for the 2009 season.

**83**  The plaintiff's accusation that Whistler is withholding relevant evidence rests on his suspicion about the meaning of a numerical difference in two different data sets. The plaintiff's allegations do not rise above the level of speculation. Neither suspicion nor speculation is a sufficient basis upon which to allege a party of disobeying a court order.

**84**  Moreover, the plaintiff has not demonstrated a significant conflict or contradiction in the evidence relating to a material issue. The critical question is whether the differences in the data are material to a legal or factual issue and if so, whether I have a basis upon which to resolve the differences. The mere existence of an evidentiary conflict does not militate against a summary proceeding; it is whether the conflict can fairly be resolved.

**85**  I am not persuaded that the difference in numerical data establishes a conflict in the evidence so critical that it cannot be addressed on a summary trial; it certainly does not raise credibility issues. Nor am I persuaded that cross-examination of the affiants would assist me to make inferences or conclusions about the nature of risks at the Park based on all of the evidence submitted by the parties.

**86**  For all those reasons, I am satisfied that I can find the necessary facts to determine the risks inherent in using the Park.

1. **Evidence about the adequacy of the Release**

**87**  I must determine if the wording on the Release adequately warns a reasonable person of the risks of using the Park. That involves examining the wording, and the presentation of the Release to patrons. The Release is in evidence and affiants have addressed how it was presented to patrons; clearly, I can make findings about its content and presentation.

**88**  The plaintiff has a number of affidavits that discuss what he says are the real risks of using the park. That evidence includes the two studies that I have already dealt with earlier in this judgment. In addition, the plaintiff relies on statements from individuals, including Dr. Jamieson, about their appreciation of risks when they used the Park.

**89**  It may be that it is appropriate for me to consider subjective beliefs when determining the validity of the Release. If so, I am satisfied I can make the necessary findings to determine the issue.

**90**  Whistler contests what conclusions I can draw from the affiants' statements about their appreciation of risk and it challenges, in some cases, the reliability of those subjective beliefs. However, Whistler does not rely on patrons' subjective belief. Nor has it produced an alternate body of evidence that contradicts the plaintiff's evidence about patrons' subjective beliefs. I do not see that deciding the issue without cross-examination would be unfair or unjust.

**91**  Instead, Whistler relies on its own data and other facts to argue that I can conclude a reasonable person would have appreciated the real risks of using the Park. This does not contradict the plaintiff's evidence. The controversy is not in the evidence but in the legal conclusions, and factual inferences I can or should draw form the evidence. Given that, I am satisfied I can find the necessary facts to resolve this issue based on the evidence before me.

**3. Are there Other Factors Militating Against a Summary Trial?**

**92**  The plaintiff also says that the case is too complex for a summary trial. In *Marine Masters v. Victoria Harbour Authority*, [*2009 BCSC 953*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-FGCG-S0GD-00000-00&context=), Justice Macaulay comments that complex cases involving factual disputes are rarely suitable for summary disposition. The plaintiff also submits that courts are reluctant to grant summary trial if the matter will proceed to trial in any event: *Calder v. King* [*(1994), 91 B.C.L.R (2d) 336*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F956-S1RF-00000-00&context=) (SC).

**93**  I do not agree that this is a complex case. The issues are important, and it is clear the resolution of these issues may have a significant impact on the plaintiff and/or Whistler. Those are factors that I should take into account to decide whether to proceed with the summary trial, but that does not make the case complex. As I have examined earlier, the evidence is not characterized by diametrically opposed facts that are difficult to resolve.

**94**  Similarly, I do not find the legal issues complex. I am not faced with a set of cases that appear to have inconsistent reasoning. The parties acknowledge the case has some novel aspects (the applicability of the particular legislation to a mountain bike park, and the validity of the Park's Release). However, those issues are only novel in the sense that legal principles are being applied to facts that have not yet been the subject of a judgment. This is not a case where either party is arguing for a change or modification of legal principles, which may make a case more complex.

**95**  With regard to the stage of the litigation, both parties concluded examinations for discovery by June 2015. In September 2015, Whistler filed a notice of application, and three days later, the plaintiff filed a notice of trial. The trial is set for April 2018. In my view, these factors favour Whistler. If it succeeds on the merits, it may be that the litigation ends. However, if it fails, there will still be a saving of trial time because a main issue about liability will have been resolved. The application is not premature because the parties have concluded examinations for discovery and there is sufficient time before trial for the parties to respond to the result in this application.

**96**  I acknowledge the amount of damages involved in this case may be high because the nature of the injuries suffered by Dr. Jamieson. If he succeeds on this application, those issues are set to go to trial. The quantum issues are not before me. The issue before me on liability relates solely to the validity and enforceability of the Release; the issues of ***negligence*** or contributory ***negligence*** do not arise. If they did, evidence might need to be repeated at any subsequent trial, which raises the risk of contradictory findings of fact from two different judges. The findings of fact I make here relate only to the claim about the Release and the legislation.

**97**  All of these factors persuade me that this summary application will shorten the length of the trial, regardless of which party succeeds on this application. For all the reasons discussed above, I conclude this matter is suitable for summary trial.

**B. Does the Release the Plaintiff Signed Bar his Action?**

**98**  Whistler submits the Release is valid and enforceable and precludes the action. The plaintiff alleges that Whistler failed to warn him adequately about the risks of using the Park, and therefore the Release he signed does not preclude his action. In addition, he alleges that Whistler has engaged in deceptive or unconscionable conduct both disentitling it from relying on the Release and making it liable for a breach legislation, entitling him to compensation.

**99**  From these positions, the following issues arise:

1. Is the Release valid and enforceable?
2. What are the risks of using the Park, and does the Release adequately warn of those?
3. Even if the Release is valid, is Whistler liable under the terms of the *Business Practices and Consumer Protection Act*?

**100**  Before examining those issues, it is convenient for me first to address two other issues. First, the plaintiff pleads and relies on the *Occupiers Liability Act*, *R.S.B.C. 1996, c. 337*. The issue in this application under that legislation is whether Whistler met its duty in s. 4(1) to take reasonable steps to bring the Release to the attention of its patrons. My analysis and conclusion with regard to the validity of the Release also applies to this issue because the same facts and legal principles are involved. I did not understand the parties to disagree.

**101**  Secondly, the plaintiff submits there is an independent duty to warn "over and above" any ***negligence***[**2**](#Forward_fnref_fnr-2). The plaintiff argues the duty to warn is independent of the scope of the waiver. The plaintiff submits *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 1214, confirms his submission.

**102**  With respect, the plaintiff has misread the essential finding from *Rivtow Marine*. The statement that the failure to warn is an independent tort distinguishes it from liability arising from breach of contract. *Rivtow Marine* is most commonly cited for the proposition that recovery in the case of ***negligence*** is not limited to physical damage, but extends to encompass economic loss. Thus, I do not agree with the plaintiff's proposition that the duty to warn is a tort independent of ***negligence***.

**1. Is the Release Valid and Enforceable?**

**103**  To answer this issue I must examine the text of the Release, in the context of other facts in the case. I must also assess the nature of risks at the Park in order to determine if Whistler has met its duty to warn of those risks. I turn first to the applicable legal principles.

1. **Legal Principles**

**104**  The leading case about the validity of enforceability of waiver agreements in the context of recreational activities is *Karroll v. Silver Star Mountain Resorts Ltd.*, [*[1988] B.C.J. No. 2266*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-JTNR-M4B7-00000-00&context=) (S.C.). A number of propositions from that case are applicable to the facts before me. In that case, the plaintiff submitted that a release she signed could not bind her because she was not given reasonable opportunity to read and understand it. Many similar cases cite McLachlin J.'s discussion of the issue. Prior to the judgment in *Karroll*, cases appeared to rely on one of two contradictory principles:

17 Stated thus, the legal propositions for which the plaintiff and the defendants respectively contend, appear to be incompatible. How is the general contractual principle that a party signing a legal document is bound by its terms despite not having read them, to be reconciled with a requirement that a party presenting a document for signature must take reasonable steps to bring them to the signing party's attention?

18 The key, in my opinion, is recognition of the limited applicability of the rule that a party proffering for signature an exclusion of liability must take reasonable steps to bring it to the other party's attention. It is not a general principle of contract law establishing requirements which must be met in each case. Rather, it is a limited principle, applicable only in special circumstances.

*Karroll* at paras. 17-18.

**105**  She continues that "where a party has signed a written agreement it is immaterial to the question of his liability under it that he has not read it and does not know its contents" (quoting from *L'Estrange v. Graucob*, [1934] 2 K.B. 394 at 406-407). Justice McLachlin discusses that two exceptions to that rule had been recognized: if the signature was not an action of the plaintiff (*non est factum*), or if the agreement was induced by fraud or misrepresentation.

**106**  Justice McLachlin adds a third exception: if the party seeking to rely on an exclusion knew or had reason to know that the signor was mistaken as to its terms of exclusion, those terms are not enforceable. She states at para. 24 that "there is no general requirement that a party tendering a document for signature take reasonable steps to apprise the party signing of onerous terms or to ensure that he reads and understands them" unless a reasonable person should have known that the party singing was not consenting to the terms in question.

**107**  It is clear from a number of cases that the content of a clause excluding liability is critical to its validity in personal injury actions even if ***negligence*** has been proven. Sometimes the exclusion clause is determinative: *Dyck v. Man Snowmobile Assn. Inc.*, [*[1985] 1 S.C.R. 589*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2372-00000-00&context=); *Mayer v. Big White Ski Resort Ltd.*, [*[1997] B.C.J. No. 725*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JX3N-B0N1-00000-00&context=) (S.C.) - aff'd [*112 B.C.A.C. 288*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JCBX-S0RT-00000-00&context=); *McQuary v. Big White Ski Resort Ltd.*, [*[1993] B.C.J. No. 1956*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-FD4T-B0V2-00000-00&context=); and *Ocsko v. Cypress Bowl Recreations Ltd.*, [*17 B.C.A.C. 210*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JC0G-62MG-00000-00&context=).

**108**  Based on that case law, the content and presentation of the text on the Release is an important, potentially decisive issue; but courts also look at the personal circumstances of the plaintiff, and the context of the accident.

**109**  In *Blomberg v. Blackcomb Skiing Enterprises Ltd.*, [*[1992] B.C.J. No. 196*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F4W2-61SF-00000-00&context=) (S.C.) the plaintiff claimed damages for personal injuries suffered caused by a skiing accident. The parties agreed to limit the trial to the issue of the validity and enforceability of the release, and try the ***negligence*** and damages issues on another day. The court states that the knowledge and experience of the plaintiff and the fact he had executed similar releases to the one at issue in that case were highly relevant. He was an expert skier and a well-educated businessman. The plaintiff's action failed.

**110**  In *Schuster v. Blackcomb Skiing Enterprises Ltd. Partnership*, [*[1994] B.C.J. No. 2602*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JC0G-63P6-00000-00&context=), the court made a point of relying on the fact that the plaintiff was an educated woman conversant in English. Both *Braun v. Whistler Mountain Resort Limited*, [*2016 BCSC 2259*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5MBP-67G1-F2MB-S3TW-00000-00&context=) and *Dawe v. Cypress Bowl Recreations* Ltd., [*[1993] B.C.J. No. 2892*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F8D9-M0XD-00000-00&context=) (S.C.), come to the same conclusion, based on similar reasoning. In both these cases, the court dismissed the action based on the exclusion of liability on a summary trial application.

**111**  The Court of Appeal has commented that a case involving the validity of a release is "ideal" for summary trial, remembering that a party is obliged to bring his or her entire case to the summary application even where he or she argues it should not proceed that way: *B.C. Snowmobile Federation et al.*, [*2003 BCCA 174*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FCSB-S291-00000-00&context=) at para. 5. In that case, the Court of Appeal found the wording of the release clear, overturning the trial judge's conclusion that it did not sufficiently identify any specific risk.

**112**  The plaintiff relies on *Buchan v. Ortho Pharmaceutical*, [*[1984] O.J. No. 3181*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SG91-DY33-B3XS-00000-00&context=), aff'd [*[1986] O.J. No. 2331*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCJ1-FGJR-23VM-00000-00&context=) (C.A.), but that case is not relevant because it deals with product liability. Nevertheless, the plaintiff relies on that court's commentary that a general warning is not sufficient where there are conditions that may increase a particular risk (para. 19), referring to *Lambert v. Lastoplex Chemicals Co.*, [*[1972] S.C.R. 569*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B021-00000-00&context=). In other words, the plaintiff's position is that the duty to warn must be tailored to the gravity of the potential hazard.

**113**  The plaintiff argues the Release is invalid because it fails to alert patrons to a known mechanism of injury (being thrown over the handlebars), a possible injury (spinal cord injury) and the frequency of injuries. That principle may operate in product liability cases, but it does not apply to the issues in this case. Where a plaintiff signs a contract containing an exclusion of liability clause, identification of specific risks is not generally required. In *Dyck*, the Supreme Court of Canada was assessing whether the appellant, who suffered "serious injuries", was bound by the terms of his membership in an association whose rules purported to release the association from liability. Those terms were also on an application form relating to a particular event. At para. 2, the Court states those documents "made no express mention of injuries resulting from the ***negligence***" of the respondents, although the application form expressly stated that Dyck agreed to "save harmless and keep indemnified the Association... from all liability, howsoever caused, in connection with taking part in the race 'notwithstanding that the same may have been contributed to or occasioned by [their] ***negligence***'." The Court held the release was valid, resulting in the dismissal of the appellant's case.

**114**  Many cases do not even refer to the severity or mechanism of injury. It is enough that the wavier is described as "broad in scope and effect", having an explicit heading in bold print and a body that "contain[ed] the wavier of all claims for any cause including ***negligence***" (*Blomberg* at para. 11) or "drafted in such a way as to include nearly every conceivable form of ***negligence*** or want of duty that might be imposed" (*Braun* para. 2).

**115**  In *Delaney Estate v. Cascade River Holidays Ltd.*, [*[1981] B.C.J. No. 2209*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6T1-FD4T-B088-00000-00&context=), aff'd [*[1983] B.C.J. No. 476*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6V1-FJTD-G258-00000-00&context=), the wording of the release arguably was less broad. It stated the defendant company had "no responsibility for patrons' safety or property" and that it was not responsible for "any loss or damage suffered by any person... whatsoever including ***negligence***". Even though there were fatalities in that case, the claims were dismissed because of the validity and effectiveness of the waiver. Other cases affirm these principles, including *Dawe*; *Dixon v. B.C. Snowmobile Federation et al.*, [*2003 BCCA 174*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-FCSB-S291-00000-00&context=); *Loychuk v. Cougar Mountain Adventures Ltd.*, [*2011 BCSC 193*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G34B-00000-00&context=), aff'd [*2012 BCCA 122*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-6297-00000-00&context=); and *Simpson v. Nahanni River Adventures Ltd.*, [*[1997] Y.J. No. 74*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5XR8-3W01-JGBH-B3W8-00000-00&context=) (S.C.).

**116**  Therefore, I do not agree with the plaintiff that in order to meet the duty to warn, Whistler was necessarily required to mention the specific risks of spinal injuries or being thrown over the handlebars as a known mechanism of injury. It depends on the wording of the Release, among other things.

**b) The Plaintiff's Circumstances**

**117**  The cases discussed above make it clear the characteristics of the plaintiff are relevant to determining if an exclusion of liability is enforceable. Whistler submits Dr. Jamieson was highly educated at the time of the accident, and that fact is an important factor supporting its position. I agree. Dr. Jamieson had completed an undergraduate degree and two years of medical school at the time of the accident.

**118**  Whistler points to his experience at the Park in addition to his experience with ski racing, heli-skiing and many years of downhill skiing, all of which involved signing a document including clauses for the exclusion of liability. Thus, this was not the first exclusion of liability clause he had signed. Those facts are also relevant; many of the cases cited earlier in this judgment refer to similar facts in upholding exclusion of liability clauses.

**119**  Whistler also emphasizes Dr. Jamieson's personal involvement with incidents at the Park as a first responder. He performed spinal precautions on injured riders himself. Not only that, he even purported to "rule out" the possibility of a spinal injury on one occasion. I find these facts to be highly relevant.

**120**  Dr. Jamieson did not contest the information on any of the incident forms and admitted he was aware that "spinal precautions" were used a number of times for injured patrons. Given that, it is very difficult to find the following statements from paragraph 6 of his affidavit to be reliable or credible: "I had no idea that a spinal cord injury was possible"; "... I did not know that experiencing a serious injury was a possible outcome of mountain biking [in] the park." I find on a balance of probabilities that Dr. Jamieson did know that spinal injuries were a possible injury that riders in the park may suffer. Taking all of his evidence into account, I place little weight on his statement from paragraph 6 of the affidavit that, "Had I known this [referring to serious injury was a possible outcome of using the Park], I would not have ridden in the park."

**121**  I find on a balance of probabilities that Dr. Jamieson was aware of the possibility of spinal injury resulting from biking in the Park.

1. **The Release**

**122**  With regard to the Release itself, I find any reasonable person, who can read English, faced with the document, would understand that the risks of using the Park are very serious, and that by signing it, the person waives his or her right to sue Whistler. It has many of the same features as the waivers at issue in the cases mentioned earlier in this judgment, but it has many additional features.

**123**  Among the features of the Release that are the most relevant are:

1. On the top third of the first page, the following text is printed inside a bold-lined box highlighted in yellow:

**RELEASE OF LIABILITY, WAIVER OF CLAIMS,**

**ASSUMPTION OF RISKS AND INDEMNITY AGREEMENT**

**(hereinafter the "Release Agreement")**

**BY SIGNING THIS RELEASE AGREEMENT YOU WILL**

**WAIVE OR GIVE UP CERTAIN LEGAL RIGHTS,**

**INCLUDING THE RIGHT TO SUE OR CLAIM**

**COMPENSATION FOLLOWING AN ACCIDENT**.

***PLEASE READ CAREFULLY!***

1. At the bottom of that yellow box is a space for the patron to initial next to the following statement: "I have been offered a copy of this Release Agreement and I have been advised to read it carefully".
2. At the bottom of the first page, similarly outlined in a bold-lined box (but not highlighted in yellow) the following is printed (I have extracted the most relevant portions):

**NOTICE TO RIDERS, PARENTS AND GUARDIANS**

**If you are new to the mountain biking program at Whistler Blackcomb... please take the time to review this document carefully and familiarize yourself with the mountain biking activities at Whistler Mountain. Injuries are a common and expected part of mountain biking. Whistler Blackcomb offers introductory mountain biking lessons and beginner mountain biking terrain. More challenging terrain should not be attempted until the rider has the appropriate skill, experience and equipment..**.

1. The Release is in the form of a booklet. When you open it, on the right-hand side is the third page. The same information reproduced above in subparagraph (a) appears in the top quarter of that page, outlined in red and highlighted in yellow.
2. The text on the second page is printed such that you have to turn the Release sideways (to landscape orientation) to read it. In my view, this makes the features on that page more noticeable.
3. On the left hand side of the second page, outlined in a black box at the top, printed in bold, capital, italicized and larger font, it states: "***STOP - READ THIS***!!!"
4. Underneath that heading are eight bulleted statements including:
5. "Use of the Bike Parks involves the risk of injury. You control the degree of risk you will encounter in using the trails and features in the Bike Parks";
6. "Do not attempt any of the trails or features unless you have sufficient ability and skill to do so safely. Always ride in control and within your ability level"; and
7. "The Bike Parks are not recommended for first time cyclists, without proper instruction".
8. At the bottom of the second page, the following is written:

**YOU ASSUME THE RISK OF ANY INJURY THAT MAY OCCUR WHEN USING THE BIKE PARKS. WHISTLER BLACKCOMB MOUNTAIN'S LIABILITY FOR ANY INJURY OR LOSS IS EXCLUDED BY THE TERMS AND CONDITIONS ON YOUR TICKET OR BIKE PARK PASS RELEASE OF LIABILITY**.

1. On the third page, Whistler and its agents are defined as "the Releasees". Further down form that definition, there is a paragraph titled: "**ASSUMPTION OF RISKS"**. The following text is extracted from that paragraph:

Injuries are a common and expected part of mountain biking. Mountain biking... takes place on steep and rugged terrain and features that are both physically and technically challenging and will expose the rider to many risks, dangers and hazards. These include but are not limited to: use of chairlifts and gondolas; changing weather conditions; mechanical failure of equipment; falls; loss of balance; high speed descents; difficulty or inability to control one's speed and direction; rapid or uncontrolled acceleration on hills and inclines; extreme variation in cycling terrain including... ; constructed features such as bridges, ramps, ladders, bumps, berms, jumps, and drops; ... ***negligence*** of other riders or users of the premises; and ***NEGLIGENCE* ON THE PART OF THE RELEASEES, INCLUDING THE FAILURE ON THE PART OF THE RELEASEES TO SAFEGUARD OR PROTECT ME FROM THE RISKS, DANGERS AND HAZARDS OF MOUNTAIN BIKING**.

1. The following is printed on the top of the fourth page:

"I AM AWARE OF THE RISKS, DANGERS AND HAZARDS ASSOCIATED WITH MOUNTAIN BIKING AND I FREELY ACCEPT AND FULLY ASSUME ALL SUCH RISKS, DANGERS AND HAZARDS AND THE POSSIBILITY OF PERSONAL INJURY, DEATH, PROPERTY DAMAGE OR LOSS RESULTING THEREFROM".

1. Below that is a heading printed in bold: "**RELEASE OF LIABILITY, WAIVER OF CLAIMS AND INDEMNITY AGREEMENT"**
2. Shortly below that, in a box outlined in red and highlighted in yellow, is the wording of the waiver including what I reproduced earlier in this judgment. I repeat it here for convenience:
3. TO WAIVE ANY AND ALL CLAIMS I have or may in the future have against the RELEASEES AND TO RELEASE THE RELEASEES from any and all liability for any loss, damage, expense or injury, including death, that I may suffer or that my next of kin may suffer, as a result of my participation in Mountain Biking, DUE TO ANY CAUSE WHATSOEVER, INCLUDING ***NEGLIGENCE***, BREACH OF CONTRACT, OR BREACH OF ANY STATUTORY OR OTHER DUTY OF CARE, INCLUDING ANY DUTY OF CARE OWED UNDER THE OCCUPIERS LIABILITY ACT, ON THE PART OF THE RELEASEES, AND FURTHER INCLUDING THE FAILURE ON THE PART OF THE RELEASEES TO SAFEGUARD OR PROTECT ME FROM THE RISKS, DANGERS AND HAZARDS OF MOUNTAIN BIKING REFERRED TO ABOVE;
4. Just above the signature block on the last page, it states: "In entering into this Release Agreement I am not relying on any oral or written representations or statements made by the Releasees with respect to the safety of Mountain Biking, other than what is set forth in this Release Agreement".

**124**  Whistler also relies on the signs at the Park to submit it took reasonable steps to warn the plaintiff of the risks. I do find the signs are consistent with the content of the Release. They form part of the context within which the plaintiff used the Park, and are relevant to the issue of Whistler's meeting its duty to warn.

**125**  In my view, the Release is comprehensive, clear and blunt. I do not see how any adult with basic reading skills could reasonably believe he or she retained the right to sue Whistler if they were injured using the Park, even if Whistler was negligent.

**126**  The key wording in the Release is the wavier of "all liability for any loss... injury... that [the signatory] may suffer... as a result of... participation in Mountain Biking, DUE TO ANY CAUSE WHATSOEVER, INCLUDING ***NEGLIGENCE***,... BREACH OF ANY STATUTORY OR OTHER DUTY OF CARE". I find that wording independently sufficient to make the waiver valid. However, the Release has many other features identified above that put it beyond dispute that a person signing the Release could not sue Whistler for any personal injury no matter how it was sustained.

**127**  Despite that wording, Dr. Jamieson submits he was unaware of the legal impact of the Release. It is difficult to believe an adult with a degree in English Literature would not understand the plain words of the Release. Dr. Jamieson's reading and comprehension skills were considerably higher than the average, reasonable person. Moreover, I find Dr. Jamieson had a sophisticated understanding of liability that exceeds the average person. This is revealed by evidence from his examination for discovery, where he stated that he did not "buy into a dichotomy" that an accident could either be his fault, or be Whistler's fault. Additionally, he compared what he understood he had waived by signing the Release to the concept of informed consent. His denial of knowledge of the content and impact of the Release is very difficult to accept in light of his personal characteristics and his evidence.

**128**  I find on a balance of probabilities that Dr. Jamieson knew and understood the impact of his signing the Release.

1. **Conclusion**

**129**  Returning to the criteria in *Karroll* and other cases cited earlier, I am satisfied on a balance of probabilities that Whistler has proven the Release is valid and enforceable because the plaintiff signed it and none of the exceptions apply. There is no question that Dr. Jamieson signed the document, and I have dismissed the accusation that Whistler has breached a court order, and there is no other accusation or evidence of fraud or misrepresentation. Nor is there any evidence that Whistler ought reasonably to have believed that Dr. Jamieson might be mistaken about what he was signing. More importantly, I believe he understood the Release. In any event, since none of the exceptions apply it would not matter if I had not made that finding because "where a party has signed a written agreement it is immaterial to the question of his liability under it that he has not read it and does not know its contents".

**130**  Dr. Jamieson stated he was not told the ticket contained a waiver but he had a season's pass for 2009 and signed the Release when he purchased it. In any event, there was no requirement that Whistler had to apprise him of the Release's onerous terms. Even if that was a requirement, I find Whistler easily met that requirement by: the wording and appearance of the Release; the requirement that patrons initial each page of the Release and sign the last page; the necessity for an employee to witness the signature; what employees said before witnessing a signature; and the signs within the Park.

**2. What are the risks of using the Park, and does the Release adequately warn of those?**

**131**  Notwithstanding the comprehensive and broad wording of the Release, and its formidable appearance, the plaintiff's position is that the Release does not adequately warn of the specific risk of spinal injury, or the probability of sustaining that kind of injury.

**132**  Assuming without deciding that the evidence before me does prove there is a considerable and specific risk of spinal injury when using the Park (a finding that I do not make), I would still conclude that the Release provides adequate warning even though spinal injuries and the risk of being thrown over a bike's handlebars are not mentioned.

**133**  The law does not require a waiver to identify with specificity every mechanism of injury or possible injury in the face of a broadly worded, comprehensive waiver. The Release is comprehensive; it clearly excludes liability for any loss or injury no matter how caused. The Release is broader than many found valid in the case law discussed earlier, and significantly more comprehensive than many. Given that, it is unnecessary for me to make a factual finding about any specific risks from using the Park.

**134**  If I am wrong, and it is incumbent upon me to make a finding about risks, I am not persuaded by the plaintiff's submissions. I would have to find on a balance of probabilities that the risk of spinal injury, the frequency of injuries at large or the likelihood of injury resulting from being thrown over the handlebars are so high that an exception should be made to the principles that specific risks do not have to be identified in the face of a comprehensive exclusion of liability clause.

**135**  I do not find the 13 Year Study to be helpful. Its purpose was to identify the characteristics of injuries and injured mountain bike riders. It was not specific to injuries incurred in a bike park. Given the number of riders the Park has (over 120,000 in 2009), the sample size in the 13 Year Study was very small: 107 cases over a 12-year period.

**136**  The Whistler Study does provide insight into the rate of injuries. However, the study itself stated one of its limitations was it did not have data about the number of riders in the Park. Thus, it would be unreasonable for me to draw any firm conclusions from that Study. Certainly, it does not prove the plaintiff's assertion about the frequency of spinal injuries.

**137**  The plaintiff emphasized that the raw number of patient visits identified in the Whistler Study far exceeded the number of injuries identified in Whistler's data. While that is true, it is reasonable to assume that not every rider injured at the Park resulted in an incident form being filled out. People might seek medical attention for injuries that were not serious enough that they sought assistance at the Park itself. In any event, the plaintiff did not suggest or prove any "standard" against which Whistler's evidence of an injury rate of 0.4% was too high.

**138**  Nor do I find the expert evidence compelling enough to override any legal principles. The relevant opinions of Mr. Pendrel are: (i) there is a gap between a rider's perception of his or her skill level, versus the skills they actually possess; (ii) it is generally accepted in the industry that the gap exists; (iii) riders in the Park may have a false sense of their true skill and ability and a false confidence that terrain will always be predictable; (iv) riders are able to appreciate and perceive the risks associated with downhill mountain biking but novice or intermediate riders do not understand as well as expert riders how quickly things can get out of control, or how difficult it can be to regain control, and; (v) more novice riders may find the fast-moving expert traffic in the Park intimidating and frustrating. In my view, the Release does alert riders to the specific risks identified in Mr. Pendrel's opinion: see above, paras. 123(c), (g) and (i).

**139**  I also find Dr. Jamieson's evidence from his examination for discovery to be revealing. The crux of one of his answers was that he "understood what [he] was signing... as per my knowledge... at the time... in... medical ethics, and then later would go on and have training as a physician, my understanding of informed consent was that if I was signing something where there were serious risks, specific risks, or if there were risks that were very, very common, they would be brought to my attention".

**140**  I find this is a strong indication demonstrating that Dr. Jamieson had a sophisticated understanding of potential liability that exceeds the average person. His evidence also intimates that he believed the Release should operate like informed consent. That theme underlies his position and appears in the doctors' affidavits. The two concepts are distinct. Filtering the facts in this case through the lens of "informed consent" cannot be the measure by which to test the adequacy of the Release.

**141**  In addition, I find the evidence of Fernando Romero to be powerful evidence in favour of Whistler's position. It demonstrates that even someone who has injured his spine while mountain bike riding continues frequently to use the Park, despite the Release and despite what he thinks is dangerous behaviour displayed by other bikers. His first-hand knowledge has not stopped him from mountain bike riding; it has only made him believe he is more cautious, although he is sometimes uncomfortable with the situations he faces. Why? Presumably, because he finds the activity so enjoyable and thrilling that he is willing to risk injury again even after he injured his own spine.

**142**  Nor do the personal beliefs of medical doctors that biking in the park is dangerous and carries a high risk of spinal cord injuries persuade me that the normal legal principles about the applicability of waivers do not apply. This is true even though those doctors say their beliefs stem from their professional observations. In my view, the Release's appearance, wording and presentation alerts riders to all of the risks the doctors identify.

**3. Even if the Release is valid, is Whistler liable under the Business Practices and Consumer Protection Act?**

**143**  The plaintiff pleads and relies on the *Business Practices and Consumer Protection Act*, *S.B.C. 2004, c. 2* (the "*Act*"). He submits Whistler engaged in unconscionable acts or practices contrary to s. 8 and/or deceptive acts or practices contrary to s. 4(5), such that it cannot rely on the Release to bar his action.

**144**  In my view, the analysis and result in *Loychuk v. Cougar Mountain Adventures Ltd.*, [*2012 BCCA 122*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-6297-00000-00&context=) at paras. 48-63; aff'g [*2011 BCSC 193*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G34B-00000-00&context=), is a complete answer to this claim. The issue in that case was the enforceability of a waiver of liability that the appellants signed before going on a zip-line tour operated by the respondent. The respondent admitted its ***negligence*** caused the accident. At para. 49, the Court held it was unnecessary to decide if the *Act* applied to the recreational sports activities industry because it agreed with the trial judge that even if it did, the provisions relied upon by the appellants did not invalidate the waiver they signed.

**145**  The only basis upon which Dr. Jamieson submits Whistler engaged in unconscionable or deceptive acts or practices was his allegation of deliberate non-disclosure of relevant documents or information about the rate and severity of injuries at the Park. However, I have already found the plaintiff's allegation of non-disclosure to be unsubstantiated, the Release to be comprehensive and, in the alternative, the risks of spinal injury not proven significant enough to depart from the established case law about exclusion of liability.

**146**  The Court of Appeal confirmed that the common law principles of unconscionable conduct apply to the *Act*. Whistler bears the burden of proving their actions were not unconscionable and I am satisfied that it has met that burden for the reasons discussed throughout this judgment: I am satisfied on a balance of probabilities that Dr. Jamieson knowingly and voluntarily signed the Release in order to use the Park. That eliminates his claim under s. 8 of the *Act*.

**147**  Because I have already concluded the Release adequately identifies the risks of using the park, I am satisfied that Whistler has proven under the *Act* that it did not engage in any "oral, written, visual, descriptive or other representation" that had the "capability, tendency or effect of deceiving or misleading" its patrons.

**148**  For those reasons, I dismiss the plaintiff's claim that Whistler violated the *Act*.

**IV. CONCLUSIONS**

**149**  For the reasons discussed herein, I find the Release is valid and enforceable, and effective to bar the plaintiff's claim. I also find Whistler has proven it has not violated any provision of the *Act*.

**150**  Therefore, Whistler is entitled to a declaration that Dr. Jamieson is bound by the terms and conditions of the Release he signed on June 28, 2009 thus precluding him from suing Whistler for any injury, loss, damage or expense he may have sustained as a result of the accident that took place on August 28, 2009 in the Park. I also grant an Order dismissing his action.

**V. COSTS**

**151**  Whistler is entitled to its costs of this application and of the underlying action unless there are relevant circumstances of which I am unaware justifying the parties making submissions on costs. If that is the case, the parties must contact the Registry no later than 30 days from the date of this Judgment to set down a brief hearing.

N. SHARMA J.

[**1**](#Backward_fnref_fnr-1) The action against the defendant Gravity Logic Inc. was discontinued in June 2012.

[**2**](#Backward_fnref_fnr-2) Paragraph 17(f) of the Amended Notice of Civil Claim alleges Whistler failed to warn or disclose to the Plaintiff the true risks of using the Park.

**End of Document**

[***Lane v. Wahl, [2015] B.C.J. No. 2129***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5H4P-HBF1-JJYN-B28T-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

R.J. Sewell J.

Heard: February 16-20, 23 and 25, 2015.

Judgment: October 1, 2015.

Dockets: M101225, M104264, M134517

Registry: Vancouver

**[2015] B.C.J. No. 2129** | 2015 BCSC 1779

Between Gerald Lane, Plaintiff, and Alan Reidar Wahl and Daniel S. Weightman, Defendants Between Gerald Lane, Plaintiff, and Robert Paul Pierce, Defendant, and Between Gerald Lane, Plaintiff, and BMW Canada Inc., Vishal Raj Naiker, Defendants

(100 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Soft tissue — Psychological injuries — Depression — Considerations impacting on award — Contributory *negligence* — Action by 62-year-old plaintiff for damages for injuries suffered in three accidents in 2008, 2010, and 2012 allowed in part — Plaintiff, carpenter, had not worked since first accident — Found solely responsible for second accident — For first accident, in which plaintiff sustained shoulder injury, non-pecuniary damages of $70,000 and $80,000 for loss of income earning capacity were awarded — Plaintiff entitled to recover $40,000 from defendants in third accident for his depression — Plaintiff's non-pecuniary damages for mild soft tissue injuries suffered in third accident assessed at $25,000 — Awarded $5,000 for loss of future income earning capacity.**

**Damages — Types of damages — General damages — For personal injuries — Loss of earning capacity — Non-pecuniary loss — Pain and suffering — Action by 62-year-old plaintiff for damages for injuries suffered in three accidents in 2008, 2010, and 2012 allowed in part — Plaintiff, carpenter, had not worked since first accident — Found solely responsible for second accident — For first accident, in which plaintiff sustained shoulder injury, non-pecuniary damages of $70,000 and $80,000 for loss of income earning capacity were awarded — Plaintiff entitled to recover $40,000 from defendants in third accident for his depression — Plaintiff's non-pecuniary damages for mild soft tissue injuries suffered in third accident assessed at $25,000 — Awarded $5,000 for loss of future income earning capacity.**

**Damages — Assessment of damages — Limiting factors — Contributory *negligence* — Intervening cause — Action by 62-year-old plaintiff for damages for injuries suffered in three accidents in 2008, 2010, and 2012 allowed in part — Plaintiff, carpenter, had not worked since first accident — Found solely responsible for second accident — For first accident, in which plaintiff sustained shoulder injury, non-pecuniary damages of $70,000 and $80,000 for loss of income earning capacity were awarded — Plaintiff entitled to recover $40,000 from defendants in third accident for his depression — Plaintiff's non-pecuniary damages for mild soft tissue injuries suffered in third accident assessed at $25,000 — Awarded $5,000 for loss of future income earning capacity.**

**Tort law — *Negligence* — Contributory *negligence* — Apportionment of liability — Equal apportionment — Action by 62-year-old plaintiff for damages for injuries suffered in three accidents in 2008, 2010, and 2012 allowed in part — Liability for first and third accidents admitted — Plaintiff, carpenter, had not worked since first accident — Found solely responsible for second accident — Depression was indivisible injury arising from cumulative effects of second and third accidents — Equal fault was attributed to second and third accidents for plaintiff's depression.**

**Transportation law — Motor vehicles and highway traffic — Rules of the road — Meeting, overtaking and passing — *Negligence* — Liability — Civil actions — Breach of rules of the road — Action by plaintiff for damages for injuries suffered in three accidents that occurred in 2008, 2010, and 2012 allowed in part — Liability for first and third accidents admitted — In second accident, plaintiff was in violation of s. 158 of Motor Vehicle Act when he attempted to pass truck on right — Truck driver was not in contravention of s. 167 of Act and was not negligent in failing to notice plaintiff was attempting to pass him on right — Plaintiff failed to keep proper lookout to notice turn signals on truck — Plaintiff was solely responsible for second accident — Motor Vehicle Act, s. 158.**

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| --- |
| Action by the 62-year-old plaintiff for damages for injuries suffered in three accidents that occurred in 2008, 2010, and 2012. The plaintiff, a carpenter, had not worked since the first accident. Liability for the first and third accidents was admitted. Liability was not admitted for the second accident in which the plaintiff sustained the most serious injuries. In the second accident, the plaintiff testified his motorcycle collided with a flat deck truck in front of him after the truck unexpectedly turned right without braking or signalling. The driver of the truck testified he had his signal on to complete a wide turn. The plaintiff suffered a shoulder injury, including a torn rotator cuff in the first accident. In the second accident, the plaintiff sustained a fractured leg and aggravation of his shoulder injury. He required eight surgical procedures on his leg. The second accident also triggered a major depressive disorder. The plaintiff suffered low back pain after the third accident and continued to suffer from depression.  HELD: Action allowed in part.  The truck driver's evidence was preferred. The plaintiff was in violation of s. 158 of the Motor Vehicle Act when he attempted to pass the truck on the right. The truck driver was not in contravention of s. 167 of the Act and was not negligent in failing to notice the plaintiff was attempting to pass him on the right. The plaintiff failed to keep a proper lookout to notice the turn signals on the truck. The plaintiff was solely responsible for the second accident. Any damages for loss of earning capacity suffered in the first accident had to terminate as of the date of the second accident. For the first accident, non-pecuniary damages of $70,000 and $80,000 for loss of income earning capacity were awarded. While the plaintiff suffered a mild soft tissue injury in the third accident, the primary physical cause of his back pain was degenerative arthritis. His depression was an indivisible injury arising from the cumulative effects of the second and third accidents. Equal fault was attributed to the second and third accidents for the plaintiff's depression. The plaintiff was entitled to recover $40,000 from the defendants in the third accident for his depression. The plaintiff's non-pecuniary damages for the soft tissue injuries suffered in the third accident were assessed at $25,000. He was awarded $5,000 for his loss of future income earning capacity. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, [*R.S.B.C. 1996, c. 318, s. 158*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-F361-M0GM-00000-00&context=), s. 167

***Negligence*** Act, *R.S.B.C. 1996, c. 333*,

**Counsel**

Counsel for the Plaintiff: E.J. McNeney, Q.C., R.B. McNeney.

Counsel for the Defendants: H. Grewal, L. Karr.

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**Reasons for Judgment**

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| **R.J. SEWELL J.** |

**1**   Gerald Lane was born on January 30, 1953. He is a qualified carpenter who worked at that occupation until he was injured in a motor vehicle accident on July 7, 2008. Since that time, he has been unable to work at that occupation as a result of injuries suffered in three successive motor vehicle accidents.

**2**  The accidents occurred on July 7, 2008, March 13, 2010 and March 9, 2012. Mr. Lane suffered some injuries in all three accidents. He has brought separate actions seeking damages for personal injuries arising from each of the three accidents. The three actions were tried together before me. It is agreed that Mr. Lane suffered his most serious physical injuries in the second accident.

**3**  The defendants in the first and third accidents have admitted liability to Mr. Lane. However the defendant in the second accident has denied liability and submits that Mr. Lane is solely responsible for that accident. Mr. Lane continues to suffer symptoms from the second and third accidents. It is therefore necessary for me to determine liability in the second accident and to determine which of his injuries are attributable to which accident. In addition, there is an issue about whether Mr. Lane's continuing back pain is caused by a pre-existing natural condition.

**4**  In these reasons, I will first address the question of who is at fault in the second accident. I will then address the quantum and allocation of damages.

**The Second Accident**

**5**  Mr. Lane is a motorcyclist. On March 13, 2010, he suffered serious injuries when the motorcycle he was operating collided with a Ford F450 flat deck truck owned and driven by the defendant, Robert Pierce, on 203rd Street in Maple Ridge.

**6**  Mr. Lane testified that in the mid-morning on March 13, 2010, he turned on to 203rd Street in Langley and proceeded in a southbound direction. Mr. Lane needed a pair of dress shoes that he had left in a storage locker at the end of 203rd Street and was on his way to retrieve them. After turning onto 203rd Street, Mr. Lane caught up to a Ford F450 flat deck truck. He followed that truck for some distance. The road was straight and visibility was good. Mr. Lane said there was a light rain falling and the roadway was wet but not flooded. He estimated his speed and the speed of the truck at about 50 kph or less.

**7**  Mr. Lane stated that just after the truck crossed the intersection of 203rd Street and 125th Avenue it moved completely into the left oncoming lane of traffic but continued on at the same speed. He testified that he did not see any active turn signal go on the truck, although he was looking for a turn signal. When the truck moved into the left lane, Mr. Lane did not know what it was going to do but he says he prepared to slow down by placing his right hand on the front brake lever on the motorcycle and his right foot on the foot brake for the rear wheel. However, he did not apply the brakes at that time.

**8**  Mr. Lane said that after the truck was entirely in the left lane it started to slow down and it "scare[d]" him a little bit because there was no previous indication that it would slow down; he had seen neither any brake light nor signal. He said that at that point he was "hard on the brakes" and pulled over to the right of the southbound lane.

**9**  I must confess that I found Mr. Lane's evidence as to what occurred next to be somewhat confusing. His evidence was that he was looking for a route to follow if the truck turned back into the right lane. He stated that there was a possibility that he had a route to the right of the paved roadway and that he "might squeak through" between a ditch and some shrubs. However, he did not explain how it was that he had come to be in a place of danger at that time.

**10**  In any event, Mr. Lane said that by the time he was looking for a route to avoid the danger, he was applying "maximum braking". He testified that he was skidding his front and rear tires but still keeping control. At that point he noticed the front wheel of the truck turn towards him. He leaned down as hard as he could and tried to go into the driveway to the right of the truck but was struck by a part of the deck. He testified that he was afraid that he might break his neck in a collision with the back of the truck because the height of the deck was approximately level with his head. In an attempt to avoid life-threatening injury, he manoeuvered himself so that he collided with the middle of the truck, at a point where two tool boxes hung down from the deck. He believes that the tool boxes were his point of impact with the truck.

**11**  Mr. Pierce has a markedly different recollection of the circumstances of the accident. Mr. Pierce is now retired but in 2010 was self-employed as a truck driver who hauled salvage vehicles. On the morning of March 13, 2010, he was returning to his home on 203rd Street after having dropped off a car at a yard.

**12**  Mr. Pierce testified that he always checked the brake lights and turn signal lights on his truck before he left home in the morning. He said he did so for a number of reasons, including a concern that the police might notice a faulty light.

**13**  Mr. Pierce said that he was proceeding southbound on 203rd Street when he noticed a motorcycle in his rear view mirror. He stated that he was initially driving at about 50 kph but began to slow down as he approached the intersection of 125th Avenue and 203rd Street. Mr. Pierce's house was located one house to the south of the intersection and had a large driveway and parking area in front of it to the right of cars travelling in the southbound lane. It was his practice to park his truck on the driveway at a right angle to 203rd Street.

**14**  Mr. Pierce said that he turned on his right turn signal when he reached a point on 203rd Street immediately adjacent to a power pole approximately two metres south of the stop sign on 125th Avenue. He testified that he did not engage the signal sooner because he did not want to give other drivers the impression that he was turning right on to 125th Avenue. He stated that he took his foot off the accelerator as he crossed 125th Avenue to slow his truck in preparation for the turn into his driveway but did not say that he engaged the brakes.

**15**  At some point between the power pole and his driveway, Mr. Pierce said that he pulled somewhat into the northbound lane to make a wide turn into his driveway. He was firm in his evidence that he had his right turn signal on throughout this maneuver. His evidence was that no more than one-half of the width of his truck was in the northbound lane as he made his turn. He also stated that by the time he made the turn he was driving "dead slow". Mr. Pierce says that he first became aware that the motorcycle might be in a position of danger when he saw it to the right of his truck in his side view mirror as he made his turn. At the time he saw Mr. Lane's motorcycle it was upright with Mr. Lane on it.

**16**  Mr. Pierce said he did not hear any horn before noticing the motorcycle and was not sure he had collided with it until he stopped and got out of his truck and noticed Mr. Lane lying on the ground.

**The Position of the Parties**

**17**  Mr. Lane submits that Mr. Pierce is solely responsible, or at least partially responsible, for the accident. He relies on s. 167 of the *Motor Vehicle Act,* *R.S.B.C. 1996, c. 318*, which states:

**167** A driver of a vehicle must not turn the vehicle to the right from a highway at a place other than an intersection unless

1. the driver causes the vehicle to approach the place as closely as practicable to the right hand curb or edge of the roadway, and
2. the vehicle is in the position on the highway required by paragraph (a).

**18**  Mr. Lane says that Mr. Pierce's truck was entirely in the left lane of traffic when, suddenly and without warning, it made a sharp right turn into the right lane and drove Mr. Lane's motorcycle off the road and into the driveway of Mr. Pierce's home, where the two vehicles collided.

**19**  While Mr. Lane never expressly said so, I must conclude that he was intending to pass Mr. Pierce's truck by continuing to proceed in the southbound right lane while Mr. Pierce's truck remained in the left lane of the road. I reach this conclusion because I cannot conceive of any other way in which Mr. Lane could have found himself in the position of danger he was in immediately before the accident. On his own evidence, he must have been alongside of the truck when it commenced its right hand turn.

**20**  Mr. Pierce submits that Mr. Lane is entirely responsible for the accident because he attempted to pass Mr. Pierce's truck to the right in the same traffic lane occupied by the truck when it was unsafe to do so. Mr. Pierce relies on s. 158 of the *Motor Vehicle Act*, which he submits Mr. Lane breached:

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

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

**Conclusion as to Liability**

**21**  There were no independent witnesses to the accident. I have two quite different versions of the accident from the parties. After having heard both parties testify, and considering the reasonable probabilities of the situation, I conclude that I must prefer Mr. Pierce's evidence to that of Mr. Lane.

**22**  I found that Mr. Pierce gave his evidence in a straightforward manner. He gave a reasonable and credible explanation for his belief that he had engaged his turn signal and that his brake lights were functioning properly at the time of the accident. I also take into account the fact that he was an experienced truck driver who was well familiar with the area of the accident and would have been unlikely to make any sudden turns in the manner of those suggested by Mr. Lane in his evidence.

**23**  As I have already indicated, I had difficulty in understanding how Mr. Lane found himself in a position of danger prior to the accident. His evidence about what the truck did does not seem to be consistent with the reasonable probabilities of the surrounding circumstances: *Gichuru v. Smith*, [*2013 BCSC 895*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-20NC-00000-00&context=); *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.). In particular, I do not find it credible that Mr. Lane was preparing to brake as Mr. Pierce's truck moved over into the northbound lane and then somehow found himself beside Mr. Pierce's truck in a position of danger.

**24**  I therefore find that Mr. Pierce did not move his truck completely out of the right lane of traffic but did move somewhat into that lane in the process of making his right hand turn. I find that Mr. Pierce did activate his turn signal to indicate his intention to turn right as he cleared the intersection of 203rd Street and 125th Avenue. I am also satisfied on the balance of probabilities that his brake lights were working on the day in question and that they were on when he commence to brake his truck.

**25**  Counsel for Mr. Pierce relies on *Fabellorin v. Peterson*, [*93 B.C.L.R. (2d) 105*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F8D9-M10D-00000-00&context=) (C.A.), [*[1994] B.C.J. No. 628*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F8D9-M10D-00000-00&context=), for the proposition that there is a heavy onus on a driver who passes another vehicle on the right:

**13** Section 160 [now, section 158] imposes a heavy onus on the driver of a vehicle attempting to pass other vehicles on the right. More especially is this so when the vehicles ahead have stopped or slowed on the roadway other than at an intersection or a crosswalk when there is no apparent reason for their doing so. The very fact that they have done so should alert the driver of the overtaking vehicle, intending to pass, that there must be some reason for the drivers ahead of him to have acted as they did and this should have alerted the overtaking driver to exercise extra caution to ensure that he or she can pass on the right safely.

**26**  More recently, in *Ormiston v. Insurance Corporation of British Columbia*, [*2014 BCCA 276*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B145-00000-00&context=), the Court of Appeal has again emphasized the heavy burden on a driver who passes another vehicle on the right in a travelled lane of traffic. In *Ormiston,* the Court found a cyclist who had passed a stopped vehicle on the right to be 100% liable for the accident.

**27**  I conclude that Mr. Lane was in violation of s. 158 of the *Motor Vehicle Act* when he proceeded to pass Mr. Pierce's truck on the right in the same lane of traffic that Mr. Pierce's truck was partially occupying. I accept Mr. Pierce's evidence that no more than one-half of the width of his truck was in the oncoming lane when he made his right turn into his driveway.

**28**  On the facts that I have found, I am unable to find that Mr. Pierce was acting in contravention of s. 167 of the *Motor Vehicle Act.* I find that Mr. Pierce was operating his truck as closely as practicable to the right side of the southbound lane to permit him to successfully turn into his driveway. I am also satisfied that his truck continued to occupy a portion of the southbound lane throughout his turning maneuver. Given that Mr. Pierce's truck continued to occupy a significant portion of the southbound lane, that he engaged his turn signals before he began his turn and that he engaged his brakes before the turn, I do not think he was negligent in failing to notice that Mr. Lane was attempting to pass him on the right.

**29**  I conclude that the best that can be said for Mr. Lane is that he believed that Mr. Pierce intended to turn his truck to the left but failed to keep a proper lookout to notice the turn signals on Mr. Pierce's truck engage to signal a right hand turn. Mr. Lane acknowledges that he was following Mr. Pierce's truck. The implication of his evidence is that he was following at a safe distance for much of the way down 203rd Street. I find that if he had been keeping a proper lookout he would have observed Mr. Pierce's turn signals engage in ample time for him to stop his motorcycle and avoid the collision in which he was so seriously injured.

**30**  Based on my findings of fact, I conclude that Mr. Lane is solely responsible for the March 2010 accident and his claim against Mr. Pierce must be dismissed.

**Damages**

**31**  Mr. Lane suffered injuries in all three accidents in which he was involved. He is entitled to damages for the injuries he suffered in the two accidents for which liability is admitted.

**32**  To assess the damages that Mr. Lane is entitled to recover, I must first assess his damages from the first accident. Next, I must consider the effect the second accident had on Mr. Lane's damages in regards to future loss stemming from the first accident. Finally, I must determine what injuries Mr. Lane suffered in the second accident in order to determine his pre-accident condition to assess the damages he suffered in the third accident.

**The First Accident**

**33**  The first accident occurred on July 7, 2008. Mr. Lane was operating his motorcycle southbound on 203rd Street and Lougheed Hwy in Maple Ridge when another motorcycle pulled out from a gas station so close in front of him that it was impossible for him to take any evasive action. There was some confusion about which motorcycle hit which, but in any event, there was a collision between the two and Mr. Lane's motorcycle was knocked to the ground.

**34**  Mr. Lane was injured in the accident and felt immediate pain in his right, non-dominant, shoulder. He also experienced pain in his right wrist and left hip.

**35**  The injuries to the wrist and hip healed uneventfully after a few months but the right shoulder injury did not. Mr. Lane continued to suffer from discomfort and a significantly limited range of motion in that shoulder. Despite kinesiology, his shoulder had not improved by September.

**36**  In September, an MRI did not show any significant findings to explain his continuing symptoms. However, in December an enhanced MRI procedure disclosed a partial rotator cuff tear with labral pathology and loss of the axillary pouch of the glenohumeral joint indicating adhesive capsulitis.

**37**  In April 2009, he was seen by Dr. Regan, an orthopedic surgeon, who diagnosed the following conditions:

1. Post traumatic adhesive capsulitis of the right shoulder;
2. Long head of biceps dislocation or rupture;
3. Impingement syndrome right shoulder; and
4. Labral tear of right shoulder.

**38**  Dr. Regan recommended surgery that would have required a five month period of rehabilitation to allow Mr. Lane to regain range of motion and strength in the right shoulder. However, after seeing Dr. Regan, Mr. Lane consulted with another physician, Dr. Shearer, who advised Mr. Lane with respect to an exercise program that alleviated his symptoms significantly. In August 2009, Mr. Lane was again examined by Dr. Regan, who described him as vastly improved and concluded that surgery was no longer necessary. At that time, Mr. Lane's range of motion had improved to 160 degrees of forward elevation and full abduction and external rotation and Dr. Regan cleared him for return to work.

**39**  Mr. Lane did attempt to return to work as a framing carpenter in the summer of 2009 but concluded that he required further conditioning to be able to meet the physical demands of that occupation. I am satisfied that he continued to work diligently to regain his strength and to achieve complete range of motion in his shoulder. I find that by the time of the second accident he was almost ready to return to work. There was some suggestion in the medical evidence that Mr. Lane might have required further rehabilitation beyond March 2010. However, given my findings with respect to liability in the second accident it is unnecessary to make any finding in that regard.

**40**  It is not disputed that as a result of the serious injuries Mr. Lane suffered in the second accident he was incapacitated for a period beyond the expected date of recovery from the first accident.

**41**  Mr. Lane is entitled to non-pecuniary damages for his injuries suffered in the first accident and compensation for loss of income earning capacity for the period from July 7, 2008 to March 13, 2010. I accept the submission of counsel for the defendants that any damages for loss of earning capacity suffered in the first accident must terminate as of the date of the second accident.

**42**  This principle is stated in a number of cases cited by the defendants, including *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 *Wood v. Boutilier*, [*[1998] N.S.J. No. 417*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-XPW1-F8D9-M52D-00000-00&context=), [*171 N.S.R. (2d) 18*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-XPW1-F8D9-M52D-00000-00&context=), which states:

**45** In *Athey v. Leonati* [*(1996) 203 N.R. 36*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=) (SCC) the Supreme Court of Canada addressed the issue of novus actus interveniens. The Court clearly indicated that the basic principal of tort law is that a plaintiff is to be placed back in the position they were in prior to the tortious act of the defendant. The plaintiff should be compensated for his losses resulting from the actions of the defendant but should not be put in a position which is better than he or she would have been in prior to the accident.

**46** In the present case the injuries sustained by the plaintiff in the accident of October 12th, 1997, clearly superseded the injuries of the August, 1993 accident. In saying this I note that I am referring only to the loss of income claim and the claim for future care costs as advanced by the plaintiff. There is no evidence before the Court which would indicate that the plaintiff does not continue to suffer from the excruciating pain which he had experienced prior to the accident. The only apparent difference now is that the plaintiff perhaps has no way of expressing the continuing pain. In this case the plaintiff was rendered totally disabled from obtaining employment as the result of the first accident. He would also have been totally disabled as a result of the second accident.

**43**  Mr. Lane has not presented any claim for special damages relating to the first accident nor has he advanced a cost of care claim in relation to that accident. Accordingly, the only damages recoverable by him for the first accident are non-pecuniary damages and damages for loss of past earning capacity.

**Non-Pecuniary Damages**

**44**  Mr. Lane suffered serious but not catastrophic injuries in the first accident. He suffered a serious shoulder injury that incapacitated him for the period between the first and second accident, required him to engage in extended rehabilitation, and prevented him from working throughout that period.

**45**  I was somewhat handicapped in assessing damages for the first accident because counsel for the plaintiff based his submissions on damages on the assumption that Mr. Pierce would be found liable for the second accident. His position was that Mr. Lane's injuries were indivisible and ought to be assessed on that basis.

**46**  However, counsel for the defendants did provide me with some authorities dealing with injuries similar to those suffered by Mr. Lane in the first accident. In *Grant v. Diels*, [*[1996] B.C.J. No. 1765*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-FJM6-61KM-00000-00&context=) (S.C.), the court awarded non-pecuniary damages of $50,000, the equivalent of approximately $76,500 in 2015, for similar injuries. In that case, the plaintiff underwent two surgical procedures for a somewhat more severe shoulder injury. In *Gregory v. Insurance Corporation of British Columbia*, [*2010 BCSC 352*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X16V-00000-00&context=), the court awarded damages of $60,000 for a shoulder injury that required one surgical procedure. In *Antonishak v. Piebenga*, [*2012 BCSC 745*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JFSV-G3S3-00000-00&context=), the court also awarded non-pecuniary damages of $60,000.

**47**  Taking all of the circumstances into account and having regard to the other decisions of this court dealing with somewhat similar injuries, I award non-pecuniary damages with respect to the first accident in the amount of $70,000.

**Loss of Past Income Earning Capacity**

**48**  It is not disputed that Mr. Lane was unable to work as a result of his injuries in the period between the first and second accident. It is also not disputed that Mr. Lane's injuries from the second accident prevented him from working for a longer period than he would otherwise have been incapacitated following the first accident. Given my findings on liability in the second accident, the damages for loss of income to which he is entitled are limited to the time from the first accident to the second.

**49**  Mr. Lane is a qualified journeyman carpenter who was employed, either as an independent contractor or employee, as a framing carpenter for a number of years before the first accident. There is some dispute in the evidence with respect to his pre-accident earnings. I am satisfied that at the time of the first accident, Mr. Lane was capable of working as a carpenter and that he intended to do so. I am also satisfied that in that period there was sufficient work available to permit Mr. Lane to find full-time employment. I find that Mr. Lane would have received a gross salary of $25 per hour had he been able to work in that period.

**50**  An award for loss of past income is an award for loss of capacity (*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). Such a loss can often be quantified by reference to the pre-accident employment of a plaintiff. Even if so quantified, however, the loss remains one of loss of capacity. In this case, Mr. Lane's pre-accident income was negatively affected by some unsuccessful business ventures in which he engaged. These business ventures tended to lower his income for periods prior to the accident.

**51**  Based on Mr. Lane's circumstances at the time of the first accident, his age and his capabilities, I find that it is likely that he would have pursued and obtained full-time employment from July 7, 2008 to March 13, 2010 had he not been injured. However, I also am of the view that there was a substantial possibility that he may have faced some brief periods in that time when there would have been no work available. That being said, I am satisfied that there would have been some overtime available to him.

**52**  Taking all these considerations into account, I assess Mr. Lane's damages for loss of income earning capacity in that period at $80,000. This amount must be adjusted to take income tax into account. If the parties are unable to agree on the appropriate tax adjustment they may make further submissions to me.

**Injuries Suffered in the Second Accident**

**53**  While I have found that Mr. Lane is solely at fault for the second accident, and it is therefore unnecessary to assess damages for the injuries he suffered, I must still review his injuries from that accident to determine his condition prior to the third accident.

**54**  In addition, I have concluded that one of the injuries he suffered in the second accident is indivisible from the injuries he suffered in the third accident.

**55**  It is not disputed that Mr. Lane suffered very serious injuries in the second accident. His physical injuries are accurately summarized in the plaintiff's submissions:

1. Severely comminuted fracture of the left distal tibial diaphysis. The distal shaft was displaced 2 cm anterolaterally with numerous butterfly fragments.
2. Comminuted fracture of the distal fibular shaft at the junction of the middle and distal thirds, with 6 mm lateral and 4 mm anterior displacement of the distal shaft relative to the proximal, plus apex lateral angulation of 12 degrees.
3. Transaction extensor tendons, left ankle and foot
4. Small left knee effusion
5. Aggravation of his shoulder injury from the first motor vehicle accident

**56**  Mr. Lane required eight significant surgical procedures, culminating in an operation to remove a small section of his tibia that resulted in a shortening of the affected left leg by approximately 2.5 centimetres. The discrepancy in the length of Mr. Lane's legs resulted in difficulties in balance and caused pain and discomfort in his pelvic region due to the disruption of his gait.

**57**  In addition to these physical injuries, I find that Mr. Lane suffered a major depressive disorder triggered by the second accident. In this regard, I accept the evidence of Dr. Miki that the onset of the major depressive disorder was precipitated by the injury to Mr. Lane's leg and the long and difficult course of treatment he underwent to address that injury.

**The Third Accident**

**58**  The third accident occurred on March 9, 2012, just a few days short of the second anniversary of the second accident. Mr. Lane was driving a friend's pickup truck on Marine Way approaching the intersection of Marine Way and Boundary Road in Burnaby. As he approached Boundary Road, he observed that the traffic light was red and began braking to stop his truck. Shortly after he commenced braking he noticed that his truck was not coming to a stop. He had been unaware of any collision up to that point and at first thought his brakes had failed. Before coming to a stop, Mr. Lane looked in his rear view mirror and saw some debris in the air and realized at that point his truck had been rear-ended.

**59**  Mr. Lane did not notice any movement of his body relative to the truck until the truck came to a stop. He testified that at that point he felt a short, quick spike of pain in his lower back and it felt like one of his vertebrae was going out of line.

**60**  After the accident, Mr. Lane noticed that the right rear fender of his truck had been pushed into the wheel. He was able to pull the fender out enough to stop it from rubbing the wheel. He then proceeded to drive to the airport to pick up a friend and drop her off at her home.

**61**  In the period immediately before the third accident, Mr. Lane said that he was feeling better and was taking steps to prepare to return to work. He said he was physically stronger. For example, he testified that he was able to lift 235 lbs on the weight machine in the gym and was able to walk four kilometres and do wind sprints. He acknowledged in his evidence that he was not capable of returning to his former occupation as a framing carpenter because of problems with his balance but said he was taking steps to find work as a carpenter in a shop setting. One area he was exploring was the possibility of working in the film industry building sets.

**62**  Mr. Lane testified that he was "pretty sore" when he woke up the morning after the accident. He was surprised because he did not think he had been hurt in the accident. He said that he felt pain in his lower back, shoulders and neck. Mr. Lane did not seek medical attention at that time. However, the pain continued to worsen and his lower back pain became very intense over time.

**63**  By that time, Mr. Lane was staying with his sister who helped him into the car and took him to Ridge Meadows Hospital. When they arrived at the emergency ward his sister helped him into a wheel chair to go into the hospital. At the hospital he was given an X-ray and had some morphine administered to him. When he was released he was provided with ibuprofen and told to see his family doctor, Dr. Lytle, if he did not improve.

**64**  Shortly afterwards, Mr. Lane went to his family doctor. He does not recall if he saw his regular doctor or a locum. The doctor prescribed Tylenol 3s but these eventually upset his stomach and caused constipation and he was placed on tramadol, which was less upsetting for him.

**65**  Mr. Lane testified that after the third accident he continued to experience lower back pain that did not improve. This pain prevented him from continuing with any exercises in the gym requiring the use of his legs. However, for a time he did continue with workouts involving his upper body. He testified that from a few weeks after the third accident up to the time of trial he continued to suffer from pain in his lower back.

**66**  At trial, Mr. Lane gave specific evidence that the pain was between the L4 and L5 vertebrae. When asked where that was he said it was around his belt line. Mr. Lane distinguished this pain from the pain he had experienced before, which he described as centered in the pelvic region, and related to the difficulties he experienced from having his leg shortened after the second accident.

**67**  Mr. Lane said that he was initially advised that the pain in the middle of his lower back was the result of soft tissue injury that should improve with rest and the use of anti-inflammatory pain medication. However he testified that the pain did not improve and this made it harder and harder to exercise. Eventually he stopped exercising altogether and his body condition deteriorated. He gained a great deal of weight and became deconditioned. He stated that there are times when his back is in such pain, he is immobilized and has to stay in bed. At one point he described having to use a wheelchair to go to the pool to exercise.

**68**  Mr. Lane did get some very temporary relief from localized injections of anaesthetic but this relief lasted only a few hours. He has considered but not pursued, corrective surgery as well as a procedure called radiofrequency ablation. The latter treatment, Mr. Lane believes, may hold out some hope for improvement in his pain. As of the date of trial he has not had any such treatment. As Mr. Lane's physical conditioning and ability to exercise has diminished, his mood has also deteriorated.

**69**  As I will expand on later in these reasons, I also find that Mr. Lane suffers from a major depression disorder attributable to the second and third accidents.

**Medical Evidence with Respect to the Third Accident**

**70**  Apart from the issue of liability for the second accident, the most contentious issue in this case is the cause of Mr. Lane's low back pain that manifested itself after the third accident and continues to cause him debilitating pain. There is a disagreement in the medical evidence as to the cause of this pain.

**71**  Dr. Lytle is of the view that the pain is a direct result of the third accident. Dr. Lytle does agree that the pain is associated with degenerative changes to Mr. Lane lumbar spine and, in particular, with a degenerative osteoarthritic L4-5 facet joint. However, he points out that Mr. Lane did not experience pain in this region before the third accident. He states in his report that "one might say that the Motor Vehicle Accident aggravated a silent pre-existing condition". Dr. Lytle goes on to conclude that but for the third accident, Mr. Lane would not have his current pain and disability.

**72**  Dr. McGraw conducted two examinations of Mr. Lane; one on October 25, 2012 and one on November 13, 2014. In his report following the October 25, 2012 examination, Dr. McGraw was of the opinion that any back pain being experienced by Mr. Lane originated in his pelvic area and was the direct cause of the surgical shortening of his left leg as a result of the serious injury and subsequent infection of that leg caused by the second accident. Dr. McGraw stated that Mr. Lane made no mention of the third accident at the first examination.

**73**  Dr. McGraw is now of the opinion that Mr. Lane's current low back symptoms are caused by lumbar spine arthritis without any significant contribution from the third accident. Dr. McGraw is also of the opinion that the pain is aggravated by marked weight gain, poor posture, inactivity and deconditioning.

**74**  There is reason to have some reservations about both opinions as to the cause of Mr. Lane's current low back pain. Dr. Lytle has obvious sympathy for Mr. Lane, who has been his long-term patient. In addition he does not explain how the third accident could have aggravated what he concedes to be the underlying cause of Mr. Lane's back pain. On the other hand Dr. McGraw does demonstrate some frustration with Mr. Lane for not disclosing the third accident at his first medical examination and this may be colouring his attitude towards Mr. Lane. I do not suggest that either doctor is attempting to mislead me, only that these are considerations I must take into account in assessing their evidence.

**75**  I find that Mr. Lane suffered a mild soft tissue injury in the third accident. On balance, I am forced to conclude that this soft tissue injury is not the predominant physical cause of Mr. Lane's ongoing back pain. I conclude that the preponderance of evidence shows that the primary physical cause of the back pain Mr. Lane is suffering is that identified by Dr. McGraw, that is, degenerative arthritis aggravated by the factors set out at paragraph 73.

**76**  I find that the third accident has contributed to Mr. Lane's depressive symptoms and that those depressive symptoms are attributable to the second and third accidents.

**77**  I accept Dr. Miki's opinion that Mr. Lane suffers from a major depressive disorder. The evidence does not disclose any major depressive episodes resulting from the first accident and I find that this accident did not make any material contribution to this complaint. It is, however, quite clear that Mr. Lane was severely depressed after the second accident. The evidence also shows that he was making some significant improvement both in his physical and emotional health before the third accident. Both Dr. Miki and Dr. McGraw commented on Mr. Lane's marked deterioration in November 2014, after the third accident.

**78**  Based on the pattern of Mr. Lane's symptoms, and in particular the marked deterioration in his mood after the third accident, I conclude that his depressive disorder is caused or contributed to by both the second and third accidents. Mr. Lane's depression has affected his physical conditioning and functioning. In turn, Mr. Lane's back pain is aggravated by his deconditioning and inactivity, including his marked weight gain and poor posture. I accept that Mr. Lane's ongoing depression is substantially connected to the back pain he continues to experience.

**79**  Based on this conclusion, I must address the extent to which the third accident is a cause of Mr. Lane's back pain. The principle is explained by Neilson J.A. in *Ferrant v. Latkin*, [*2011 BCCA 336*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22RP-00000-00&context=):

49 Turning to the judge's analysis, I am satisfied that two uncontentious facts demonstrate that, in finding the plaintiff had failed to establish the disabling pain would not have occurred "but for" the defendant's conduct, the trial judge considered only whether the accident was the sole cause of the disabling pain, and failed to turn his mind to whether there was a substantial connection between that pain and the accident.

50 The first was the consensus of the medical witnesses that the plaintiff's spinal degeneration made him more vulnerable to the injuries he sustained in the accident. This demonstrated some inter-relationship between the two potential causes of the disabling pain, and should have led the judge to consider whether the accident was a trigger that accelerated and aggravated the spinal degeneration, causing the disabling pain to develop earlier than it would have without the accident. In short, were the whiplash and spinal degeneration both a necessary cause of a single and indivisible disability?

51 The second was the trial judge's finding that the plaintiff's condition after the accident never resolved to its pre-accident state. This established that the injury from the accident continued to contribute to the plaintiff's back pain to some degree at the time of trial. The trial judge was therefore obliged to assess the extent of its contribution, and determine if it was substantially connected to the disabling pain beyond the *de minimus* range. If so, the crumbling skull doctrine would come into play, requiring an assessment of what the plaintiff's condition would have been had the accident not occurred.

**80**  I am satisfied that Mr. Lane's disorder and complaints are genuine and that his present psychological distress is directly attributable to the combined effects of the second and third accident. I find that the major depressive disorder has made a substantial contribution to the debilitating back pain suffered by Mr. Lane after the third accident.

**81**  I am not convinced that Mr. Lane's underlying degenerative changes to his spine would have become symptomatic even if he had not been involved in the third accident. There is no indication that he was troubled by his arthritic condition prior to the third accident. Dr. McGraw attributed the low back pain he reported in his initial examination to complications from the shortening of his leg and not to any pre-existing condition. Dr. Lytle does not report any significant issues with the back prior to the third accident. Most people of Mr. Lane's age have some degree of degenerative change in their spines but many do not develop symptoms. On balance, I therefore conclude that prior to the third accident there was a low likelihood of the degenerative changes becoming symptomatic.

**82**  These findings raise the issues of how the damages from the major depressive disorder should be assessed and allocated. I am satisfied that the major depressive disorder suffered by Mr. Lane is an indivisible injury arising from the cumulative effects of the second and third accidents. Mr. Lane's depressive disorder was triggered initially by the second accident, for which he is entirely at fault. However, I am satisfied that he was recovering from the effects of the disorder at the time of the third accident, which caused a recurrence of severe symptoms. In my view the major depressive disorder that Mr. Lane now suffers was caused by both accidents and is an indivisible injury.

**83**  In the absence of any fault on the part of Mr. Lane, the other drivers involved in the second and third accidents would be jointly and severally liable for the damages arising from the major depressive disorder. However, Mr. Pierce was not at fault for the second accident. On these facts, I adopt the analysis of Harvey J. in *Bilanik v. Ferman*, [*2014 BCSC 732*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JNJT-B2D3-00000-00&context=), and find that the defendants in the third accident are only liable for the damages for which they are at fault. This requires me to apportion the damages attributable to the indivisible injury between the second and third accidents.

**84**  The law is clear that apportionment of liability under the ***Negligence*** *Act*, *R.S.B.C. 1996, c. 333*, should be based on the relative fault of the persons responsible for the damage as opposed to the degree to which they are found to be responsible for the injuries as stated in *Alberta Wheat Pool v. Northwest Pile,* [*2000 BCCA 505*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B136-00000-00&context=):

[40] Both parties referred us to *Cempel v. Harrison Hot Springs Hotel Ltd.* [*(1997), 43 B.C.L.R. (3d) 219*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M2CY-00000-00&context=) (C.A.) as to the correct interpretation of "fault" in the ***Negligence*** *Act*, *R.S.B.C. 1996, c. 333*, and the distinction to be drawn between "blameworthiness" and "causation".

[41] This case is governed by s. 1(1) of the ***Negligence*** *Act* which provides:

Apportionment of liability for damages

1 (1) If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.

[42] In *Cempel, supra,* this Court held that the learned trial judge had erred in applying s. 1 based on an assessment of the extent to which the parties could be said to have caused the loss or injury suffered by the plaintiff. In rejecting that approach, Mr. Justice Lambert for the majority said:

[19] I think that such an approach to apportionment is wrong in law. The ***Negligence*** *Act* requires that the apportionment must be made on the basis of "*the degree* to which each person was *at fault*". It does not say that the apportionment should be on the basis of the degree to which each person's fault *caused* the damage. So we are not assessing degrees of causation, we are assessing degrees of fault. In this context, "fault" means blameworthiness. So it is a gauge of the amount by which each proximate and effective causative agent fell short of the standard of care that was required of that person in all the circumstances.

. . .

**85**  In this case I am unable to find that either Mr. Lane or the defendants in the third accident are more at fault for the injury he suffered in the second and third accidents. It seems to me that in both cases, the parties responsible for the accidents had a momentary lapse of attention that led to the accidents in question. I do not find that Mr. Lane knowingly acted recklessly in the second accident by attempting to pass a vehicle on the right when he knew the vehicle was about to make a right hand turn. Rather, I think it more likely that he was preoccupied with getting to the storage locker to retrieve appropriate attire for the funeral he planned to attend later that day and simply failed to see the turn signal on Mr. Pierce's vehicle. I do not consider his fault to be any greater than Mr. Naiker's in the third accident. In both cases, the party responsible failed to keep a proper lookout to avoid a collision with a vehicle that they were approaching from behind. In these circumstances, I assess equal fault for the indivisible injury of the depression suffered by Mr. Lane following the second and third accidents. Accordingly, Mr. Lane is entitled to recover one-half of the damages attributable to the major depressive disorder from the defendants in the third accident.

**Non-Pecuniary Damages**

**86**  The particular circumstances of this case require me to assess non-pecuniary damages in an unusual way. I conclude that Mr. Lane suffered two injuries in the third accident. The first was a relatively minor soft tissue injury to his lower back. The second was a recurrence of the major depressive disorder he first suffered after the second accident and which manifested in ongoing back pain following the third accident. I am satisfied that it is the latter injury that is the principal cause of the symptoms and disability from which Mr. Lane is currently suffering. In this regard, I accept Dr. McGraw's evidence that Mr. Lane's back pain is aggravated by marked weight gain, poor posture, inactivity and deconditioning. However, I also find that these factors are the direct result of Mr. Lane's major depressive disorder. I am satisfied that it is that disorder that prevents Mr. Lane from taking the steps necessary to address these aggravating factors.

**87**  Turning first to the physical injuries to the lumbar region of the spine, I am satisfied that in the absence of the major depressive disorder, Mr. Lane would have recovered from any effects attributable to the third accident within a short period of time. I assess Mr. Lane's damages for that injury at $25,000.

**88**  Mr. Lane has suffered greatly from the effects of the major depressive disorder. Based on Dr. Miki's report, the prognosis for this disorder is not promising. It has now been some three years since the third accident and Mr. Lane continues to suffer serious consequences from that condition. However, based on my observations of Mr. Lane, and in particular the obvious extent to which this litigation has become a central focus of his life, I conclude that once this case is behind him it is reasonable to expect that he will experience some improvement in his mood and ability to address the aggravating factors identified by Dr. McGraw.

**89**  I am somewhat hampered in assessing damages for this injury because neither counsel made submissions with respect to assessing damages for the specific injury, namely depression, that I have found to be attributable to the third accident. The plaintiff's submissions assumed that there would be a finding of liability for the second accident. The defendants' submissions did not include reference to any cases dealing with prolonged ongoing depressive symptoms. For the defendants, Mr. Grewal referred me to *Hubbard v. Saunders*, [*2008 BCSC 486*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JBT7-X3YV-00000-00&context=). In that case Humphries J. awarded non-pecuniary damages of $45,000 for all injuries, including significantly less severe psychological symptoms.

**90**  In *Thompson v. Choi*, [*2015 BCSC 1283*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GM0-J411-JJYN-B3XJ-00000-00&context=), the court awarded a 44-year-old journeyman sheet-metal worker $90,000 for his injuries, which included soft tissue injuries and depression. The court noted that as a result of the accident, the plaintiff "became distraught, depressed and sought counselling for his anger and frustration" (at para. 138). Mr. Lane's soft tissue injuries are not as significant as those in *Thompson* but Mr. Lane's depression is greater.

**91**  In *MacLean v. Budget-Rent-A-Car of Edmonton Ltd. et al,* [*2006 BCSC 1344*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JX3N-B1C8-00000-00&context=), a 49-year old plaintiff was awarded $80,000 in non-pecuniary damages for injuries including chronic back pain, shoulder and knee problems and depression. The plaintiff had been injured in two motor vehicle accidents and "confirmed that his depression commenced after Accident #1, then improved, but worsened again after Accident #2" (at para. 23). His depression interfered with his ability to work. This court accepted that successful treatment of the plaintiff's depression would have a positive effect on his long-term prognosis.

**92**  In *Jopling v. Brodowich*, [*2009 BCSC 653*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M2KK-00000-00&context=), a 63-year-old plaintiff was rear-ended and suffered headaches, shoulder, neck and back pain. She also suffered depression following the accident. The court found that "[h]eadaches, lack of sleep and depression do not seem to have bothered the plaintiff much, if at all, before the accident" (at para. 37). She was awarded $75,000 in non-pecuniary damages.

**93**  Taking into account the severity of Mr. Lane's present symptoms, their duration and the guarded prognosis of Dr. Miki, I award non-pecuniary damages for the major depressive disorder of $80,000. In accordance with my above reasons, Mr. Lane is entitled to recover $40,000 with respect to this injury from the defendants in the action relating to the third accident.

**Loss of Future Income Earning Capacity**

**94**  I agree with counsel for the defendants that Mr. Lane likely would have curtailed his employment to a large extent as a result of the second accident. Nevertheless, I am satisfied that the third accident did reduce his future income earning capacity. As against this conclusion, I also am of the view that there are a large number of contingencies that should substantially reduce any award in this regard.

**95**  Taking these contingencies into account, I award Mr. Lane $10,000 for loss of future income earning capacity. As I am of the view that the loss of future income earning capacity is attributable to the indivisible injury, the major depressive disorder, this award will be reduced to $5000 to take into account the degree to which I have found Mr. Lane to be at fault for that injury.

**Special Damages and Cost of Future Care**

**96**  In his written submissions, counsel for the defendants stated that the only claims for special damages and cost of future care arise out of the injuries suffered in the second accident. Counsel for Mr. Lane did not appear to dispute that submission.

**97**  Based on the forgoing paragraph, I make no award under either of these heads of damage. However, I grant leave to the plaintiff to make further submissions on these heads given my finding that there is an indivisible injury with respect to the second and third accident.

**Summary of Relief**

**98**  Damages for the first accident are awarded as follows:

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| --- | --- | --- | --- | --- |
| 1. |  | non-pecuniary damages: | $70,000 |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 2. |  | loss of past income earning capacity: | $80,000 |  |
|  |  | (less deduction for income tax) |  |  |

**99**  Damages for the third accident are awarded as follows:

1. non-pecuniary damages for soft tissue injury $25,000
2. non-pecuniary damages for indivisible injury $40,000

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| 3. |  | loss of future earning capacity | $5,000 |  |

**100**  The parties will be at liberty to make further submissions as to costs.

R.J. SEWELL J.

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[***McNeilly v. Pollard, [2016] B.C.J. No. 1848***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5KMV-YFM1-FJDY-X3SF-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Campbell River, British Columbia

D.W. Thompson J.

Heard: July 7, 8 and 11-13, 2016.

Judgment: August 30, 2016.

Docket: M10795

Registry: Campbell River

**[2016] B.C.J. No. 1848** | 2016 BCSC 1604

Between Cecil Arthur McNeilly, Plaintiff, and James Arnold Pollard and Acemyth Contracting Inc., Defendants

(78 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Soft tissue — Arm injuries — Leg injuries — Action by motorist for damages for injuries sustained in motor vehicle accident allowed — Parties were travelling in opposite directions on snow-covered road around curve — Plaintiff drove into snow bank and was sideswiped by defendants' trailer — Both parties caused accident — Plaintiff suffered multiple soft tissue injuries and had shoulder surgery and hip replacement — Plaintiff's damages assessed at $110,000 for non-pecuniary damages, $70,672 for loss of income, $150,000 for loss of future earning capacity, $5,646 for costs of future care and $5,592 for special damages — As fault equally apportioned, plaintiff entitled to recover 50 per cent.**

**Damages — Types of damages — For personal injuries — Cost of future care — Loss of earning capacity — Special damages — Past loss of income — Expenses and expenditures — Non-pecuniary loss — Action by motorist for damages for injuries sustained in motor vehicle accident allowed — Parties were travelling in opposite directions on snow-covered road around curve — Plaintiff drove into snow bank and was sideswiped by defendants' trailer — Both parties caused accident — Plaintiff suffered multiple soft tissue injuries and had shoulder surgery and hip replacement — Plaintiff's damages assessed at $110,000 for non-pecuniary damages, $70,672 for loss of income, $150,000 for loss of future earning capacity, $5,646 for costs of future care and $5,592 for special damages — As fault equally apportioned, plaintiff entitled to recover 50 per cent.**

**Transportation law — Motor vehicles and highway traffic — Liability — Civil actions — *Negligence* — Action by motorist for damages for injuries sustained in motor vehicle accident allowed — Parties were travelling in opposite directions on snow-covered road around curve — Plaintiff drove into snow bank and was sideswiped by defendants' trailer — Both parties caused accident — Plaintiff suffered multiple soft tissue injuries and had shoulder surgery and hip replacement — Plaintiff's damages assessed at $110,000 for non-pecuniary damages, $70,672 for loss of income, $150,000 for loss of future earning capacity, $5,646 for costs of future care and $5,592 for special damages — As fault equally apportioned, plaintiff entitled to recover 50 per cent.**

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| --- |
| Action by a motorist for damages for injuries sustained in a motor vehicle accident. The parties were travelling in opposite directions on a snow-covered gravel road. The defendant Pollard was driving a truck and fully-loaded logging trailer owned by the defendant Acemyth. He was travelling at approximately 40 kph. The plaintiff was driving a pick-up truck and was travelling at approximately 60 kph. As the two vehicles approached a curve, the logging truck took up the available width of the road and neither driver was able to see the other in enough time to stop their vehicles. The plaintiff pulled his vehicle off the road into the snow bank, and was side-swiped by the last several feet of the trailer. Following the accident, both vehicles left the scene. Neither driver reported the accident to the police. As a result of the accident, the plaintiff suffered multiple soft tissue injuries. While he was in a great deal of discomfort in the weeks following the accident, he continued to work. He took significant time off work in 2014 and 2015 and had undergone a shoulder surgery and a hip replacement. The plaintiff was 52 year of age. He was married with one adult child. He had a grade eight education and had worked in the logging industry since he was 15. He previously suffered a low back injury, which continued to trouble him. He also suffered from psoriatic arthritis, which caused pain, especially in his feet. The defendants denied liability for the accident.  HELD: Action allowed.  Both drivers were driving too fast for the conditions and they both removed any chance that either would be able to stop in time to avoid an accident. Together, they created an emergency and caused the accident. Section 150(1) of the Motor Vehicle Act did not apply. The road was not sufficiently wide and it was not practicable for Pollard to confine the course of his vehicle to the right hand half of the roadway. In addition, the plaintiff had not established that Pollard failed to make use of his radio. It was likely that the parties were on different channels for the different sections of the road upon which they were travelling. Both parties were equally at fault for the accident. It was not practicable for Pollard to confine his trailer to the right hand half of the curve. The plaintiff knew that loaded logging trucks might be coming the other way. On the narrow and icy curve, it was incumbent on each driver to exercise great caution, but neither did so. Each driver maintained control of their vehicle after the emergency presented itself and each did the best they could in a situation they created together by their ***negligence***. The accident accelerated the need for the plaintiff to have hip replacement surgery. The plaintiff's damages were assessed at $110,000 for non-pecuniary damages, $70,672 for loss of income, $150,000 for loss of future earning capacity, $5,646 for costs of future care and $5,592 for special damages. As fault was equally apportioned, the plaintiff was entitled to recover 50 per cent. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, R.S.B.C. c. 318, s. 150(1)

***Negligence*** Act, R.S.B.C. 1979, c. 333, s. 1

**Counsel**

Counsel for the Plaintiff: P. Field.

Counsel for the Defendants: B. Boan.

**Reasons for Judgment**

|  |
| --- |
| **D.W. THOMPSON J.** |

**1**   This action for damages arises out of a mid-winter accident (the "MVA") involving a logging truck and a pick-up truck. The vehicles were heading in opposite directions on a snow-covered gravel road northeast of 100 Mile House. The plaintiff pick-up driver suffered injuries in the MVA, and has since undergone shoulder surgery and a hip replacement. The defendants deny liability for the MVA. On the damages side, the principal issues are causation for the hip problem, and the extent of compensation due for diminished future earning capacity.

**Liability**

**2**  The MVA occurred just after daybreak on 31 January 2011 on a curve at kilometre 34 on the Canim-Hendrix Lake Road, also known as the "6000 Road". This road is a public highway from its beginning at kilometre 0 up to kilometre 34; beyond that it is a forest service road. It is common ground the MVA occurred at a point where the road is a public highway.

**3**  The 6000 Road is surfaced with gravel. There are pull-outs at intervals to make it easier for vehicles to pass. In winter, the road is snow-covered and plowed regularly. The public highway section, up to kilometre 34, was plowed by a Ministry of Transportation and Highways contractor. The plowing beyond that point was the responsibility of forestry industry grader operators.

**4**  Some distance beyond kilometre 34 there was an active timber harvesting operation, referred to by the witnesses as the "cut block". At the time of the MVA, the defendant Pollard was driving a truck owned by the defendant Acemyth Contracting Inc. The truck was pulling a fully-loaded 60-foot logging trailer away from the cut block, and was heading "down kilometres" on the 6000 Road; the ultimate destination was a mill near 100 Mile House. Mr. McNeilly, the plaintiff, was driving a one ton pick-up truck with dual rear wheels. He was on his way to his work as a heavy equipment operator at the cut block that Mr. Pollard was hauling logs from.

**5**  About two inches of fresh snow had fallen on the road, but it was not snowing at the time of the MVA and visibility was good. The hard-packed surface underneath the fresh snow was icy.

**6**  As the two vehicles approached the kilometre 43 curve, the McNeilly pick-up truck was travelling at about 60 kmh and Mr. Pollard was driving the logging truck at about 40 kmh. As it came around the curve to the left, the log trailer was tracking far inside the path of the wheels of its truck -- to the extent that the available width of the road was fully taken up by the Pollard rig. Because of the configuration of the curve, the closing speed of their vehicles, and perhaps vegetation and snowbanks obscuring their lines of sight, neither driver saw the other vehicle soon enough to bring his vehicle to a safe stop.

**7**  From the point in time when they were faced with a dire emergency, both drivers made accurate decisions. Mr. McNeilly attempted to get his pick-up entirely off the road surface. He slowed slightly before driving into the snowbank on his side of the road at approximately 50 kmh. He described his pick-up as coming to a complete and sudden stop when it hit the snowbank. I find that only the rear driver's side of the pick-up remained on the travelled portion of the road. Although the Pollard truck was equipped with tire chains, it was moving at a speed that made it unsafe for Mr. Pollard to brake heavily. Mr. Pollard was rightly concerned that, at the speed he was travelling, heavy braking action on the icy surface risked complete loss of control of his rig with potentially disastrous consequences. Most of Mr. Pollard's truck and log trailer passed by the McNeilly pick-up truck, but the last several feet of the trailer struck a sideswipe blow to the rear quarter panel of the pick-up on its driver's side. By the time Mr. Pollard was able to bring his vehicle to a stop, the front of his truck was sixty to eighty feet down the road from the back of the McNeilly pick-up.

**8**  After Mr. Pollard's truck came to rest, the parties communicated by radio. Mr. Pollard attached chains to the back of the log trailer and to the back of the McNeilly pick-up truck and pulled the pick-up out of the snowbank. Both vehicles then left the scene. Neither driver reported the collision to the RCMP.

**9**  Mr. McNeilly was intent on carrying on to the cut block but remembered, before he had gone far, that he had with him a phone capable of taking photos. He turned around and returned to the scene where he took a selection of poor quality photos of the roadway and surrounds at kilometre 34. These are in evidence along with two other sets of photos -- of much better quality -- taken later by Mr. McNeilly: (1) images of the MVA scene, taken days or perhaps weeks later; and (2) images showing damage to the pick-up truck as a result of its collisions with the snowbank and the log trailer, taken about two weeks after the MVA.

**10**  Mr. McNeilly returned to the 6000 Road in the summer months following the MVA and measured the road width at the kilometre 34 curve. It was 29 feet wide from ditch to ditch. He also took about five other width measurements along the 6000 Road and they ranged from 29 feet to 31 feet. The evidence also establishes the McNeilly pick-up truck with its dual rear wheels was nearly ten feet wide, and the Pollard rig was just over ten feet wide when travelling in a straight line.

**11**  There are no weather records in evidence, but *viva voce* and photographic evidence makes clear that a significant amount of snow had fallen on the 6000 Road that winter. The photos taken by Mr. McNeilly on the MVA date show high snowbanks, particularly on the side of the road travelled by Mr. Pollard. These banks were undoubtedly formed by plowing carried out in the days, weeks, and months leading up to the MVA date.

**12**  One contested issue in this case is the available width of the roadway in the conditions prevailing at kilometre 34 at the time of the MVA. Dan Mikkelsen gave evidence. He is 52 years old and began logging when he was 17. Mr. Mikkelsen was one of two grader operators charged with plowing snow on the forest service section of the 6000 Road. He began this work about six weeks before the MVA. This was his first season plowing snow; he had not operated a grader before. He was "shown the ropes" by the other operator who made a "couple of passes" while Mr. Mikkelsen observed. The graders were equipped with 14-foot-wide plowing blades, and he was instructed not to "overplow" -- the goal was to keep as much of the road open to traffic as possible but to keep the vehicles out of the ditches: if the snow was plowed wider than the edge of the roadway, it could mislead a driver as to the width of the road.

**13**  Mr. Mikkelsen was asked to describe the snow conditions that winter. He said there was more snow than he has ever seen, and that it was "pretty hard for a greenhorn". When asked about the available width of the road after plowing, he testified his goal was to try to maintain the full width of the roadway and depending on the snowfall he would try to make multiple passes: "I tried to keep it as wide as I could, as best as I could." On one pass along the road, he would grade a 14 foot width. On the second pass coming back, he would overlap the first pass. The plowed portion after the second pass would be 14 feet wide plus an extra ten feet "if you're lucky, depending where you are on the road." Some days it was a challenge to keep up with the snow, and it fell as fast as he could grade.

**14**  Mr. Mikkelsen testified there were areas on the 6000 Road where a logging truck and a standard sized vehicle could pass, including on some curves if the vehicles went by one another carefully. Mr. Mikkelsen was not contacted as a witness until earlier this year, and he was understandably not able to be specific about the conditions on the MVA date or the conditions at the curve where the MVA occurred. He was able to remember that it was his practice to plow past the kilometre 34 curve and onto the public highway section of the 6000 Road to a landing about one kilometre down the road.

**15**  Mr. McNeilly testified that the road conditions shown in the photos he took later that winter are similar to the road conditions on the MVA date. Looking at this set of photos of the kilometre 34 curve, Mr. Mikkelsen testified that they showed a 14-foot-wide strip had been recently plowed and he estimated that the unplowed portion is four to five feet wide (making the available width of the road 18 or 19 feet). I accept these estimates as accurate. It may have been possible for the Pollard and McNeilly vehicles to pass by one another at some locations on the 6000 Road that morning (other than at pullouts), but I find it was not possible at the kilometre 34 curve. Even if the travelled portion of the road were as wide as 20 or 21 feet, I bear in mind that the log trailer would have tracked inside the path of its truck to some degree regardless of the speed Mr. Pollard was driving.

**16**  Each driver had reason to be on the lookout for traffic. As he came upon the kilometre 34 curve, Mr. Pollard was entering upon a public road. For his part, Mr. McNeilly knew that he was on a road leading to an active logging area and that loaded logging trucks might be coming down from the cut block. And, each driver knew the road was narrow and slippery. It was therefore incumbent on each driver to operate his vehicle at a slow enough speed that, notwithstanding the prevailing slippery conditions, he could bring his truck to a controlled stop if he encountered another vehicle on that curve. I find both drivers were going much too fast, and by together producing a closing speed of approximately 100 kmh (approximately 88 feet per second) they both removed any chance that either would be able to stop in time to avoid an accident. Together, they created an emergency; together, they caused the MVA.

**17**  I reject the defendants' contention that it was necessary for Mr. Pollard to round the curve at 40 kmh because of the icy road conditions. Mr. Pollard's evidence was that the camber of the road was such that if he had been driving slower than 40 kmh his log trailer might have slipped off the road to his left, and, further, that he needed to have enough speed to avoid slipping on an up-sloping hill that was in near prospect. I accept that the 6000 Road was icy at the 34 kilometre curve, but I reject the submission that there were operational reasons to excuse what would otherwise be driving too fast for these conditions. First, I do not have confidence in Mr. Pollard's observations or memory of the roadway's camber and slope. His observations or memory of the roadway were in other respects demonstrably in error. One example is his testimony that there was one to two feet of fresh snow on the 6000 Road that morning; the photos taken in the minutes after the MVA are not clear images but they are good enough to demonstrate that Mr. Pollard's recollection is substantially in error. Another example is his recollection that the contractor responsible for the public highway section of the 6000 Road plowed approximately once every two weeks -- this is contrary to Mr. Mikkelsen's evidence about the regular plowing carried out on the public highway and at odds with the reality that, with the heavy snowfall that winter described by all witnesses, the public highway section would have been impassable if plowed so infrequently. There is a second reason for rejecting the defendants' submission on the need for speed on the kilometre 34 curve: even if the road conditions combined with the roadway design were such that Mr. Pollard was required to round that curve at 40 kmh, then it would surely follow that it was unsafe for Mr. Pollard's vehicle to be on the 6000 Road that morning.

**18**  By travelling too fast for the prevailing conditions, each driver was negligent. However, Mr. McNeilly argues that Mr. Pollard breached the standard of care in additional ways, and submits that the liability apportionment ought to reflect Mr. Pollard's greater degree of fault. In particular, Mr. McNeilly contends that Mr. Pollard failed to stay right, and failed to use his radio to warn of his approach. For the reasons that follow, I conclude that these additional allegations have not been made out.

*Obligation to Confine Course to Right Hand Half of Roadway*

**19**  Section 150(1) of the *Motor Vehicle Act*, *R.S.B.C. 1996, c. 318*, provides:

**Driver on right**

**150** (1) The driver of a vehicle must confine the course of the vehicle to the right hand half of the roadway if the roadway is of sufficient width and it is practicable to do so, except

1. when overtaking and passing a vehicle proceeding in the same direction,
2. when the right hand half of the roadway is closed to traffic while under construction or repair,
3. on a highway designated and marked by signs for one way traffic,
4. if necessary when operating snow removing equipment, or
5. if
6. the movement of a vehicle, or combination of vehicles, is permitted by and is done in conformity with the terms of the oversize permit issued under the *Commercial Transport Act*, and
7. the width of a vehicle, or combination of vehicles, or the width of a load on the vehicle makes the operation of the vehicle or combination of vehicles on the right hand half of the roadway unsafe.

**20**  Mr. McNeilly's first submission is that the travelled portion of the roadway was of sufficient width and it was practicable for Mr. Pollard to have negotiated that curve without any part of the tractor-trailer encroaching on the other half of the roadway. This submission is answered by my finding of fact to the contrary. At the kilometre 34 curve, the 6000 Road on the morning of the MVA was not sufficiently wide and it was not practicable for Mr. Pollard to confine the course of his vehicle to the right hand half of the roadway. Accordingly, the precondition for the s. 150(1) *Motor Vehicle Act* obligation is not satisfied.

**21**  Mr. McNeilly argues that even if s. 150(1) does not apply, the Pollard truck was being driven too close to the centre of the road. Mr. McNeilly testified that Mr. Pollard's truck was more or less in the centre of the road when Mr. McNeilly first saw it. He submits that if Mr. Pollard had taken the curve further to the right, his trailer would have tracked further to the right as he went through the curve and would not have collided with Mr. McNeilly's pick-up truck. Mr. Pollard testified that when he travelled around the curve, his truck was travelling as close to the right hand side of the travelled portion of the roadway as was advisable without risking going off the road. Mr. Pollard testified that it was Mr. McNeilly's pick-up truck that was travelling in the centre of the road.

**22**  I do not have confidence in the recollection of either Mr. McNeilly or Mr. Pollard as to the position of the other's vehicle on the road. Their recollections are based on an instant in time that each saw the other's position on the roadway, in a moment of crisis. I am unable to conclude from either driver's evidence, or any of the photographs taken on the day of the MVA by Mr. McNeilly, that either vehicle was positioned improperly.

*Radio Use*

**23**  The plaintiff pleads as one particular of ***negligence*** that Mr. Pollard drove "without using radio communication". (The defendants' pleadings do not make any radio use allegations against the plaintiff.) The 6000 Road is a "radio-assisted road": radio use is the norm for industrial vehicles, but is not a precondition for using the road. The concept behind radio use on narrow and winding industrial roads is that the number of accidents will be reduced if drivers periodically broadcast their location to one another. Both vehicles in this case were equipped with two-way radios, and both drivers testified that they were transmitting and monitoring.

**24**  In *Neale Bros. Transfer Ltd. v. Caruso*, [*[1986] B.C.J. No. 1112*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-FBN1-2167-00000-00&context=) (S.C.), Taylor J. (as he then was) reviewed four earlier cases in this Court that addressed use of radios on logging roads, and summarized the guidance provided by those cases as to the standard of care. Users of logging roads must observe the normal rules of the road, *i.e.*, they must keep to their own side and maintain a speed that will enable them to control their vehicle if they should meet oncoming traffic. Drivers are not entitled to rely on the absence of radio warning as an assurance the road ahead is clear. However, a driver is not entitled to refrain from making appropriate use of radio; such conduct will generally constitute ***negligence***.

**25**  Mr. McNeilly testified that there is one channel for the whole of the 6000 Road. He says he was tuned in to this channel and heard no broadcasts from Mr. Pollard. On the other hand, Mr. Pollard and Mr. Mikkelsen testified that there is a channel change at kilometre 34, where the road changes from a public highway to a forest service road.

**26**  Mr. McNeilly submits that it is unlikely that there would have been a channel change in the midst of the 6000 Road. While I agree that it does not seem a particularly sensible arrangement, the weight of the evidence supports a finding that there was a channel change at kilometre 34. Both Mr. Pollard and Mr. Mikkelsen, more frequent users of the road than Mr. McNeilly, testified to this. And, after the collision, Mr. McNeilly and Mr. Pollard had difficulty establishing radio communication with one another -- this is consistent with each being on different radio channels. I think it likely that at the time of the MVA, Mr. Pollard was on the channel for the 6000 Road above kilometre 34, and Mr. McNeilly was on the channel for the public highway section below kilometre 34. I also think it likely that Mr. Pollard was periodically broadcasting his location as he was travelling down the 6000 Road, but during these broadcasts Mr. McNeilly was monitoring the other channel. I conclude that Mr. McNeilly has not established that Mr. Pollard failed to make use of his radio.

**27**  In his oral argument, in reply, Mr. McNeilly makes an alternative submission. He submits that if there was a channel change then Mr. Pollard ought to have broadcast on both channels as he made his approach to the kilometre 34 curve. This is a proposition that was not pleaded, not part of the plaintiff's opening statement, and not put to Mr. Pollard in cross-examination. I think it would be unfair to call upon the defendants to answer this last-ditch volley. If the point were to be considered, I think fairness would dictate that it be considered alongside the argument available to the defendants, had it been pleaded, that Mr. McNeilly ought to have been monitoring broadcasts on both channels as he approached the kilometre 34 curve. In this fuller context, it seems to me that Mr. McNeilly's alternative argument, had it been pleaded and evidence been developed to support it, is unlikely to have affected the apportionment of liability -- because the argument, if sound, would seem to lead to a result where both drivers failed in equal measure to make appropriate use of their radios.

*Apportionment*

**28**  The only proven breach of the standard of care is that each driver was not exercising due care: each was going too fast on a narrow curve on an icy logging road. The remaining liability issue is apportionment. Section 1 of the ***Negligence*** *Act*, R.S.B.C. 1979, c. 333, provides:

**Apportionment of liability for damages**

**1** (1) If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.

1. Despite subsection (1), if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.
2. Nothing in this section operates to make a person liable for damage or loss to which the person's fault has not contributed.

**29**  Of the cases cited by counsel, one stands out as being most instructive: *England v. Hoffman*, [*[1976] B.C.J. No. 702*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6S1-JX3N-B03T-00000-00&context=) (C.A.), rev'g [*[1975] B.C.J. No. 256*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6S1-F7VM-S25J-00000-00&context=) (S.C.). A tractor-trailer unit, of a total length of 60 feet, collided with a van on a curve. The accident happened on a winding and narrow gravel road covered with ice and fresh snow. The road was extremely slippery. The curve was tight and the tractor-trailer could not negotiate it without using most of the road. Each vehicle was travelling at approximately 15 mph. The drivers saw one another when they were not more than 90 feet apart. At that time, the tractor-trailer was taking up more than one half of the road surface. Both vehicles braked. The tractor-trailer slid to its right side of the roadway and almost stopped. The van skidded forward and across the road. The collision occurred on the tractor-trailer's side of the road. The trial judge found the tractor-trailer driver entirely at fault for the collision.

**30**  On appeal, fault was apportioned equally. After noting the statutory rule that a vehicle confine its course to the right hand half of the roadway "if the roadway is of sufficient width and it is practicable to do so," Seaton J.A. continued as follows on the subject of the tractor-trailer driver's ***negligence***:

[5] The fact that a vehicle obstructs the road puts upon its driver a duty to be very careful about oncoming traffic. The appellant's vehicle was the maximum permissible length and width and created a serious hazard on this country road. Such large vehicles have to be in a position to stop in a very few feet because if they move quickly they use up too much of the space between meeting vehicles for the other to stop before a collision. Each of these vehicles was travelling at about 15 m.p.h. That is a modest speed in most circumstances but not in these circumstances. At that speed they were closing the gap between them at the rate of 44 ft. per second. If they saw each other at the first opportunity and maintained speed they would meet in about two seconds. I think that a driver of a large vehicle approaching a corner such as this should, by a suitable warning, give the other driver as much information as possible and should, by driving with great caution, have himself in a position to stop in a very few feet. In those duties I think that the appellant Hoffman failed. I would not disturb the finding that he was negligent.

**31**  Seaton J.A. turned to the van driver, and rejected his argument that the situation he faced when he rounded the corner was not reasonably foreseeable. His obligation was to round the corner at such a speed that he, too, could stop in a few feet:

[6] . . . He knew that the road was narrow and twisting and that it was snow covered and very slippery. He had on other occasions encountered large trucks on that particular stretch of road and on prior occasions he had had to pull over and stop to let a truck go by. This road is not comparable to a modern highway where vehicles remain on their right. Vehicles occupying a large part of this road are reasonably to be foreseen. Mr. England was obliged to round this blind corner with such control and at such speed that he could stop in a few feet. Driving in that manner the appearance of a truck would not create an emergency.

[7] The England vehicle's skid across the road into the truck points to excessive speed, lack of control or both. I do not think it can be said to have been driven without ***negligence***.

**32**  Mr. Pollard submits that the *England* case is to be distinguished because, unlike the defendant in that case, Mr. Pollard announced his presence on the roadway via radio. I was referred to *Koopman v. Fehr* [*(1993), 81 B.C.L.R. (2d) 145*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-JSC5-M3VG-00000-00&context=) (C.A.). In that case, a van and pick-up truck collided on a curve on a narrow logging road. Both drivers were travelling too quickly. One driver was using a radio but the other was not. The trial judge apportioned fault equally. The Court of Appeal allowed the appeal, holding that the plaintiff's radio use reduced his share of liability to 25 percent.

**33**  The difficulty with this submission is that both Mr. Pollard and Mr. McNeilly were using their radios. However, because of the radio channel change at kilometre 34, Mr. McNeilly did not hear Mr. Pollard's periodic broadcasts. Mr. McNeilly was, I have found, monitoring the channel for the public highway section of the 6000 Road and not the channel that Mr. Pollard was broadcasting on. Mr. Pollard must be taken to have been aware that his broadcasts would not have been received by drivers monitoring the public highway channel; recall that the defendants have not alleged that Mr. McNeilly was negligent in his use of the radio -- they do not plead that Mr. McNeilly ought to have been monitoring the channel for the 6000 Road above kilometre 34. In these circumstances, I cannot distinguish the *England* case on the basis of Mr. Pollard's radio use.

**34**  The van driver in the *England* case lost control and skidded across the road and into the path of the oncoming truck. In our case, Mr. McNeilly maintained control but was left with no choice but to drive at speed into the snowbank on his side of the road. I have considered whether Mr. McNeilly's greater control of his vehicle than the van driver in *England* is an important difference. I do not think this difference ought to result in a different outcome than the equal apportionment result in *England*. The fact is that the kilometre 34 curve was very narrow and icy. It was not practicable for a logging truck driver on this curve to confine his rig to the right hand half of the roadway. It was a situation that called for great caution on the part of both drivers. Each driver maintained control of their vehicle after the emergency presented itself and each did the best they could in difficult circumstances they both created negligently by driving much too fast.

**35**  The case at bar is also similar in important ways to *ICBC v. Lemare Lake Logging Ltd.*, [*2003 BCSC 1906*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-6114-00000-00&context=), in which fault was apportioned equally for a collision between a logging truck and a pick-up truck on a narrow logging road. The width and nature of the road surface made it difficult for two vehicles to pass if one was a logging truck. Because of the narrowness of the road, the point of impact was well over onto the pick-up driver's side. Each driver alleged the other was travelling too fast, and that the other had failed to transmit their location via radio.

**36**  Madam Justice Holmes found the radio allegations to be unproven, but concluded that each driver breached the standard of care by driving too fast for the conditions. She found that the collision could only have been avoided if both vehicles stopped before they reached the other, and the time available to stop was in turn determined by the speed at which the vehicles were travelling. In that case, as in the case at bar, the pick-up driver was travelling 60 kmh. The logging truck driver was in that case travelling 35 kmh. Although the pick-up was travelling much faster than the logging truck, Holmes J. apportioned 50 percent responsibility to each driver. She reasoned as follows:

[42] . . . [The logging truck driver] was travelling at a slower speed than was [the pick-up driver], but had less ability to brake and, significantly, occupied the full width of the road. He held a high responsibility to ensure that he could avoid collision with an oncoming vehicle in any of the varying circumstances he might encounter along the road.

**37**  I conclude that Mr. McNeilly and Mr. Pollard are equally at fault for the MVA. It was not practicable for Mr. Pollard to confine his trailer to the right hand half of the travelled portion of the curve at kilometre 34. Mr. McNeilly knew that loaded logging trucks could be coming down from the cut block. Mr. Pollard knew there might be vehicles coming the other way. On that narrow and icy curve, it was incumbent on each driver to exercise great caution. Neither did so. Each was driving much too fast to bring their vehicle to a stop if faced with the foreseeable event of encountering an oncoming vehicle on the curve. Although Mr. Pollard was driving slower than Mr. McNeilly, Mr. Pollard had less ability to brake and his vehicle occupied the full width of the curve. Each driver maintained control of their vehicle after the emergency presented itself and each did the best they could in a situation they created together by their ***negligence***. Having regard to all the circumstances of the case, it is not possible to establish different degrees of fault and liability is apportioned equally.

**Damages**

**38**  Mr. McNeilly is 52 years old. He is the spouse of Pamela Bates and they have a 23-year-old boy, Dax McNeilly. I was impressed with the evidence of each member of this close-knit and hard-working family.

**39**  Mr. McNeilly grew up in Sayward on Vancouver Island. He has a grade eight education. By the time he was 15 years old he was working in the logging industry. In the 37 years since, at one time or another he has worked at most jobs a logger could do. He has been a faller, worked as a choker, operated heavy equipment, and driven logging trucks. Mr. McNeilly has a strong work ethic, and he has not lost his enthusiasm for logging work after all these years.

**40**  In about 2004, Mr. McNeilly moved with his family to Clearwater, in the North Thompson River valley. He did some falling in that area, and operated heavy equipment. Eventually he incorporated his own company, logging the "bug kill" -- trees infested with the mountain pine beetle. He conducted all operations from felling the trees to delivery of the logs to the mill. Mr. McNeilly testified his company was very successful, but he was forced to shut down its operations shortly before the MVA because his logging truck was vandalized. The absence of documentary evidence, and in particular corporate tax returns or financial statements, makes it impossible to test Mr. McNeilly's assertions about his company's profitability.

**41**  About a month before the MVA, Mr. McNeilly went to work for Grizzly Mountain Construction Ltd., a company based in Clearwater. He was operating a "grapple cat" on the cut block accessed by the 6000 Road. A grapple cat is a type of heavy equipment called a "skidder", designed for grabbing the bundles of trees (that have been cut down and assembled by a machine called a "buncher") using a grapple hook and dragging (skidding) them to the landing. At the landing, the fallen trees are limbed and bucked to a length specified by the mill, and loaded onto logging trucks. The grapple cat is a tracked vehicle capable of operating on steep and rough terrain such as Mr. McNeilly was working on at the cut block. On less challenging terrain, an ordinary skidder with rubber tires is used.

**42**  After skidding wood during the day for Grizzly Mountain, Mr. McNeilly was quartered at a lodge near the cut block. The lodge had no power, and featured few comforts. He lit a stove for heat, and cooked his own dinners. He returned home to Clearwater on the weekends, a drive of between 90 minutes and two hours.

**43**  Mr. McNeilly suffered multiple soft tissue injuries as a result of his pick-up truck's collisions with the snowbank and with the log trailer. The worst of his injuries were to his left shoulder and right hip, although he has experienced long-lasting pain in his neck, and in the area of his sternum.

**44**  Mr. McNeilly was in a great deal of discomfort in the days and weeks following the MVA, but he carried on with his work at the cut block using strong analgesics he found in a cupboard at the lodge. His grapple cat work jarred him around inside the cab, and he began instead to work in a "hoe chucking" machine. Hoe chucking is part of the process of moving the bunched fallen trees to the loading area. The hoe chucker is a tracked machine that grabbed the bundles and moved them to the landing area via a couple of "chucks". He described this work as not as jarring as working in the grapple cat, because the ground, although steep, was not as steep as the terrain requiring the grapple cat.

**45**  In early April 2011, about two months after the MVA, Mr. McNeilly went to work for his current employer, Western Forest Products Inc., based out of Campbell River. At first, he was driving logging trucks. Most of his driving was off highway and involved vibration and pounding that aggravated his hip, shoulder, and neck pain. About a year later, he began operating a log loader. He found this easier than the truck driving because was able to take some breaks as a loader operator.

**46**  The WFP records corroborate Mr. McNeilly's evidence that he took significant time away from work in 2014 and 2015, leading up to and then after his left shoulder repair (1 April 2015) and right hip replacement (4 September 2015). He returned to work in January 2016. At that time, his employer put him to work doing some hoe chucking. He tried this for two weeks but found it too hard on his hip and shoulder. He reported to his employer that he could not continue. Fortunately, WFP accommodated his condition by returning him to work operating a log loader. Mr. McNeilly finds he is able to carry on with this work, albeit with the assistance of over-the-counter pain medications.

**47**  The defendants accept the plaintiff suffered significant injuries in the MVA. Some heads of loss were settled between the parties and for some others there is not much daylight between their positions. Two issues require some detailed analysis. The first is whether the plaintiff's right hip problem, culminating in hip replacement surgery, was caused by the MVA. The second is the extent of the loss of future earning capacity.

*The Plaintiff's Original Position*

**48**  The plaintiff is entitled to an assessment of damages that returns him to, but does not better, his "original position": *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. Mr. McNeilly has two relevant pre-existing health conditions. He suffered a low back injury in 1987, and this continues to trouble him up to the present. A CT scan of his lumbar spine of 15 October 2010, a few months prior to the MVA, indicated a moderate degree of degenerative disc disease. He was also diagnosed with psoriatic arthritis which gave him pain, especially in his feet. It is clear from the records in the year or two leading up to the MVA that these conditions -- especially the psoriatic arthritis -- were causing Mr. McNeilly a significant amount of pain. In fact, during this period he was using cannabis (in edible forms) and was prescribed Oxycocet for pain control.

**49**  However, the evidence also establishes that these pre-existing conditions did not have any significant effect on Mr. McNeilly's employment, his recreational pursuits, or his family life, and there is no evidence that either his chronic low back pain or the psoriatic arthritis will progress to the point where they will be functionally disabling. In fact, Mr. McNeilly is no longer on medication for his psoriatic arthritis.

*Injuries Caused by the MVA*

**50**  The defendants do not take issue with Mr. McNeilly's claim that he suffered shoulder, neck, and chest injuries in the MVA. The evidence establishes the MVA caused a labral tear in his left shoulder; this was successfully repaired on 1 April 2015. He has been left with a minor degree of impingement that bothers him when he has to work with his arms over his head or when he reaches for something too quickly with his left arm. His neck problems continue to flare up from time to time, especially if he carries something heavy, and when his neck is bothering him he tends to have an accompanying headache. He also describes an occasional "popping" feeling around his sternum.

**51**  The defendants submit Mr. McNeilly has not proved his hip complaints are caused by the MVA. Factual causation is addressed using the "but for" test: Mr. McNeilly must show on a balance of probabilities that, but for the ***negligence*** of Mr. Pollard, the injury would not have occurred: *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 and 13. Scientific proof of causation is not necessary; common sense inferences from the facts may be sufficient, but guesswork or conjecture is never enough to meet the onus: *Clements*, at paras. 38 and 46; *Borgfjord v. Boizard*, [*2016 BCCA 317*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K9P-92K1-F1H1-217H-00000-00&context=) at para. 55.

**52**  Mr. McNeilly's position, based on the opinion evidence of his orthopaedic surgeons, Dr. Crosby and Dr. Leete, is that while he had some pre-MVA arthritis in his right hip joint, the MVA triggered the onset of pain in this previously asymptomatic joint, leading to hip replacement an estimated four or five years earlier than would have been the case but for the MVA.

**53**  The defendants acknowledge that the mechanism of the pick-up truck's impact with the snowbank could theoretically produce sufficient axial loading to cause articular damage to the hip joint. However, their orthopaedic examiner Dr. Sidky opines that the MVA did not in fact cause damage to the articular surface or cartilage within the joint. He bases his opinion on the absence of clinical chart notes of hip complaints for more than two months after the MVA, and the minor degree of arthritis demonstrated by the x-ray studies. Dr. Sidky's further opinion is the MVA did not in any way change the progression of the arthritis within the joint, but he acknowledges the possibility Mr. McNeilly suffered soft tissue injury adjacent to the joint causing his arthritis symptoms -- particularly pain -- to become notable and leading to hip replacement surgery earlier than would have been the case but for the MVA.

**54**  Mr. McNeilly testified he noticed right hip symptoms in the day or so following the MVA. Dr. Sidky took a history from Mr. McNeilly, and reports:

Mr. McNeilly described noting his left shoulder symptoms, right hip symptoms, sternal symptoms and neck symptoms within the first few days of the MVA.

Dr. Sidky noted that Mr. McNeilly's first complaint related to his hip was made to his family doctor on 18 April 2011, approximately 11 weeks post-MVA, and Dr. Sidky's opinion was based on the assumption that the onset of hip problems in fact occurred in April 2011 rather than in the days following the MVA.

**55**  Beginning on 22 February 2011, on the advice received from a lawyer, Mr. McNeilly began to keep a daily diary of his aches, pains, and medications taken. The diary was admitted into evidence for the limited purpose of rebutting the allegation of recent fabrication of hip complaints in the period between the MVA and 18 April 2011. The diary corroborates Mr. McNeilly's evidence that he had significant aching in his hip much earlier than 18 April 2011, and I find the onset of problems in his hip occurred within a day or so of the MVA as he testified and plagued him until he had the hip replaced in September 2015. I am persuaded that either the articular surface of the hip was damaged by forces causing axial loading, or that the surrounding soft tissues were damaged giving rise to symptoms in the hip in accordance with the theory acknowledged by Dr. Sidky to be a possibility. The medical consequence of this hip injury is that the joint was replaced four or five years earlier than it would have been but for the MVA.

**56**  Accordingly, I find the plaintiff has established causation in fact in relation to the hip on the balance of probabilities. Causation is a two-stage process -- the first step is proof of causation in fact, and the second step requires causation in law to be established. The defendants quite properly do not contest that the hip injury was a type or kind of injury that was a reasonably foreseeable consequence of the MVA. I find causation in fact and law established to the extent argued by the plaintiff: the MVA accelerated the need for his right hip replacement surgery by four or five years.

*Non-Pecuniary Damages*

**57**  The proper approach to the assessment of non-pecuniary damages is well-settled and is encapsulated 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 paras. 45-46. The factors to be considered include the age of the plaintiff, the nature of his injuries, the severity and duration his pain, disability, emotional suffering, loss or impairment of life, impairment of family and social relationships, impairment of physical and mental abilities, and loss of lifestyle. A stoic nature ought not to result in a lesser award; this principle has direct application to Mr. McNeilly who has carried on admirably.

**58**  Mr. McNeilly has endured some back pain for many years, and had a bad bout with psoriatic arthritis shortly before the MVA. It is clear from the evidence, however, that these pre-MVA conditions did not disable him from logging, or his work on the family farm, or from pursuing his active recreational life. Before the MVA, Mr. McNeilly enjoyed camping, fishing, hunting, riding his Harley-Davidson motorbike, and socializing with neighbours and friends. Since the accident, he has done little other than his logging work. His mood has been affected by his injuries: both his wife and son describe his demeanour as being unpleasant since the MVA, although his wife has noticed some improvement in his disposition following his successful hip replacement.

**59**  Mr. McNeilly has undergone an arthroscopic repair of the labral tear in his shoulder, and replacement of his right hip joint four or five years earlier than he would have but for the MVA. By his efforts to remain at work, he has endured more pain than a person of weaker constitution would have. His injuries have had a significant effect on his recreational, social, and family life.

**60**  The plaintiff submits the non-pecuniary damages ought to be assessed in the range of $90,000 to $120,000, citing *Hart v. Hansma*, [*2014 BCSC 518*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JP4G-61XP-00000-00&context=) [$95,000]; *Wong v. Hemmings*, [*2012 BCSC 907*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-24FJ-00000-00&context=) [$100,000]; *Hanson v. Yun*, [*2013 BCSC 2313*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JG02-S4CG-00000-00&context=) [$120,000]; *Dycke v. Nanaimo Paving and Seal Coating Ltd.*, [*2007 BCSC 455*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M31D-00000-00&context=) [$120,000]; and *Severud v. Smit*, [*2016 BCSC 1021*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K0Y-G9P1-DYMS-61NK-00000-00&context=) [$130,000]. The defendants contend that if causation for the hip problem is established, the proper range is $90,000 to $100,000, placing particular emphasis on *Witt v. Vancouver International Airport Authority*, [*2012 BCSC 1185*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S2BH-00000-00&context=) [$100,000].

**61**  These cases provide some guidance but there is no close comparator. Reference to similar cases can be of assistance in arriving at a fair award for non-pecuniary damages, but each case must be decided on its own facts. An individualized assessment is called for. It is neither possible nor desirable to develop a "tariff". See *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; *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 paras. 39-43. I assess Mr. McNeilly's non-pecuniary damages at $110,000.

*Past Loss of Earning Capacity*

**62**  The parties agreed that if I find, as I have, that the hip problem is causally related to the MVA then the past loss of earning capacity claim for the period from 2014 to date ought to be assessed at $70,672. There remains only one minor issue for adjudication under this head of damages. Mr. McNeilly submits he has proved a loss of approximately $2000 during a pay period shortly after the MVA, from 13 February 2011 to 26 February 2011. The defendants contend the evidence in support of this part of the claim is too thin.

**63**  Mr. McNeilly points to his pay stubs in this period and contrasts them with surrounding pay periods in order to attempt to demonstrate a loss. He did earn substantially less in this pay period. The question is whether Mr. McNeilly has shown that he was off work during this time for reasons related to the MVA -- as opposed to, say, a shutdown of logging operations. I instruct myself that in all cases evidence "must be scrutinized with care" and "must always be clear, convincing and cogent ... to satisfy the balance of probabilities test": *F.H. v. McDougall,* [*2008 SCC 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1D5-00000-00&context=) at paras. 45-46.

**64**  Mr. McNeilly's evidence on this point is that he cannot think of any reason other than his injuries from the MVA that could account for him missing work. Mr. McNeilly conceded in cross-examination that this was too long ago for him to have an accurate memory on this point. I find the evidence led by the plaintiff is not sufficient to prove the alleged loss in February 2011 on a balance of probabilities.

*Future Loss of Earning Capacity*

**65**  A plaintiff is required to prove a substantial possibility of a future event resulting in a loss in order to recover damages for loss of future earning capacity. If such an event is proven, then it is open to the plaintiff to quantify his loss according to the earnings he will lose (the "earnings approach"), or by the harm caused to his earning capacity as a capital asset in the working world (the "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.

**66**  Certain of the important principles in making an assessment of damages for diminished future earning capacity were listed in *Falati v. Smith*, [*2010 BCSC 465*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-62PC-00000-00&context=) at para. 41, aff'd [*2011 BCCA 45*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1KT-00000-00&context=):

1. The standard of proof in relation to hypothetical or future events is simple probability, not the balance of probabilities: *Reilly v. Lynn*, [*2003 BCCA 49*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G50F-00000-00&context=) at para. 101. Hypothetical events are to be given weight according to their relative likelihood: [*Athey 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].
2. The court must make allowances for the possibility that the assumptions upon which an award is based may prove to be wrong: *Milina v. Bartsch* [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=) at 79 (S.C.), aff'd [*(1987), 49 B.C.L.R. (2d) 99*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6X1-JTNR-M3X3-00000-00&context=) (C.A.). Evidence which supports a contingency must show a "realistic as opposed to a speculative possibility": *Graham v. Rourke* [*(1990), 75 O.R. (2d) 622*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-F5T5-M3YH-00000-00&context=) at 636 (C.A.).
3. The court must assess damages for loss of earning capacity, rather than calculating those damages with mathematical precision: *Mulholland (Guardian ad litem of) v. Riley Estate* [*(1995), 12 B.C.L.R. (3d) 248*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-DY33-B0YN-00000-00&context=) at para. 43. The assessment is based on the evidence, taking into account all positive and negative contingencies. The overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, [*2001 BCCA 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=) at para. 11.

**67**  The earnings approach will be appropriate when the loss is more easily measurable: *Westbroek v. Brizuela*, [*2014 BCCA 48*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1GW-00000-00&context=) at para. 64. The matter at hand is not suited to measuring the loss by an earnings approach. The parties agree and I conclude that the capital asset approach is appropriate.

**68**  The capital asset approach calls for an inquiry into the extent to which the plaintiff's earning capacity, as a capital asset, has been diminished. The inquiry focuses on whether the plaintiff: (1) has been rendered less capable overall of earning income from all types of employment; (2) has been rendered less marketable or attractive as an employee to future employers; (3) has lost the ability to take advantage of job opportunities which might otherwise have been open to him; or (4) is less valuable to himself as a person capable of earning income in a competitive labour market: *Brown v. Golaiy* [*(1985), 26 B.C.L.R. (3d) 353*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JYYX-61TX-00000-00&context=) at para. 8 (S.C.). Although quantification of the loss under the capital asset approach cannot be a matter of precise measurement, this does not mean the assessment is entirely at large -- findings of fact as to the nature and extent of the loss of capacity and its relation to the plaintiff's ability to earn income are necessary: *Morgan v. Galbraith*, [*2013 BCCA 305*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JW09-M12P-00000-00&context=) at para. 56.

**69**  The defendants concede the plaintiff has proved a real and substantial possibility he will suffer a future income loss. The live issue is the extent of proper compensation for the diminishment of his capital asset. The parties agree the proper method of assessment in this case is to award the plaintiff the equivalent of one or more years of his current income. This is well-recognized as one of the available approaches to the assessment of damage done to a plaintiff's capital asset -- see *Pallos v. Insurance Corp. of British Columbia* [*(1995), 100 B.C.L.R. (2d) 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0K2-00000-00&context=) at para. 43 (C.A.). The plaintiff urges an award based on two years of current earnings. He submits the evidence supports current annual earnings of 106,000, and therefore supports an award of $212,000. The defendant submits the appropriate award is one year's earnings, measured at $100,000.

**70**  As a result of his MVA injuries, Mr. McNeilly is less capable overall of earning income from all types of employment. Before the MVA, he was fully capable of performing all logging-related functions. He now finds work on certain machinery such as a grapple cat to be too hard on him -- and it makes sense he avoid the equipment that works on steep and uneven terrain so he can minimize jarring and vibration, thus prolonging the time before he needs to have his right hip replaced again.

**71**  And because he is no longer capable of performing all logging functions, Mr. McNeilly would be less marketable and attractive to other employers should his work at WFP come to an end. In this sense, he has lost the ability to take advantage of job opportunities which might otherwise have been open to him. Recall as well that Mr. McNeilly has some history of self-employment in which he carried out all logging functions. Having some restrictions might cause him to be reticent about returning to self-employment or might require hiring others to perform work he would otherwise do.

**72**  If there are periods of unemployment caused by his MVA injuries, Mr. McNeilly will be hard-pressed to replace his income by accessing or retraining for sedentary employment. The report of the vocational expert, Mr. Nordin, discloses that his learning ability score -- a composite of verbal aptitude, numerical aptitude, and spatial perception -- places him at the 5th percentile of the general working population. In other words, 95 percent of the general working population has a higher learning ability score. Mr. McNeilly's math computation, spelling, word reading, and sentence comprehension test results show him performing in a range between grades four and eight.

**73**  Various contingencies, both positive and negative, have to be accounted for in the *Athey* process of giving weight to hypothetical events according to their relative likelihood. The documents from WFP establish that pay increases are expected. There is a possibility -- but far from a probability -- that another hip replacement may be needed during the years Mr. McNeilly has remaining in his career. On the other hand, macro- and micro-economic vagaries and the possibility of industrial accidents must also be considered.

**74**  I conclude Mr. McNeilly will likely earn just over $100,000 this year -- an amount in rough accord with his income since the MVA (after adjustment for the income he has lost when disabled from working because of his MVA injuries). I assess his damages for diminished future earning capacity at $150,000, near the mid-point of one and two years' earnings.

*Cost of Future Care and Special Damages*

**75**  These heads of damages are agreed-upon at $5646 for cost of future care, and $5592 for special damages.

**Summary and Order**

**76**  I assess damages as follows:

|  |  |  |
| --- | --- | --- |
| Non-pecuniary Damages | $110,000 |  |
| Past Loss of Earning Capacity | 70,672 |  |
| Future Loss of Earning Capacity | 150,000 |  |
| Cost of Future Care | 5,646 |  |
| Special Damages | 5,592 |  |
| **TOTAL** | **$341,910** |  |

**77**  I am satisfied that this assessment is fair and reasonable to both the plaintiff and the defendants. Fault for the MVA is apportioned equally; the plaintiff is entitled to recover 50 percent of the assessed damages. Accordingly, the plaintiff is entitled to judgment against the defendants for $170,955, plus court order interest.

**78**  The parties have liberty to apply if they are unable to agree on a costs order.

D.W. THOMPSON J.

**End of Document**

[***Oliver v. Branch, [2001] B.C.J. No. 2742***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JSC5-M4DF-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Tysoe J.

Oral judgment: November 21, 2001.

Vancouver Registry No. C970447

**[2001] B.C.J. No. 2742** | 2001 BCSC 1711 | 110 A.C.W.S. (3d) 767

Between Donella Oliver and Tarryn Oliver by her Guardian ad litem, Donella Oliver, plaintiffs, and Ward K. Branch, Noreen V. Brox, Lauri Ann Fenlon, Robin J. Harper, Donald J. Holubitsky, June C. Laker, Paul T. McGivern, Bull Housser & Tupper, Harper Grey Easton, Russell & DuMoulin, and the Public Trustee, defendants

(70 paras.)

**Case Summary**

**Practice — Dismissal of action — Estoppel — Estoppel by record (res judicata) — Res judicata as a bar to subsequent proceedings — When applicable — Barristers and solicitors — *Negligence* — Particular negligent acts — Settlements — Compensation — Agreements, contingent fees — Review and approval — Duty to client.**

|  |
| --- |
| Application by the defendants, Brox, Laker and the Public Trustee, to dismiss Oliver's action against them. Oliver's child was born with cerebral palsy. She brought an action on behalf of herself and her child against her general practitioner, her obstetrician, and the hospital. The Public Trustee later took Oliver's place as guardian ad litem for the child. The defendant law firm, Russell & DuMoulin, became counsel for both Oliver and the Public Trustee on a contingency fee basis. Brox was a solicitor who reported to Laker, who was the Deputy Public Trustee. The Public Trustee gave authorization to accept a settlement offer subject to court approval. A judge approved the settlement over Oliver's objections. Oliver's appeal failed for lack of standing. Oliver then applied to set aside the contingency fee agreement, but the agreement and the fees were approved. Oliver then commenced an action against various defendants, including Brox, Laker and the Public Trustee. She alleged that the defendants failed to provide for the child's special needs, failed to ensure application of conditions in the Infants Act, paid a premium on legal fees which unreasonably depleted the net settlement award, and neglected their fiduciary duties in accepting the settlement and in depriving the child of the right to tax the lawyer's bill. The defendants argued that they did not breach any duty of care, and that the claims were res judicata.  HELD: Application allowed in part.  Res judicata was not a bar to the claims because Oliver and her child were not parties to the applications in connection with the settlement and contingency fee, and the issues were not necessarily identical. The evidence overwhelmingly established that the settlement was fair and reasonable. The conditions of the Infants Act alleged not to have been followed were not particularized. The only provision that might have been breached was not a mandatory one. There was no evidence that the contingency fee was higher than usual, and Russell & DuMoulin were clearly entitled to a premium based on the risks inherent in the disputed issues in the original action. The fees were subject to court approval, which was tantamount to a taxation. There was no breach of a duty of care as alleged. The action was dismissed as against Brox and Laker. The claim of ***negligence*** against the Public Trustee in relation to the settlement and fees was dismissed. However, as the Public Trustee still held some of the proceeds of the original action as referred to in the statement of claim, the action against the Public Trustee was not dismissed it its entirety. |

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rules 6(4), 18, 18A.

Infants Act, s. 31.

**Counsel**

The plaintiffs, on their own behalf at the hearing on September 10, 2001. Duncan J. Manson, for the defendants Brox and Laker. James D. Baker, Q.C., for the defendant, the Public Trustee and Trustee.

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| --- |
| **TYSOE J. (orally)** |

**1**   The Defendants Noreen V. Brox and June C. Laker and the Defendant the Public Trustee (now called the Public Guardian and Trustee), each apply under Rules 18 and 18A for the dismissal of this action against them.

**2**  The Plaintiffs appeared at the commencement of the hearing on September 10, 2001 and applied by way of a preliminary motion for an Order preventing Mr. Manson from acting as counsel for Ms. Brox and Ms. Laker. After I gave my ruling dismissing this motion, the Plaintiffs left the courtroom without speaking. As the Plaintiffs did not request a stay or an adjournment or provide any explanation for their departure, I proceeded to hear the applications under Rules 18 and 18A. I reserved my decision so that I could thoroughly review the materials.

**3**  After reviewing the materials and having some research conducted and having drafted Reasons for Judgment, I requested counsel to make further submissions on the applicability of the related doctrines of res judicata and abuse of process. Rather than requesting that the further submissions be made in writing, I directed that there be an oral hearing so that the Plaintiffs would have an opportunity to reconsider their position and be able to make submissions on the application. I have now heard the further submissions on behalf of the Defendants, Ms. Brox and Ms. Laker, and the Defendant, the Public Guardian and Trustee. The Plaintiffs chose not to attend at the further hearing.

FACTS

**4**  Ms. Donella Oliver gave birth to Tarryn Oliver in June 1982. Tarryn was tragically born with mild cerebral palsy and she developed cataracts in both eyes, making her legally blind. In 1984 Ms. Oliver commenced Action No. C843242 (the "1984 Action") on behalf of herself and as guardian ad litem for her daughter. The action claimed against Ms. Oliver's general practitioner and obstetrician, as well as the hospital in which the birth took place.

**5**  The Public Trustee took the place of Ms. Oliver as the guardian ad litem for Tarryn in 1992 in connection with an effort to have the trial of the 1984 Action adjourned. Russell & DuMoulin became counsel for both Ms. Oliver and the Public Trustee on a contingency fee basis. Ms. Brox was employed as an in-house solicitor with the Services to Children Department of the Public Trustee and had direct dealings with Russell & DuMoulin. Ms. Brox reported to Ms. Laker, who was the Deputy Public Trustee and who reported to Ms. Myrna Hall, the Public Trustee at the time.

**6**  The 1984 Action came on for trial before Meredith, J. in January 1984. Settlement negotiations took place during the trial and Russell & DuMoulin recommended settlement of Tarryn's claims by way of accepting an offer made by the defendants in the 1984 Action. The offer consisted of a structured settlement with an immediate payment of $600,000, monthly payments of at least $2,032.17 for the life of Tarryn and periodic lump sum payments in the aggregate of $350,000 over approximately 40 years. The offer had a present value of approximately $1,250,000.

**7**  By letter dated March 21, 1994, Ms. Laker wrote on behalf of the Public Trustee agreeing with Russell & DuMoulin's recommendation and giving authorization to accept the offer made by the defendants in the 1984 Action subject to court approval. In this letter, Ms. Laker also commented on the proposed fee of Russell & DuMoulin in the amount of $331,049.23 based on a contingency fee arrangement. On an hourly rate basis, the billings of Russell & DuMoulin totalled $226,530.90 and Ms. Laker expressed the opinion that a premium above this amount was warranted but stated that she would leave the amount of the premium to the discretion of the court.

**8**  An application was made to court for the approval of the settlement pursuant to s. 31 of the Infants Act, RSBC 1979, c. 196. The application was heard by Huddart J. on April 15, 1994. She approved the settlement over the objections of Ms. Oliver, who felt that a structured settlement would deprive Tarryn of social benefits which could be provided with a lump sum payment and that the discount for the risks of trial was too large.

**9**  The Order of Huddart J. approved the settlement in the amount of $1,250,000 payable as follows:

1. $97,729.62 for legal disbursements and taxes;
2. $433,484.12 for legal fees and taxes, including $331,049.23 for Russell & DuMoulin and the balance for the five lawyers who preceded Russell & DuMoulin as counsel;
3. $18,786.30 to the Public Trustee in trust for Tarryn to be applied immediately for care costs; and
4. the balance to be used to purchase the structured settlement payment schedule to Tarryn of monthly income in the amount of $2,460.91, life guaranteed 35 years, plus lump sum payments aggregating $350,000.

**10**  Ms. Oliver filed an appeal from the decision of Huddart J. but the appeal was effectively dismissed when the Court of Appeal refused to extend the time for filing of appeal books. This decision was predicated on the finding that Ms. Oliver did not have standing to bring the appeal. Leave to appeal the decision was dismissed by the Supreme Court of Canada.

**11**  Huddart J. subsequently dealt specifically with the fees charged by Russell & DuMoulin. Ms. Oliver participated in the application, and took the position that the contingency fee agreement between Russell & DuMoulin and the Public Trustee should be set aside and that there should be a reference to the Registrar for a review of the account. By Reasons for Judgment dated February 9, 1995, [*[1995] B.C.J. No. 258*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F1WF-M218-00000-00&context=), Huddart J. approved the contingency fee agreement and held that the fees of Russell & DuMoulin were reasonable. In particular, she held that the "premium" had been earned by Russell & DuMoulin, primarily because the settlement represented a fine result for Tarryn.

**12**  Ms. Oliver commenced this action in 1997. She claimed on her own behalf and on behalf of Tarryn against the lawyers involved in the trial of the 1984 Action, the Public Trustee, Ms. Brox, Ms. Laker and the Ministry of the Attorney General. I am informed that the action has been discontinued against the lawyers involved in the trial of the 1984 Action with the exception of Russell & DuMoulin (and its two representatives, Mr. Branch and Ms. Fenlon) and I am informed that the Plaintiffs' claims against Russell & DuMoulin and its representatives were dismissed on October 19, 2001 pursuant to a Rule 18A application.

**13**  The Plaintiffs claim against the Public Trustee, Ms. Brox and Ms. Laker in ***negligence***, and the particulars of which are contained in paragraph 21 of the Statement of Claim as follows:

1. failing to provide for the special needs of the infant, Plaintiff TARRYN OLIVER.
2. failing to ensure that the conditions of The Infants Act regarding approval of fee agreements were applied in Action No. C843242; and
3. offering a premium to Lauri Ann Fenlon and Russell and DuMoulin in Action No. C843242 over and above hourly legal fees and thereby unreasonably depleting the net settlement award of infant Plaintiff TARRYN OLIVER.
4. neglecting their fiduciary duties to the infant plaintiff TARRYN OLIVER by accepting a settlement in Action No. C843242, and depriving the said Plaintiff of the right to tax the lawyer's bill.

The Statement of Claim also alleges that the Public Trustee has refused or neglected to provide the $18,786.30 sum and $2,406.91 monthly sums as required by the April 15, 1994 Order of Huddart J. The Statement of Claim seeks the removal of the Public Trustee together with general and punitive damages against all of the Defendants.

**14**  Ms. Oliver made an application in this action on behalf of the Plaintiffs in early 1998. The application was heard by Harvey J. on March 18, 1998. He ordered, among other things, that:

1. the Public Trustee account for all monies in its possession as a result of the two Orders of Huddart J.;
2. the Public Trustee pay the lump sum of $1,000 and monthly sums of $250 into a trust account for Ms. Oliver in trust for Tarryn, provided that Ms. Oliver account to the Public Trustee every three months for how the monies have been spent; and
3. the Public Trustee pay the sum of $18,786.30 referred to in the order of Huddart J. dated April 15, 1995 to a trust account of Ms. Oliver in trust for Tarryn, provided that Ms. Oliver has provided the Public Trustee with particulars of the proposed allocation of the funds.

Harvey J. declined to accede to the part of the application by which the Plaintiffs sought to have the settlement monies transferred to a private trust company and Ms. Oliver as co-trustees.

**15**  In late 1998, Ms. Oliver applied on behalf of the Plaintiffs that there be a stay of proceedings until Tarryn had obtained a solicitor to act on her behalf. The application was made in view of Rule 6(4) which provides that a guardian ad litem must act by a solicitor unless the guardian ad litem is the Public Trustee. Ms. Oliver was not successful in this Court on the application but an appeal was allowed by the Court of Appeal, which ordered that this action be stayed until the earlier of Tarryn attaining the age of 19 and Ms. Oliver retaining a solicitor to act for her as Tarryn's guardian ad litem. Tarryn turned 19 in June of 2001.

**16**  Ms. Oliver and Tarryn each swore an affidavit on August 29, 2001. Almost all the contents of the affidavits dealt with their applications to prevent Mr. Manson from acting for Ms. Brox and Ms. Laker. The only portion of the affidavits dealing with the merits of the Rule 18A application was a statement by Tarryn that the application brought by Mr. Manson was "vexatious, frivolous, lacks merit, and cannot proceed because it is premature, presents no evidence and thwarts the natural course of justice". As Ms. Oliver and Tarryn left the courtroom immediately after my ruling dismissing their application to prevent Mr. Manson from acting in this regard and in view of the fact that they have chosen not to appear at this hearing, I have not heard any evidence or submissions in support of this statement.

**17**  Three defences are put forward by the applicants in answer to the claims of ***negligence*** in connection with the contingency fee agreement, the settlement and the determination of the fees of Russell & DuMoulin. The first is that Ms. Brox and Ms. Laker did not owe a duty of care to the Plaintiffs. The second is that the claims are res judicata. The third is that the applicants did not breach any duty of care owed to the Plaintiffs.

NO DUTY OF CARE

**18**  In paragraph 6 of their Statement of Defence, Ms. Brox and Ms. Laker allege that they did not owe a duty of care to Tarryn which was separate and distinct from the duty of care owed by the Public Trustee. This defence was mentioned in passing during submissions and no authority was cited in support of it. As I may dispose of the Plaintiffs' claim on an individual basis, I do not propose to make a ruling on this general defence.

RES JUDICATA AND THE ABUSE OF PROCESS

**19**  In submitting that the Plaintiffs' claims are res judicata or are an abuse of process, the applicants rely on the principles discussed in Hamelin v. Davis [*(1996), 18 B.C.L.R. (3d) 112*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G2HN-00000-00&context=) (B.C.C.A.). In my view, the doctrines of res judicata and abuse of process should not be used as a complete bar to the claims of the Plaintiffs for two reasons. Ms. Oliver and Tarryn were not parties to the applications heard by Huddart J. in connection with the settlement and the approval of the contingency fee agreement and the fees of Russell & DuMoulin. Tarryn was represented by the Public Trustee, who she now seeks to sue with respect to these matters. Although Ms. Oliver or her counsel made submissions to Huddart J., the Court of Appeal held that she had no standing and did not permit her to pursue an appeal of the Order approving the settlement.

**20**  In addition, the issues before Huddart J. were not necessarily identical to the issues in this action. In this regard, it is my view that this case is similar to the situation in Singh v. Bank of British Columbia [*(1990), 51 B.C.L.R. (2d) 273*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JJYN-B2PC-00000-00&context=) (B.C.C.A.). As an example, if the Public Trustee, as guardian ad litem, negligently failed to disclose a material fact to a judge considering an infant settlement and the judge approved the settlement, then the Public Trustee could be liable to the infant in ***negligence*** despite the court's approval of the settlement. The issues in the two proceedings would be different because the court was not possessed of all the material facts when it approved the settlement.

**21**  Accordingly, the issues to be considered in connection with each allegation of ***negligence*** is whether the applicants were in breach of any duty of care that may have been owed to the Plaintiffs. Although the doctrines of res judicata and abuse of process are not a complete bar to the claims, it is my opinion that the findings of Huddart J. cannot be challenged in the absence of new evidence.

NO BREACH OF DUTY OF CARE

Paragraph 21(a)

**22**  Paragraph 21(a) of the statement of claim alleges that that the applicants were negligent because they failed to provide for the special needs of Tarryn. It is not entirely clear whether this allegation relates to the period of time leading up to the settlement of Tarryn's claims in the 1984 Action or the period of time after the Public Trustee was in receipt of some of the settlement funds. Based on my review of the Statement of Claim and the affidavits, I conclude that the allegation relates to the period of time leading up to the settlement.

**23**  The Statement of Claim makes two other references to the special needs of Tarryn. The first is contained in paragraph 18, where it is alleged that the Russell & DuMoulin lawyers breached their duties to Ms. Oliver by failing to provide adequate legal representation for both the Plaintiffs and, in particular, to look after the special needs of Tarryn. The second reference is paragraph 19 where it is alleged that the Russell & DuMoulin lawyers breached their duties to both of the Plaintiffs by reaching a settlement which failed to look after the special needs of Tarryn.

**24**  These other references indicate that the failure alleged in paragraph 21(a) is a failure to have the settlement provide for Tarryn's special needs. In addition Ms. Brox left the employment of the Public Trustee on or about March 15, 1994 and was only involved during the time period preceding the finalization of the settlement.

**25**  Therefore, the issue to be considered is whether the applicants were in breach of a duty of care which they may have owed to the Plaintiffs by instructing Russell & DuMoulin to accept a settlement offer which did not have further provision for Tarryn's special needs.

**26**  In my view, the evidence overwhelmingly establishes that it was a fair and reasonable settlement and that the applicants did not breach any duty of care in accepting it subject to court approval. In considering this settlement, Huddart J. specifically considered Tarryn's future needs as voiced by Ms. Oliver and she approved the settlement as being in the best interests of Tarryn. There is no evidence that the Public Trustee failed to disclose material facts to Huddart J. or that the Public Trustee was not acting prudently and in good faith in recommending the settlement. There is no new evidence to establish that the settlement was less than fair and reasonable or that it was not in the best interests of Tarryn to accept it.

**27**  I find that the applicants did not breach any duty of care owed to the Plaintiffs in connection with Tarryn's special needs.

Paragraph 21(b)

**28**  Paragraph 21(b) of the Statement of Claim alleges that the applicants were negligent because they failed to ensure that the conditions of the Infants Act regarding approval of fee agreements were applied in the 1984 Action. The Statement of Claim does not particularize the conditions of the Infants Act which are alleged to have not been applied. Upon my review of the Infants Act, the only provisions of the Act that arguably was breached by the Public Trustee and its employees was s. 31, now s. 40. It provides that a guardian may make a binding agreement for an infant, with the approval of the court, when the consideration exceeds $10,000. The Public Trustee did not sign the contingency fee agreement with Russell & DuMoulin but it conceded that it approved the terms of the agreement.

**29**  This point was addressed by Huddart J. when she dealt with the fees of Russell & DuMoulin in her Reasons for Judgment dated February 9, 1995. She said the following:

Nor is it the practice of the Public Trustee to seek the court's approval of a fee agreement. She accepts that the court has the jurisdiction to review the account at the end of the day. That practice is consistent with that of parents who act as guardians ad litem, including Ms. Oliver. There is no evidence that she or the counsel she retained sought court approval for whatever agreement she may have made with any of the five previous counsel who represented Tarryn.

The practice makes sense. If the court will review the fairness and reasonableness of the agreement in the context of a settlement or after a trial, it is a waste of the resources of the Public Trustee, the court, and the parties, to make such an application in advance. Moreover, the resulting approving order is inherently not useful, as can be seen from the comments of Harvey, J. in Re Nicholas (Guardian of) [*(1991), 57 B.C.L.R. (2d) 163*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F2P-NNR1-JKPJ-G0CB-00000-00&context=) (S.C.). At most it can determine that the agreement was entered fairly. Both parties take the risk that the court will not approve the arrangements they made. Counsel takes the additional risk that the contract may be enforceable, if at all, only against the guardian. The sensible alternative of seeking the approval of the Contingency Fee Agreement and the settlement at the same time was approved in Peters v. Squamish Indian Band [*(1990), 43 B.C.L.R. (2d) 102*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JK4W-M0WC-00000-00&context=) (Co. Crt.).

I agree with these comments.

**30**  Huddart J. went on to approve the contingency fee agreement on the basis that the agreement was made fairly, without any unfair advantage being taken of Tarryn.

**31**  There is not evidence to support the conclusion that the contingency fee agreement would not have been approved by the court at the time it was made if an application for approval had been made at that time. In addition, s. 31 is not mandatory in nature and it simply sets out a precondition to the enforceability of a contract entered into by a guardian on behalf of an infant. The real risk in not having the agreement approved by the court at the outset in the present case was borne by Russell & DuMoulin. The agreement was binding on the law firm and it was the law firm which ran the risk that the agreement may not be enforceable against the infant, Tarryn, if the court ultimately refused to approve it. There was no real risk to Tarryn if the court ultimately refused to approve the agreement because the agreement would then have been unenforceable against her.

**32**  I find that the applicants did not breach any duty of care owed to the Plaintiffs in deferring the application for approval of the contingency fee agreement until the settlement as reached.

Paragraph 21(c)

**33**  The allegation in paragraph 21(c) is that the applicants were negligent in offering a premium to Russell & DuMoulin over and above hourly legal fees and thereby depleted the net settlement award available to Tarryn.

**34**  The Public Trustee did not actually offer any premium to Russell & DuMoulin. It approved a contingency fee agreement, knowing that it would be up to the court to decide if the fee was reasonable. The contingency fee under the agreement may have been greater or less than a fee determined by applying the usual hourly rates of the lawyers at Russell & DuMoulin who worked on the matter. The fee under the agreement depended on the success achieved by Russell & DuMoulin on behalf of Tarryn.

**35**  There is no evidence that the contingency fee under the agreement was higher than the usual contingency fee charged in the legal community in comparable circumstances. In approving the fees of Russell & DuMoulin, Huddart J. found that neither the Public Trustee nor Ms. Oliver could obtain counsel on any other basis and that the contingency fees were reasonable.

**36**  In her March 21, 1994 letter instructing Russell & DuMoulin to accept the $1,250,000 offer, Ms. Laker expressed the opinion that a premium above the hourly billings was warranted but stated that she would leave the amount of the premium to the discretion of the court. This was recognized by Huddart J. who carefully considered that matter and concluded that the amount of the premium represented by the contingency fee should be approved.

**37**  It is beyond question that Russell & DuMoulin were entitled to a premium above their hourly billings due to the risks inherent in the disputed issues in the 1984 Action concerning liability, causation and quantum. It was not negligent for Ms. Laker to have expressed an opinion to that effect. The amount of the premium was determined by Huddart J.

**38**  I find that the applicants did not breach any duty of care owed to the Plaintiffs by approving the contingency fee agreement or by expressing the opinion that a premium was warranted.

Paragraph 21(d)

**39**  There are two allegations of ***negligence*** contained in paragraph 21(d). The first is that the applicants neglected their duties by accepting the settlement offer. The second is that they deprived Tarryn of the right to tax the lawyer's bill (which I take to be the bill of Russell & DuMoulin).

**40**  The first of these allegations raises essentially the same issue as paragraph 21(a) where I found that the applicants did not breach any duty of care in accepting a settlement offer subject to court approval.

**41**  The second of these allegations deals again with the fees of Russell & DuMoulin. In my view the applicants did not deprive Tarryn of the right to have the fees reviewed by the court. When the Public Trustee approved the terms of the contingency fee agreement, it was on the usual basis that the fairness of the agreement and the reasonableness of the fees were subject to court approval.

**42**  At the hearing before Huddart J. in relation to the fees of Russell & DuMoulin, counsel for Ms. Oliver took the position that the issue of the reasonableness of the fees should be referred to a registrar for review. Such a review would be tantamount to a taxation. Huddart J. recognized the court had a discretion to deal with the matter itself or refer the matter to a registrar for a fee review. After carefully considering the matter, Huddart J. concluded that none of the concerns raised on behalf of Ms. Oliver suggested to her that the fees were unreasonable or should be reviewed by a registrar. She approved the amount of the fees.

**43**  I find that the applicants did not deprive Tarryn of the right to tax the fees and disbursements of Russell & DuMoulin and that they did not breach any duty of care owed to the Plaintiffs in that regard.

CONCLUSION

**44**  I conclude that the applicants were not negligent as alleged in paragraph 21 of the Statement of Claim. I dismiss the action as against Ms. Brox and Ms. Laker, and I dismiss the claim of ***negligence*** against the Public Guardian and Trustee in connection with the settlement, the contingency fee agreement and the fees of Russell & DuMoulin.

**45**  I am not dismissing the entire action as against the Public Guardian and Trustee because I understand that he still holds some of the monies referred to in paragraphs 22 and 23 of the statement of claim. One of the prayers for relief in the statement of claim requests that control of the proceeds of the 1984 Action be removed from the Public Trustee. As Tarryn has turned 19, she is entitled to those monies subject to a passing of accounts.

**46**  I am about to deal with two final matters. One is the dispensing of the approval of the forms of the Order flowing from these Reasons by Ms. Oliver and Tarryn Oliver. I take it counsel would ask me to dispense with their approvals of the forms?

**47**  MR. MANSON: Yes, we would, my Lord.

**48**  MR. BAKER: Yes.

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| **THE COURT** |

**49**   I do so.

**50**  The second matter is the issue of costs. I note that Mr. Justice Melvin did not make any order as to costs upon the request of Russell & DuMoulin and their representatives at the Rule 18A application which he heard. What is the position of the parties in that respect?

**51**  MR. MANSON: Ms. Laker and Ms. Brox do not seek costs.

**52**  MR. BAKER: Nor does the Trustee.

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| **THE COURT** |

**53**   I therefore make no order as to costs. However, Mr. Baker, I take it that the Public Trustee is not waiving its entitlement to make a claim for expenses that it may have incurred in acting as the guardian ad litem of Tarryn out of the funds that it holds.

**54**  MR. BAKER: Yes, that will be done within the passing of the accounts and I am hopeful that the passing of the accounts will be proceed on the 10th of December as I indicated earlier and that would be the end of that I would think. Would I have liberty to come back before you after the passing of the accounts to deal with sections - or rule - I'm sorry, s. 22 and 23 of the Statement of Claim?

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| **THE COURT** |

**55**   You would be finalizing the passing of accounts and presumably payment of monies to Tarryn.

**56**  MR. BAKER: Yes. There are matters that have to be dealt with through a registrar's reference and then approval of the court and I would intend to go on that procedure. I'm hoping that I'll be able to complete the reference on the 10th of December and then I'll - after I receive the comments from the registrar I'll be able to proceed to the court for the final approval.

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| **THE COURT** |

**57**   Yes, you can schedule a further application before me and you can -

**58**  MR. BAKER: Yes, I thought I would have to deal with that in that way.

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| **THE COURT** |

**59**   Yes.

**60**  MR. BAKER: Thank you.

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| **THE COURT** |

**61**   And I have in essence said that in my Reasons.

**62**  MR. BAKER: You have, thank you.

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| **THE COURT** |

**63**   And you may make arrangements through Trial Division. I routinely sit at nine o'clock in the morning so you could schedule such an application --

**64**  MR. BAKER: That would be very - thank you.

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| **THE COURT** |

**65**   -- at that time. In order to avoid any misunderstanding, I make no order as to party and party costs on this application in favour of either Ms. Brox and Ms. Laker or the Public Guardian and Trustee. However, I make no determination as to the entitlement of the Public Guardian and Trustee to be reimbursed the expenses which it has incurred in connection with this action out of the settlement monies which it holds in trust for Tarryn, and that matter can be left to the passing of the accounts.

**66**  MR. BAKER: Thank you, my Lord.

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| **THE COURT** |

**67**   Thank you for reattending, counsel, I believe that it was necessary to hear further submissions before I reached my final conclusions in this matter.

**68**  MR. MANSON: Thank you, my Lord.

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| **THE COURT** |

**69**   I think in view of the fact that, Mr. Baker, you're intending to bring on a further application at some point, I think I will just keep this Chambers record so I will have the materials at hand.

**70**  MR. BAKER: Thank you. I appreciate that.

TYSOE J.

**End of Document**

[***Parmar v. Rink, [2019] B.C.J. No. 1833***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5X70-16K1-JJ1H-X4X1-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

B.J. Norell J.

Heard: April 8-12, 15 and 17, 2019.

Judgment: September 30, 2019.

Docket: S31613

Registry: Chilliwack

**[2019] B.C.J. No. 1833** | 2019 BCSC 1626

Between Sarbjit Kaur Parmar, Plaintiff, and Anne Rink and Harold Rink, Defendants

(136 paras.)

**Case Summary**

**Damages — Types of damages — For personal injuries — Cost of future care — Loss of earning capacity — Special damages — Past loss of income — Expenses and expenditures — Medical — Therapy or rehabilitation — Non-pecuniary loss — Pain and suffering — Action for personal injuries suffered by plaintiff, 41, in motor vehicle accident allowed — Plaintiff struck on crosswalk — She suffered broken limbs requiring surgery — She developed suspected chronic pain condition with adjustment disorder and anxiety — She worked in family cleaning business but was unable to return after accident — Non-pecuniary damages assessed at $200,000 — Past loss of capacity to date of trial assessed at $62,000 — Loss of future capacity assessed at $425,000 — Her cost of future care was assessed at $70,000 — She was awarded special damages of $8,221.**

**Tort law — *Negligence* — Contributory *negligence* — Duty of care — Pedestrians — Motor vehicles — Pedestrians — Action for personal injuries suffered by plaintiff in 2015 motor vehicle accident allowed — Plaintiff struck by defendant's vehicle in crosswalk — Plaintiff saw approaching vehicle but could not tell if the car was slowing down or moving fast — Defendant found 75 per cent liable for failing to keep proper look out and yield right of way to plaintiff while she was in crosswalk — Plaintiff 25 per cent negligent — She had an obligation to watch approaching car until she could determine its speed and whether it was slowing prior to starting out or continuing to cross.**

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| Action for personal injuries suffered by the plaintiff, 41, in a 2015 motor vehicle accident. She was struck by the defendant's vehicle on a crosswalk. It was dark and rainy. The plaintiff saw a car approach the crosswalk before she entered it but could not determine if the car was slowing down or moving fast. The defendant testified he did not see the plaintiff until she was directly in front of his car. At the time of the accident, the plaintiff worked in the family cleaning business. She commenced working there two weeks prior to the accident, after years of having either no or a small amount of part-time seasonal work outside the summer months. She suffered a broken wrist, shoulder, stitches to the left side of her head, and a broken leg in the accident requiring surgery. She had to use a wheelchair for four months, a walker, and a cane for three weeks. She tried to return to work at the cleaning business but could not do it due to pain. Although she had no orthopaedic impairments, she continued to have pain. She had developed a suspected chronic pain condition with an adjustment disorder and anxiety. The pain limited sustained walking, standing, sitting, bending, kneeling and reaching, and affected her sleep. The plaintiff's mood and chronic pain were the most disabling features of her current condition.  HELD: Action allowed.  The defendant was negligent. There was a very high standard of care on a driver approaching a marked crosswalk. He failed to keep a proper look out and yield the right of way to the plaintiff while she was in the crosswalk. While the rain made visibility more difficult, the plaintiff was there to be seen. The plaintiff was contributorily negligent. She was not able to determine the speed or distance of the oncoming car. She therefore could not make a reasoned assessment that she could safely proceed. Given these, she had an obligation to watch the approaching car until she could make a determination of its speed and whether it was slowing prior to starting out or continuing to cross. The defendant was 75 per cent responsible for the accident. Considering the significant orthopaedic injuries suffered by the plaintiff, her non-pecuniary damages were assessed at $200,000. Her adjustment disorder, depressed mood and chronic pain would continue to impair her ability to work in the future, especially in physically demanding jobs. There was no real possibility the plaintiff would have worked full-time at the family business during the school year until her youngest child was older, likely by the time he was 13 years old in 2021. With further physical treatment to address her pain and with further psychological or psychiatric treatment to address her anger and mood, her symptoms would improve, although not completely resolve. The plaintiff would be able to return to the workforce, either with training in a sedentary to light position or in a supervisory capacity at the family business. She was not completely disabled from any work. Her past loss of capacity to the date of trial was assessed at $62,000. Her loss of future capacity was assessed in the amount of $425,000. Her cost of future care was assessed at $70,000. She was awarded special damages of $8,221. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, [*R.S.B.C. 1996, c. 318, s. 179*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-F361-M0HG-00000-00&context=), s. 181

***Negligence*** Act, [*R.S.B.C. 1996, c. 333, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JBDT-B066-00000-00&context=)(1)

**Counsel**

Counsel for the Plaintiff: R. Dhami, P. Bal.

Counsel for the Defendants: H. Frost.

**Reasons for Judgment**

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| **B.J. NORELL J.** |

**1**   On the evening of December 17, 2015, the plaintiff Ms. Parmar and two of her children were proceeding on foot northbound in the crosswalk across Huntingdon Road at its intersection with Gladwin Road in Abbotsford, BC. Ms. Parmar and her son, age seven, were struck by a car driven westbound on Huntingdon Road by the defendant, Mr. Rink. Ms. Parmar's daughter, age 11, who had proceeded in front of them, was not struck. Ms. Parmar was thrown approximately 14 metres and suffered a number of injuries for which she claims damages. Mr. Rink denies liability, and in the alternative alleges contributory ***negligence*** on the part of Ms. Parmar. Damages are in issue.

**Liability**

**2**  The intersection where the collision occurred is in a rural area. The northeast and northwest corners of the intersection are fields. An autobody shop is located on the southeast corner. A small building and a gravel parking lot are located in the southwest corner. If one proceeds west on Huntingdon Road past the intersection, the road rises and South Poplar Traditional Elementary school is on the south side of Huntingdon, further west and adjacent to the parking lot. There are trees lining both sides of the roads in the southwest corner, partially shielding the school and parking lot from view. There is a marked crosswalk for pedestrians moving north and south, on the west side of the intersection. There is an "X" painted on the road for traffic approaching the intersection from the east, about 75 metres from the crosswalk. There are retroreflective crosswalk signs on both sides of the road, further west of the intersection and crosswalk.

**3**  The accident took place at approximately 7:17 p.m. It was dark at the time. There is a single streetlight at the northeast corner extending diagonally toward the middle of the intersection. The autobody shop on the southeast corner has four lights on or near its roof that are angled toward the building. Ms. Parmar said there was also a light in the gravel parking lot.

**4**  Ms. Parmar and her now 14 year old daughter both said there was "light rain". Mr. Rink described the weather as "terrible" with rain with some snow in it, and winds. The police photographs after the accident show completely wet roads, and a lot of water on Mr. Rink's vehicle. Rain is visible in some of the photographs. There was no evidence the weather changed immediately after the accident. I find there was heavy rather than light rain.

**5**  Ms. Parmar was wearing a knee length "silver" jacket with a black dress, black leggings, and black leather boots. Both her children were wearing dark clothing, except that her son had a white patka on his head and was carrying a pink teddy bear, but it is not known where he was carrying it.

**6**  The posted speed limit on Huntingdon road is 60 km/h but there was a school zone speed limit of 30 km/h between 8 a.m. and 5 p.m. on school days. The accident took place after these hours. Both accident reconstruction experts who testified estimated Mr. Rink's speed at approximately 45 km/h (a range of 41 to 48 km/h) at the time of the accident, below the posted speed limit, and I accept this as his speed.

**Ms. Parmar's evidence**

**7**  Ms. Parmar gave evidence through an interpreter.

**8**  On the evening of the accident Ms. Parmar and her two youngest children were attending her son's holiday concert at the school. There were many people in attendance. Ms. Parmar parked on the north side of the intersection on Gladwin Road. There were other cars parked near her. The concert ended about 7:00 p.m. After the concert, she walked with her two children east along the southern edge of Huntingdon Road until they reached the intersection. There were no other pedestrians walking on Huntingdon Road in either direction, or in the crosswalk, but there were people in cars exiting the gravel parking lot in the southwest corner of the intersection.

**9**  At the crosswalk she stopped and looked both ways for 4-5 seconds. Nothing was coming from the left (west), and she saw one car coming from the right (east), "but it was far". She did not know and could not determine how far away the car was, but she thought she could cross the intersection. She could not tell the speed of the car. She said "I cannot have any idea". She could not determine if the car was slowing down or if it was moving fast. She did not make eye contact with the driver because the car was far away.

**10**  Her daughter proceeded into the crosswalk an arm's reach in front of her. Ms. Parmar was holding her son's hand and started walking at a normal speed. She does not remember anything after that until she was in the hospital. When she was struck, Ms. Parmar was in the north side of the crosswalk, having already crossed the eastbound lane.

**The daughter's evidence**

**11**  Ms. Parmar's daughter gave evidence similar to that of her mother. When she got to the crosswalk she looked both ways. There was nothing to the left and a car "far away" to the right. At that point, she crossed the road at a normal walking speed. When she started out, she was about two steps in front of her mother. She did not look behind her at any time after she started to cross. She heard her mother scream and a noise. She looked back and saw her mother and brother on the road.

**Mr. Rink's evidence**

**12**  Mr. Rink was driving a 2014 Mercedes 250 SUV. His wife, who is the other defendant and owner of the car, was a passenger in the car. She did not testify at trial as she has difficulty with memory. Mr. Rink is a retired teacher and was 79 years old at the time of the accident. He was in good health then and now. He and his wife were returning home to White Rock from an early dinner with friends in Chilliwack. He took this route rather than the highway because he does not like driving on the freeway, this was a slower route, and the weather was terrible.

**13**  He was familiar with this route. He knew there was a school in the area, but did not know there was a holiday concert that night. He could not see the parking areas to the sides of the road as it was too dark. He did not see parked cars or their headlights in the area, nor any pedestrians. He could see the road signs and he knew there was a crosswalk with large white stripes. Just before the accident there was no oncoming traffic.

**14**  He was driving with his low beams as he found it harder to see with high beams because of the glare. Visibility was "terrible" and he could only see 30-40 feet ahead. He was looking straight ahead and not to the sides. He agreed he needed to scan the sides as well, but could not look any other place as "he had no choice" because it was so dark and rainy and poorly lit. The light at the intersection did not help much. He estimates he was going about 50 km/h, but he did not look at his speedometer. I accept his evidence that he did not change speed as he approached the crosswalk.

**15**  He first saw Ms. Parmar and her son when they were directly in front of his vehicle, a split second before the accident. Ms. Parmar had her right arm up around her head. He had no time to brake or take evasive action before the collision. He jammed on the brakes. He said there was nothing he could have done to avoid the accident. He did not see Ms. Parmar's daughter cross in front of him.

**Mr. Craig Luker, professional engineer**

**16**  Mr. Luker was called by Ms. Parmar. On June 1, 2017, he was asked to investigate the accident. Using information from the police report, photographs, and various studies, Mr. Luker opined as follows:

1. Ms. Parmar was struck at the car's left headlamp area and her son was struck near the car's centre line;
2. based on the distance the pedestrians were thrown, the car's most likely impact speed was in the range of 45 to 48 km/h;
3. the damage from Ms. Parmar's interaction with the vehicle is consistent with her walking rather than running;
4. the pedestrians had likely walked from 8.6 to 10.0 metres and 4.8 to 5.6 seconds in the crosswalk before impact occurred;
5. the car would have been 67 to 93 metres away from the crosswalk when Ms. Parmar and her son started to cross;
6. after Mr. Rink noticed the pedestrians, and his perception response time elapsed, he could have brought his vehicle to a complete stop from a speed of 60 km/h in 14.9 to 16.7 metres, and from a speed of 50 km/h in 10.3 to 11.6 metres. The distance Mr. Rink would have travelled during the perception response time would have to be added to this. Mr. Luker did not comment on that distance.

**17**  Mr. Luker also opined on two other matters. The first was in a section of his report entitled "Factors Affecting Visibility". He opined there were several factors that would have aided Mr. Rink in noticing the pedestrians. These included: the street light at the northeast corner of the intersection; the light colour of Mr. Parmar's jacket and her son's pink teddy bear; Ms. Parmar's daughter who made it across the road; and the large number of other people that had exited the school building in the immediate vicinity.

**18**  I have disregarded portions of this section of his report. It is the court's duty to maintain a gatekeeper function with respect to any expert evidence. Beyond the explanations regarding reflective surfaces and how flash may affect pictures, much of Mr. Luker's opinion in this section is not an engineering opinion based on evidence or assumed facts. For example, statements that "the school itself, along with the lights coming through its windows and the headlights of vehicles in the parking lot, would have been the largest source of light beyond the two street lights" is argument. Mr. Luker did not visit the scene. He did not know how many cars were in the parking lot or parked on the side of the road, or if their headlights were on. Mr. Luker did not take measurements of the light from these sources, nor was there evidence of light from headlights of other vehicles. Similarly, "activity and commotion of all the other families leaving the school would have alerted eastbound drivers to the presence of numerous people in the vicinity" is argument because he did not know how many people there were or where they were. Ms. Parmar said there were no other pedestrians along the road or in the crosswalk as she was walking toward it. Mr. Luker did say there is research on perception, for example on how movement and contrast affects ability to perceive, but that was not the opinion being offered.

**19**  Mr. Luker was also asked to comment on a "safe" travel speed if visibility was limited to 30 to 50 feet (9.1 to 15.2 metres). He opined it would be no more than 16 to 25 km/h. Any speed above those would not enable a driver to notice a hazard and stop before hitting it. Mr. Luker assumed a "safe speed" was where a driver could "react to any hazard that suddenly appears on the roadway and stop before hitting it". What is admissible is his calculation of the speed required to stop, and not the further opinion on a legal issue.

**Mr. Kurt Ising, professional engineer**

**20**  Mr. Ising was called by Mr. Rink. Mr. Ising attended the accident scene in the dark on December 19, 2018, three years after the accident. He based his opinion on information in the police report, photographs, various studies, and light measurements he took at various points along the crosswalk.

**21**  Mr. Ising found the least luminance is in the south end of the crosswalk, increasing toward the north and closer to the street lamp in the northeast corner. At the farthest south end, the luminance is 1.3 lux. At the middle of the westbound lane, near where Ms. Parmar was hit, the luminance is 2.9 lux. Mr. Ising opined that the light from the streetlight alone would not have sufficiently illuminated the pedestrians to allow for their detection when they were crossing in the south side of the intersection, which is where detection would have had to take place for the collision to be avoided by Mr. Rink. He therefore ignored any light from the streetlight and opined on Mr. Rink's ability to detect the pedestrians using light only from the car's headlights. He also opined on Ms. Parmar's ability to perceive and react to Mr. Rink's car. Mr. Ising opined:

1. the car was probably travelling at a speed of about 41 to 48 km/h at impact;
2. if the pedestrians had been wearing white clothing, an average older driver's detection could have occurred about 18 metres away from impact. If the pedestrians had been wearing dark clothing, an average older driver's detection could have occurred about 10 metres (95% confidence range of 7 to 14 metres) away from impact;
3. Ms. Parmar's detection of the car would have been possible when she was at the south end of the crosswalk. At this point the car was up to 115 metres away;
4. Ms. Parmar would have had a sightline to the car's headlights up to at least 250 metres away;
5. if Mr. Rink had a typical response time upon detection of the pedestrians, then his expected response time was about 1.5 seconds (range of 1.0 to 2.2 seconds);
6. based on Mr. Rink's range of initial speeds, detection distances, and response times, there was likely no time for him to respond or brake sufficiently to avoid impact;
7. if an average older driver in Mr. Rink's position encountered these pedestrians wearing white clothing he probably could have stopped short of the pedestrians from a speed of about 28 km/h;
8. if an average older driver in Mr. Rink's position encountered these pedestrians wearing dark clothing, then he probably could have stopped short of the pedestrians from a speed of about 19 km/h; and
9. If Ms. Parmar had a typical response time upon detecting the hazard presented by the approaching car then her last opportunity to stop short of the car was when she was about 3.7 metres away from impact. This distance corresponds to about the middle of the eastbound lane.

**22**  In cross-examination, Mr. Ising agreed the measurements of light from the streetlight did not include any illuminance from headlights. He agreed a lux of 3.0 is equivalent to "civil twilight", which means there is enough light for most outdoor activities without artificial light. It is the light level at which drivers put on their headlights. However, he said that perception is more complex and depends on factors such as contrast and movement. He agreed the pedestrians would have become more visible as they moved from south to north, and as they moved into the beam of the headlights from Mr. Rink's vehicle. He said what was important was their visibility when they started out in the southwest corner, as that is where they would have to be detected to avoid a collision.

**23**  In cross-examination, the studies which Mr. Ising relied upon to come to his conclusions were reviewed. One study addressed the time it took an older driver to see a darkly clad pedestrian. That study was based on a single pedestrian, standing on the side of a completely dark road, with no warning or reflective signs, and with different headlights from those in Mr. Rink's vehicle. This was contrasted with this case which involved three pedestrians who were moving, in a crosswalk, with a streetlight, with warning signs, and high-end headlights on Mr. Rink's vehicle.

**24**  Mr. Ising took data from the above study and doubled the time required to respond to a hazard because of another study which measured the reaction time for unexpected versus expected hazards. The reaction time for unexpected hazards is about double that of expected hazards. The difference between this second study and the current case was highlighted in cross-examination. In the study, the hazard was a single stationary dummy on the road. There was no light, no warnings and no crosswalk, and the headlights were from a vehicle from the 1930's. Mr. Ising acknowledged the differences between conditions of the studies, but said he considered those differences in coming to his opinion. He said the second study is the best data available for assessing the effect of expectation. No data will ever match a scenario exactly. For example, the streetlight in this case would make visibility better, but the rain would make it worse.

**25**  Mr. Ising agreed high beams shine further forward and more to the left side than low beams, but did not agree they would have necessarily provided more visibility in this case because of the glare and masking from the rain. Mr. Ising agreed that based on his calculations, Mr. Rink was outrunning his headlights.

**26**  Mr. Ising took a photograph of the scene from his own car on a dark night, using low beams at 113 metres from the intersection. The intersection is clearly visible from that distance, although it was not raining at the time.

**27**  Mr. Ising agreed the damage to Mr. Rink's vehicle was consistent with Mr. Parmar and her son walking. He was cross-examined on the studies he used to estimate Ms. Parmar's walking speed and her reaction time and ability to avoid the collision, but in my view his opinion on this issue was not undermined. He agreed it would be difficult for Ms. Parmar to estimate the speed of Mr. Rink's vehicle when she first started out, but said at some point when a car gets closer, a person is able to judge the speed of an oncoming car.

**Analysis**

***Law***

**28**  The relevant provisions of the *Motor Vehicle Act*, *R.S.B.C. 1996, c. 318* are:

179(1) Subject to section 180, the driver of a vehicle must yield the right of way to a pedestrian where traffic control signals are not in place or not in operation when the pedestrian is crossing the highway in a crosswalk and the pedestrian is on the half of the highway on which the vehicle is travelling, or is approaching so closely from the other half of the highway that he or she is in danger.

1. A pedestrian must not leave a curb or other place of safety and walk or run into the path of a vehicle that is so close it is impracticable for the driver to yield the right of way.

...

181 Despite sections 178, 179 and 180, a driver of a vehicle must

1. exercise due care to avoid colliding with a pedestrian who is on the highway,
2. give warning by sounding the horn of the vehicle when necessary, and
3. observe proper precaution on observing a child or apparently confused or incapacitated person on the highway.

**29**  The above provisions are not an exclusive code. Pedestrians and drivers using a roadway still have a common law obligation to exercise due care for their own and other's safety: *Cook v. Teh* [*(1990), 45 B.C.L.R. (2d) 194*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JF75-M47G-00000-00&context=) (C.A.).

**30**  I have reviewed the cases cited by counsel, which are: *Cairney v. Miller*, [*2012 BCSC 86*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1RS-00000-00&context=) [*Cairney*]; *Suedat v. Kara*, [*2014 BCSC 1837*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-JGHR-M479-00000-00&context=) [*Suedat*]; *Guitierrez v. Covvey*, [*2015 BCSC 369*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVC1-F900-G51X-00000-00&context=) [*Guitierrez*]; *Farand v. Seidel*, [*2013 BCSC 323*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JC5P-G1Y4-00000-00&context=) [*Farand*]; *William v. Ross*, [*2017 BCSC 2200*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5R4H-S261-F7G6-62WF-00000-00&context=) [*William*]; *Hmaied v. Wilkinson*, [*2010 BCSC 1074*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JWXF-20XW-00000-00&context=); *Funk v. Carter*, [*2004 BCSC 866*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JXG3-X02B-00000-00&context=); *Paskall v. Scheithauer*, [*2014 BCCA 26*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1DV-00000-00&context=); *Bell v. Thorner*, [*2009 BCSC 44*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B0Y6-00000-00&context=) [*Bell*]; *Olson v. Farran*, [*2016 BCSC 1255*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K86-HW41-JC0G-642R-00000-00&context=) [*Olson*]; and *Vandendorpel v. Evoy*, [*2018 BCCA 442*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5TV7-MTB1-JSJC-X567-00000-00&context=).

**31**  The principals are summarized in *Suedat* at paras. 16-19:

[16] Once a pedestrian has safely entered a crosswalk, absent any ***negligence*** on the pedestrian's part that could mislead a motorist into thinking he or she could proceed safely, the pedestrian may assume that motorists will yield the right of way to them and will share no responsibility if struck in the crosswalk (*Miksch v. Hambleton*, [*[1990] B.C.J. No. 1810*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-FJDY-X2D0-00000-00&context=) (S.C.)).

[17] ***Negligence*** on the part of a pedestrian in a crosswalk must be proven by the defendant on the balance of probabilities. In *Feng v. Graham* [*(1988), 25 B.C.L.R. (2d) 116*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-F65M-604Y-00000-00&context=) (C.A.), Wallace J.A. stated at page 120:

In my view the plaintiff in the circumstances of this case was entitled to assume that the defendant was going to obey the law and yield the right-of-way to her. Her right to rely on that assumption continued until such time as she knew, or ought to have known, that the defendant was not going to grant her the right-of-way, whereupon the plaintiff's obligation to avoid injury to herself superseded her right to exercise her right-of-way. The onus is on the defendants to establish that the plaintiff knew or ought to have known, that the defendant driver was not going to grant her the right-of-way, and that, at that point of time, the plaintiff could reasonably have avoided the accident.

[Emphasis added.]

[18] Pedestrians in crosswalks are not required to exercise "extreme vigilance" to ensure they won't be struck (*Jung v. Krimmer* [*(1990), 47 B.C.L.R. (2d) 145*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JK4W-M150-00000-00&context=) (C.A.), leave to appeal ref'd [*[1991] S.C.C.A. No. 36*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SB1-JPP5-24NX-00000-00&context=), [*135 N.R. 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SB1-JPP5-24NW-00000-00&context=)n (S.C.C.)). To prove contributory ***negligence*** on the part of a pedestrian, the defendant must show more than inattention. A defendant must also establish (1) at what distance the pedestrian should have realized from the speed of the approaching vehicle it was not going to yield; (2) it would it have been possible for a pedestrian to avoid being impacted; and (3) that a reasonable person in the circumstances of the plaintiff should have taken evasive action to avoid the impact: *Foreman v. Mortz*, [*2001 BCSC 95*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JJD0-G13S-00000-00&context=); *Dionne v. Romanick*, [*2007 BCSC 436*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S4FW-00000-00&context=); *Farand v. Siedel*, [*2013 BCSC 323*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JC5P-G1Y4-00000-00&context=); *Paskall v. Scheithauer*, [*2014 BCCA 26*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1DV-00000-00&context=).

[19] The fact that the plaintiff was wearing dark clothing and using a dark umbrella is not evidence in and of itself that she was contributorily negligent. She was entitled to wear whatever colour and clothes that was appropriate that evening and there was no evidence that her failure to wear light clothing would have prevented being struck (*Achilleos v. Nix*, [*2000 BCSC 1422*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JTGH-B19P-00000-00&context=)).

***Mr. Rink's alleged liability***

**32**  Ms. Parmar alleges that Mr. Rink failed to keep a proper look out and yield the right of way to her when she was lawfully in the crosswalk. Counsel argues there is no reasonable explanation why Mr. Rink did not see Ms. Parmar until the split second before his car struck her. Ms. Parmar was struck when she had already crossed one full lane and was in the middle of the westbound lane. Her daughter had crossed ahead of her and Mr. Rink did not see her. There is no evidence that Ms. Parmar did anything to confuse or mislead Mr. Rink to think that he did not have to yield the right of way to her.

**33**  Mr. Rink's counsel argues Mr. Rink could not have seen Ms. Parmar and reacted in time to avoid the accident. Visibility was terrible and counsel relies upon the opinion Mr. Ising.

**34**  In my view Mr. Rink was negligent. There is a very high standard of care on a driver approaching a marked crosswalk: *Guitierrez* at para. 31. I find that Mr. Rink failed to keep a proper look out and yield the right of way to Ms. Parmar while she was in the crosswalk. While I accept that the rain made visibility more difficult, I find Ms. Parmar was there to be seen. I do not accept all of Mr. Ising's conclusions regarding Mr. Rink's ability to perceive and react because the studies upon which he bases his opinion involve very different situations from the circumstances in this case, and he does not take into account any light from the streetlamp. Unlike the studies, there were three pedestrians, who were moving across lanes of traffic, in a lit intersection, in a marked sidewalk, in the middle of the lane, with crosswalk warning signs, in a known school zone. Although Mr. Rink would not have known there was a school concert that evening, I accept Ms. Parmar's evidence that there were cars about as people were leaving the school. This should have alerted Mr. Rink that there was some activity and to be more cautious. I do not accept visibility was only 30-40 feet, which would be extremely limited, and which does not appear consistent with the police photographs which do not show fog or rain heavy enough to obscure visibility to that extent. Even if that were the case, Mr. Rink was negligent for outrunning his headlights. The photograph Mr. Ising took, albeit on a clear night, shows the intersection clearly visible at 113 metres.

**35**  Ms. Parmar's counsel alleges that Mr. Rink was also negligent by using low beams. Given Mr. Rink's evidence that the high beams made it harder to see because of the glare from the rain, which I find is a reasonable explanation for using the low beams and was supported by Mr. Ising, I find that Ms. Parmar has not established this particular of alleged ***negligence***.

***Ms. Parmar's alleged contributory negligence***

**36**  Mr. Rink alleges Ms. Parmar had a duty to take reasonable care for her own safety. He alleges she was negligent by leaving a place of safety and walking into the path of his vehicle, and by not maintaining a proper or continuous lookout. Mr. Rink's counsel argues that Ms. Parmar was not in a position to make a reasoned assessment of whether she was putting her own safety at risk. She did not know the speed of the vehicle and could not tell how far away it was. Further, she and her children were wearing dark clothing, on a dark and rainy night, at an intersection that was poorly lit. While it is not ***negligence*** to wear dark clothing, Ms. Parmar should have appreciated that it would be difficult for a driver on such a night to see a person dressed in dark clothing. As a result, she had a duty to wait until she could make an assessment of the speed of the oncoming vehicle, and to ensure that the driver saw her and her children and was slowing.

**37**  Ms. Parmar's counsel argues Ms. Parmar looked both ways prior to crossing, that at the time Mr. Rink's vehicle was some distance away, and that it would have been difficult to assess the speed of Mr. Rink's car. Ms. Parmar did not do anything to confuse or mislead Mr. Rink.

**38**  I find that Ms. Parmar was contributorily negligent. She was not able to determine the speed or distance of the oncoming car. It should have been in her mind that she and her children might not be seen for the reasons outlined by Mr. Rink. She therefore could not make a reasoned assessment that she could safely proceed. Given these, she had an obligation to watch the approaching car until she could make a determination of its speed and whether it was slowing prior to starting out or continuing to cross. Because Ms. Parmar has no memory of the accident after she left the curb, there is no direct evidence of whether she did watch Mr. Rink. However, I have concluded she did not. Had she been watching Mr. Rink's car, she would have seen that it was not slowing and she would have and could have either not entered the crosswalk or stopped crossing in time to avoid the accident. I accept Mr. Ising's opinions on Ms. Parmar's ability to see and react to Mr. Rink's vehicle. His opinions with respect to Ms. Parmar's ability to avoid the accident were not undermined in cross-examination. I find that Mr. Rink has established the three criteria for contributory ***negligence*** as set out in *Suedat* at para. 18.

**39**  This case is distinguishable from those cited by Mr. Parmar's counsel where no contributory ***negligence*** was found. In *Cairney*, the pedestrian looked and saw the driver slowing and reasonably concluded that the driver saw him. In *Suedat* and *Guitierrez*, the plaintiffs were proceeding on a walk signal in a marked sidewalk and were hit by a left turning driver. In *Farand*, the plaintiff was walking in a marked crosswalk in midday in good weather. In *William*, the plaintiff was walking in a marked crosswalk in midday in good weather and hit by a left turning car that had previously been observed when it was stopped. The cases cited by Mr. Rink are also distinguishable, but I find the comments in *Bell* and *Olson*, where contributory ***negligence*** was found, to be applicable. In *Bell* at para. 36 the Court stated:

The plaintiff has not satisfactorily explained why he did not see an approaching vehicle with its headlights illuminated that was there to be seen. It was a dark rainy night. He was dressed in dark clothing. He was crossing a through street at an unmarked uncontrolled intersection. A bus had just passed in front of him, indicating the presence of traffic. Mr. Bell left a place of safety and stepped out into the unmarked crosswalk at the intersection, wearing dark clothing on a dark rainy night, without checking adequately or at all to see that there was no oncoming traffic from his left. There is no other available conclusion, given that the Thorner vehicle, headlights on, was there to be seen, approaching on the roadway. Mr. Bell should have been aware that it would be difficult for a driver on such a night to see a person dressed in dark clothing. It seems obvious that he did not take reasonable care for his own safety. I find that Mr. Bell was contributorily negligent.

[Emphasis added.]

**40**  In *Olson* at para. 114, the Court stated:

For her part, the plaintiff saw the defendant's vehicle when it was about three car lengths from the roundabout as it approached from her right on Nelson Street. Ms. Olson was not able to estimate the speed of Ms. Farran's vehicle at that point. Without some sense of the speed of the defendant's vehicle, which was only three car lengths from the roundabout when she observed it, Ms. Olson was in no position to make a reasonable assessment of whether she was putting her own safety at risk before she stepped into the crosswalk. The plaintiff was also engaged in a conversation with her mother, which continued until she was struck by the defendant's vehicle. I find it is more probable than not that Ms. Olson was distracted by her telephone conversation. After she left the curb she was unaware of the location of the defendant's vehicle until a moment before it struck her.

[Emphasis added.]

***Apportionment***

**41**  Section 1(1) of the ***Negligence*** *Act*, *R.S.B.C. 1996, c. 333* requires that apportionment be based on "the degree to which each person was at fault". The analysis is not based on degrees of causation. Fault refers to blameworthiness. The court considers the risks the two parties' respective conduct created, the effect and potential effect of that risk, and the extent to which each party departed from the standard of care: *Cempel v. Harrison Hot Springs Hotel Ltd*. [*(1997), 43 B.C.L.R. (3d) 219*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JBM1-M2CY-00000-00&context=) (C.A.) at paras. 19 and 24.

**42**  I find that Mr. Rink created a more significant risk than that of Ms. Parmar. I find that his failure to see Ms. Parmar's daughter at all, and seeing Ms. Parmar and her son only a split second prior to the accident indicates a significant and greater departure from the standard of care than that of Ms. Parmar. I find Mr. Rink 75% responsible and Ms. Parmar 25% responsible for the accident.

**Damages**

**Ms. Parmar's evidence**

**43**  Ms. Parmar was 41 years old at the time of the accident. She was born and grew up in India, graduated high school there, and immigrated to Canada with her family in 1996 when she was 21 years old. Because she did not speak English she worked as a labourer on farms, in nurseries and in canneries. She took English classes in 1997 and 1998. She and Mr. Parmar were married in early 2000 in India. Ms. Parmar returned to Canada and worked seven days a week at a nursery and at a hotel as a housekeeper while she waited for her husband to arrive in Canada. Mr. Parmar immigrated in early 2001. Ms. Parmar worked hard that year to save money so that she could put her husband through college when he arrived. After he arrived she continued to work seven days a week until their first child was born. They have three children, born in 2002, 2004 and 2008. After her first maternity leave she worked part time on the weekends at a hotel as a housekeeper. However, her husband started working seven days a week, and they decided she should stay at home while the children were growing up. She had stopped working outside the home by the time her second child was born. When her youngest child was three or four years old, she returned to seasonal work in the summer months, working long days picking berries. Up until the accident there was a traditional division of household work. Ms. Parmar looked after the inside of the home, did all of the cooking and cleaning, and took care of the children, taking them to all of their activities. Mr. Parmar did yard work and worked seven days a week. He is now an insurance broker.

**44**  Ms. Parmar returned to full-time employment in March 2015 in a nursery. She and her husband had discussed that their children were growing up and their oldest daughter would get her driver's licence in two years. The work at the nursery ended in July 2015. She then worked for the remainder of July and August in a cannery and another nursery. She stopped working in August 2015.

**45**  In June 2015, she and her husband decided they should have their own business, and started Magic Touch Cleaners ("Magic Touch"), a commercial home, retail, and office cleaning business. They thought this would fit well with Ms. Parmar's housekeeping experience and provide flexibility so she could still look after the children. Ms. Parmar wanted to save money for the children's higher education and pay their mortgage. She did not work at Magic Touch initially because she was then working at a nursery. Magic Touch had three part-time employees as it was just starting to do business and was getting contracts. When her work at the nursery finished in August 2015, she was told by her husband not to look for other work because the Magic Touch work would grow. They didn't feel they could lay off their existing employees.

**46**  She started working for Magic Touch on December 1, 2015. The work of the company had increased by that point. She was paid $15 per hour, worked an average of 40 hours per week, and worked 17 straight shifts until the date of the accident. She was supervising as well as cleaning. Her duties included picking up and dropping off the workers at job sites, high and low dusting, baseboard cleaning, taking the garbage out, and vacuuming with a vacuum that is carried on the shoulders. She planned to continue working with Magic Touch as long as she was able to work.

**47**  Ms. Parmar and her family live in a home in Abbotsford. Her father-in-law lives with them, and a nephew has moved in with them since the accident.

**48**  Ms. Parmar described her physical injuries as a broken left wrist, a broken left shoulder, stitches to the left side of her head, a broken right leg in two places requiring two surgeries, and scratches to her left knee, nose and eyebrow. She said her back hurts constantly, her neck and both shoulders hurt and she forgets "a lot of things". She gave examples that she forgets to put salt on vegetables, and to take medication, and what to buy when shopping. She has to put reminders of appointments in her phone calendar.

**49**  Ms. Parmar was in hospital for seven days. When she went home, she stayed in the bottom floor of her house as she was unable to walk or move without assistance. She had to keep her leg straight for six weeks. Her son was upstairs in the house. She was not able to see him often as he had also suffered a fracture to his leg and it was difficult for him to move within the house. Care aides came to the house to assist her with personal care, to do housework and to prepare dinner until June 2016. She was in a lot of pain, taking medications, and not sleeping well. She would have many visitors during the day, but was lonely at night. She had to have a sponge bath only for six weeks. She described the embarrassment of requiring personal care by aides and her daughter. She had to use a wheelchair for four months, a walker for 1.5 months, and a cane for three weeks. Her mood was very bad from December 2015 to June 2016. She was angry and crying, she saw everyone else was independent, and she asked herself why this had happened to her.

**50**  She described her current condition. Her ankle hurts. Socks bother her. She only wears running shoes. Her right leg hurts. Her right knee was painful, but recently her left knee is starting to become painful because she is putting more weight on it. She cannot kneel. If she has to get items from a bottom cupboard she has to sit on a stool. She cannot stand more than 10-15 minutes or walk more than 20-25 minutes. She can only sit without support for five minutes. She uses a heating pad when sitting and sleeping. She puts a pillow between her legs to sleep. Her neck is painful all the time. She cannot turn her neck much to the side, although it is getting better. She started driving after nine months. She can't drive long periods of time and only drives locally.

**51**  She feels angry and frustrated and cries without reason. If the children are fighting she gets frustrated. If music is too loud she gets a headache. When she tries to read she gets a headache. She is sad because she is in constant pain and worries when she will ever be normal again. She is sad she has missed events like field trips with her children. Her doctor suggested medicine for depression but she declined. Her doctor then sent her to counselling, which was not helpful. She went back to her doctor, and now she takes anti-depressants.

**52**  She did physiotherapy at home until June 2016. She continued physiotherapy and exercises at her gym until October 2016. She went to India for three weeks in November 2016. She took other physiotherapy after that. She tried massage and acupressure. She continues to exercise at her gym. She has tried injections into her shoulder and neck and they have not helped. She takes Advil almost every day for pain and headache and a muscle relaxant and an anti-depressant. She also has an ointment for her shoulders and knees which stops the pain for about 15 minutes.

**53**  Previously she did everything around the house. Now she is not able to do everything, and what she does, she does slowly and she takes a lot of breaks. Her children do some cleaning as they have grown older, but for deep cleaning, she has employees from Magic Touch come every four to five months.

**54**  She tried to return to work at Magic Touch in September 2017. An occupational therapist was involved. She tried for three months but could not do it. She was only able to sweep and mop floors and take the garbage out. She could not do low or high dusting. She could not carry the vacuum on her back. She only worked two hour shifts and had to take breaks.

**55**  A vocational rehabilitation consultant, Mr. Dhaliwal, was then hired to assist her after her attempt to return to work at Magic Touch. She was asked to apply for a job at a thrift store. She started in April 2018 and worked two hours twice per week from April to June 2018. She could not do the job because there was a lot of standing and walking. She was then asked to apply to work at a dollar store. She worked there as a cashier for two hour shifts two times per week. After one hour, her leg started to ache. Her shoulders hurt a lot. She was given a chair to sit on, but then could not open the till. She was forgetful on the till and forgot to charge for grocery bags. She was told she was not cheerful enough. She would massage her shoulders and customers would look at her. She now volunteers once a week for two hours stocking small boxes. She takes a break every hour. The manager will only accept her as a volunteer and not as a paid employee as she cannot complete four hour shifts.

**56**  Her injuries have affected her social life. She vacations, shops and visits other people less often. Her husband sometimes gets upset he has to go to events alone. She does not want to go to parties because of the noise and she has to dress up and she is not able to wear heels. She does not take the children out as much. She has low interest in activities.

**57**  Her relationship with her children and husband has been affected, but they understand she is injured. Her husband is supportive and tries to encourage her and tell her the injuries could have been worse.

**58**  In cross-examination she agreed she did not do regular exercise or recreational activities prior to the accident other than walking with her children. She now drives her youngest to school and takes the children to activities but her husband does that as well. She now goes to the gym three to four times per week, and walks in the summer. She cooks and does chores in the house, but takes frequent breaks. If she shops with the children, she sits or takes breaks.

**59**  All of her children speak English, and she hears them speak English, but they speak Punjabi to her. She attends parent-teacher interviews which are conducted in English. She uses English when shopping and in her volunteer roles. She watches English television with her children. She has not explored taking English courses to improve her English. She agreed it was important for her to do this if she wants to find a wider range of jobs.

**60**  Her tax returns show the following income:

1. 2013: $9,897 for seasonal or hotel work, plus EI of $2,674;
2. 2014: $8,043 for seasonal work, plus EI of $4,346; and
3. 2015: $11,853 for seasonal work, plus EI of $5,461, plus $1,622 from Magic Touch.

**61**  She agreed her pattern of work was to work in the summer and not in the autumn, and that was consistent with what took place in 2015 even after she and her husband started Magic Touch. A December 18, 2015 consultation report from the hospital record was put to her where she is described as "currently laid off from working in a nursery". She does not recall the consultation or saying that. She was being given medication at the time. As she did not adopt the statement it is not admissible for the truth. Further, it is not established that the statement is a prior inconsistent statement as the source of the information was not proved.

**62**  With respect to her evidence that she worked every day from December 1-17, a total of 104 hours, she agreed the only document she has is a Statement of Earnings from Magic Touch, which was issued on December 31, 2015, after the accident. She noted down the hours she worked but did not keep a time sheet. She does not know where she put the piece of paper. She denied the suggestion that she did not work those 104 hours. She denied this was simply a way of income splitting. She denied this was a way of establishing that she was working full-time to make a wage loss claim. She planned to work full time every single day for Magic Touch. With respect to her duties, she denied that once the business was established, she would only supervise or that she would work part time. She wanted to do the cleaning and owners have to work alongside the employees.

**63**  She agreed she wanted flexibility with their own business so she could take the children to activities. She agreed she would not be doing seasonal work if she was working for Magic Touch. She also agreed that at the time they started Magic Touch, her oldest child was only 13 years old and would not be eligible to drive for another three years.

**64**  When she tried to return to work at Magic Touch she could do dusting at arm level but not low or high dusting. She used a pole for high dusting, but her shoulder hurt. She did not try modified equipment. She discussed the situation with her husband and neither of them could come up with anything she could do in the business. She is a part owner of the business but when she tried to return to work at Magic Touch she did not try driving the workers or doing just supervising. In each role she has to clean and she can't do just paperwork. She agreed she can speak to people and see what they are doing. She said she cannot drive the employees. She feels she cannot lay off the woman who is working now as a supervisor.

**65**  She has never spoken to anyone about working in a job where she could speak Punjabi. She has not spoken to anyone she knows about a possible job; she said "no one helped me". She agreed her husband's business as an insurance broker is doing well. She is happy to be at home as it is important to her to spend time with her children, but she is not happy she is not working.

**66**  As for her psychological difficulties, she tried one Punjabi speaking counsellor, and went for eight sessions, but they were not helpful. Her doctor told her there were no other Punjabi speaking counsellors. She did not try to find one herself. She declined taking antidepressants in January 2018. When she eventually agreed to take them in September 2018, she was only taking them once per week rather than every day as prescribed. She said she would fall asleep. She spoke to her doctor who changed the medications. She does not recall if she took those regularly, but said she tried two or three medications. She agreed she did not always take them as prescribed.

**Mr. Parmar's evidence**

**67**  Mr. Parmar gave evidence through an interpreter.

**68**  He is an independent insurance broker. He gave similar evidence to Ms. Parmar with respect to her work history, their plan that when the children were young one of them would stay home with the children and when the children were grown up both of them would work, and their decision to start Magic Touch. By 2015 the oldest was 13 years old and the children had started to take care of themselves.

**69**  Currently, Magic Touch has 15 employees, ten full-time, and others as needed. There are two supervisors who pick up and drop off workers and make sure the work is being done. The supervisors do cleaning work as well. He occasionally has to do supervision and also does the cleaning. The employee who took over Ms. Parmar's job is still with Magic Touch and last year became a part owner. She is paid $3000 per month and if she does extra work, gets further pay of $700 to $800, and shares in the profit. The other supervisor is paid $20.50 per hour. The cleaners are paid minimum wage. Since 2016, employees of Magic Touch have health, dental and other benefits, but no details of how this is funded were given.

**70**  Each month, Magic Touch employees provide Mr. Parmar with the number of hours worked and he gives this to an accountant who writes cheques. Magic Touch doesn't record hours of employees. They trust their workers.

**71**  The only record of the hours Ms. Parmar worked is the Statement of Earnings produced by the accountant after the accident. He denied the Statement of Earnings was for the purpose of income splitting; he said they would have started earlier if that was the case. He denied Ms. Parmar simply helped out Magic Touch in December 2015. He said there was more work to do because they obtained more contracts. The plan was for Ms. Parmar to work seven days per week and to look after Magic Touch. Now he does it. He also takes the children to activities out of town and does more work around the house such as getting groceries. He said he works from home and goes out to meet clients. When Ms. Parmar returned to full time work in March 2015 he was able to take over some of the driving of the children to activities as he works from home.

**72**  He gave evidence of Ms. Parmar's injuries and said her mood is mostly low and when she is stressed she fights with the children and him.

**73**  He agreed he has learned English. They speak Punjabi at home.

**Expert reports**

***Dr. Tony Giantomaso, physiatrist***

**74**  Dr. Giantomaso's report was filed by Ms. Parmar. Mr. Rink's counsel did not require him for cross-examination. He assessed Ms. Parmar on one occasion on July 25, 2018 in the company of an interpreter.

**75**  Dr. Giantomaso concludes Ms. Parmar has suffered the following physical injuries:

1. Mild traumatic brain injury (concussive force through the body or head, reported loss of consciousness or alteration of consciousness, no reported GCS less than 15, normal CT head). No significant sequelae of brain injury;
2. Left temperoparietal scalp laceration requiring stitches. Resolved.
3. Post-traumatic right tibia and fibula segmental displaced fracture requiring open reduction and internal fixation by Dr. Rose. Followed by hardware removal of proximal screw, again by Dr. Rose. Ongoing proximal medial tibial pain.
4. Left comminuted clavicle fracture managed nonoperatively. Mild ongoing left shoulder pain.
5. Left distal radial styloid fracture managed nonoperatively. No issues.
6. Post-traumatic cervical sprain-strain injury consistent with a WAD-II injury. Chronic.
7. Post-traumatic thoracic sprain-strain injury grade 1-2. Chronic.
8. Post-traumatic lumbar sprain-strain injury grade 1-2. Chronic.

**76**  In addition, Dr. Giantomaso, diagnoses the following which he says is outside the scope of his speciality but possibly related to the accident:

1. Decreased mood and increased fatigue and anxiety post-trauma.

**77**  He recommends: an active rehabilitation program of at least 16 to 24 sessions; a referral to a psychologist or psychiatrist to address coping with chronic pain, mood and anxiety issues; consideration of trigger point injections, Botox or cortisone injections if conservative therapies fail; and medications for treatment of pain. He opined passive therapies such as massage, chiropractic, and acupuncture are unlikely to affect prognosis but may be helpful in maintaining the ability to do household work and if she returns to competitive employment.

**78**  In Dr. Giantomaso's opinion, it is unlikely Ms. Parmar will be able to return to work in a janitorial, berry-picking, or similar job. It is possible she could work very part time at these jobs, but this would likely increase her pain and she would require work accommodations. He notes Ms. Parmar is only 44 years old and otherwise in good health apart from her orthopaedic and musculoskeletal injuries. She seems to have "fairly reasonable English language skills". He opines that retraining in a vocation that requires light to sedentary work could be helpful and strongly recommends a vocational assessment to determine areas of further study or training.

**79**  As for prognosis, Dr. Giantomaso opines that "she will likely continue to have chronic pain to some degree long-term", but by following his recommendations she may experience less pain and increased function. However, this should be considered part of a long-term pain management strategy and not necessarily curative.

**80**  He summarizes:

...Essentially, prolonged standing, squatting, reaching or repetitive flexion-extension maneuvers and walking can cause right lower leg pain and left shoulder pain as well as some spinal soft tissue pain. Although she can perform most life activities, in my opinion, her tolerance and capacity for these activities have significantly declined post-trauma.

As mentioned, hopefully further rehabilitation, pain control, as well as retraining can return her to the workforce in some capacity. However in my opinion, she is unlikely to return to work competitively in her previous vocations and will likely have some limitations in her ability to perform housework compared to pre-accident levels in the future.

***Dr. Manoj Bhargava, orthopaedic surgeon***

**81**  Dr. Bhargava's report was filed by Ms. Parmar. Mr. Rink's counsel did not require him for cross-examination. He assessed Ms. Parmar on one occasion on July 12, 2018 in the company of an interpreter.

**82**  Dr. Bhargava opines there is no evidence of ongoing orthopaedic impairment that would limit her ability to return to her work as a cleaner or carry out household tasks. Range of motion and other special testing of the neck, lower back, right knee and ankle, and left shoulder were all normal. However, there was tenderness to palpation over the soft tissues of the lumbar spine. Dr. Bhargava states that despite the lack of orthopaedic impairments, there is evidence of ongoing significant functional limitations related primarily to a suspected chronic pain condition. Ms. Parmar reports ongoing concerns of depression, anxiety and irritability since the accident. Dr. Bhargava opines these may be contributing to perpetuation of her symptoms but defers to a specialist. In Dr. Bhargava's opinion, the functional limitations limit Ms. Parmar's ability to engage in her previous employment and household duties, the limitations will likely continue for the foreseeable future and are likely permanent at this point. He defers definitive comment to a chronic pain specialist.

**83**  Dr. Bhargava recommends that her suspected chronic pain condition receive further evaluation and management at a comprehensive interdisciplinary program. He states:

...Given the time elapsed since the subject incident, the nature of her traumatic injuries, and her self-reported functional limitations, my prognosis for a complete recovery is guarded at this point.

***Dr. Michael Tseng, psychiatrist***

**84**  Dr. Tseng's report was filed by Ms. Parmar. Mr. Rink's counsel did not require Dr. Tseng for cross-examination. He assessed Ms. Parmar on one occasion on July 13, 2018 in the company of an interpreter.

**85**  Dr. Tseng opines that as a result of the accident, Ms. Parmar has an adjustment disorder with depressed mood. Her prognosis is dependent on her ongoing physical symptoms. Given that she continues to experience pain 2.5 years after the accident, it is likely that the pain and her associated psychological symptoms will also persist. He recommends 12 to 16 sessions of cognitive behavioural therapy to focus on developing techniques to deal with chronic pain. Dr. Tseng did not formally test memory and cognition but commented they seemed grossly intact.

**86**  As for ability to work, Dr. Tseng opines that from a psychiatric point of view, Ms. Parmar's psychological symptoms do not interfere with her overall functioning, including work, activities of daily living, recreational, social or household activities. From a psychiatric viewpoint, she does not have a vocational disability at present.

***Dr. Donald Cameron, neurologist***

**87**  Dr. Cameron's report was filed by Ms. Parmar. Mr. Rink did not require Dr. Cameron for cross-examination. He assessed Ms. Parmar on one occasion on October 2, 2018 in the company of an interpreter.

**88**  Dr. Cameron opines that Ms. Parmar probably suffered a mild traumatic brain injury. The "symptoms include headaches, dizziness, disturbed sleep pattern, decreased memory, decreased concentration, decreased attention span, decreased interest in socializing, decreased multi-tasking abilities, decreased ability to make decisions, irritability, mood swings, anger outbursts, phonophobia [fear of loud sounds] and decreased libido". Ms. Parmar told him these symptoms had improved but not resolved. He states it is very difficult to differentiate to what degree her ongoing cognitive complaints are due to the mild traumatic brain injury, chronic pain, or anxiety and depression. At the time of the assessment Ms. Parmar told Dr. Cameron she was no longer depressed.

**89**  Dr. Cameron opines that Ms. Parmar remains partially disabled as a result of her ongoing cognitive problems, chronic pain and anxiety. She will probably remain permanently partially disabled. She is a candidate for prophylactic pain medication and a trial of Botox injections for neck and shoulder pain and headaches.

***Dr. Farida Jan, family physician***

**90**  Dr. Jan's report of July 11, 2018 was filed by Ms. Parmar. Mr. Rink's counsel did not require Dr. Jan for cross-examination.

**91**  Dr. Jan has been Ms. Parmar's family physician since 2004. Dr. Jan outlines very briefly the course of Ms. Parmar's treatment. He first saw her following the accident on January 21, 2016 when she was in a wheelchair. He removed stitches from her scalp and prescribed pain medication. She developed low mood. Her fractures healed well and mood settled. She continues to feel pain in her right ankle and foot. She has been disabled since the accident. She is still attending programs aimed at rehabilitation and Dr. Jan did not "know exactly" when she will be able to return to her job. He opines it is too early to give any reasonable prognosis.

***Ms. Crystal Fong, occupational therapist and functional capacity evaluator***

**92**  Ms. Fong's report was filed by Ms. Parmar and she was cross-examined by Mr. Rink's counsel. Ms. Fong assessed Ms. Parmar on November 26 and 28, 2018 in the company of an interpreter.

**93**  Ms. Fong opines that Ms. Parmar is not able to competitively meet all of the job demands of a full-time janitorial service worker. Ms. Fong summarized:

Ms. Parmar was able to competitively meet her pre-MVA job demands in the areas of occasional overhead level reaching, occasional shoulder level reaching, frequent sustained waist level reaching, frequent gross dexterity (at waist level), occasional sustained kneeling, occasional repeated/sustained kneeling [sic bending], occasional repeated crouching, occasional twisting, and occasional stair climbing. Ms. Parmar was also able to competitively meet her pre-MVA job demands in the areas of light amounts of lifting between floor and waist level (10-20 lbs), sedentary amounts of lifting between waist and overhead levels (0-10 lbs), light amounts of two-handed carrying on an occasional basis, and pushing/ pulling in the lower end of the medium range (20-50 lbs).

Ms. Parmar's FCE [functional capacity evaluation] scores and clinical observations suggest that she is not presently capable of competitively meeting her pre-MVA job demands in the areas of repeated kneeling, sustained crouching, occasional balance, frequent walking, frequent standing, and one-handed carrying of up to light amounts.

It is this writer's opinion that Ms. Parmar is also not presently capable of tolerating sustained postures for a full work day. Ms. Parmar presented with decreased endurance over the course of the FCE day, requiring frequent rest breaks in order to manage her symptoms. She was observed to rely on wall/shelves for external support, particularly when completing tasks in standing. It is likely that her requirement for frequent breaks would limit her efficiency at work.

**94**  Ms. Fong opines that should Ms. Parmar obtain work within her limitations she anticipates her durability for full time work would be improved.

**95**  Ms. Fong's report contains details of the testing. Ms. Parmar performed either at or better than industrial standards for all of the tests measuring reaching, bending, twisting, stair climbing, and five minute walking, but the testing was often accompanied by indications or complaints of increased pain. She had difficulty with repeated kneeling and was unable to do sustained crouching. Ms. Parmar's balance was poor, although she reported this was worse than normal because of increased fatigue in her legs. With respect to the five minute walking test on the treadmill, Ms. Fong noted that during this test Ms. Parmar "was observed to walk at a brisk pace, with an even gait, and was able to converse with this Evaluator without obvious issues/signs of discomfort. During untested observations, not on the treadmill, Ms. Parmar appeared to walk with a slight antalgic gait, favoring her left side." Testing at the end of the day showed that Ms. Parmar's scores on the five minute walking and stair climbing tests had improved. Ms. Parmar reported that her pain was significantly exacerbated following the day of testing. Functional testing of manual dexterity of the hands showed results at or below the industrial standards. Ms. Fong found that Ms. Parmar "demonstrated the ability to perform virtually all household tasks", but with observable signs of discomfort and requiring frequent micro-breaks.

**96**  Ms. Fong's report also contains recommendations for cost of future care. Some recommendations were not prescriptive, but simply costing of all possible future treatment suggestions made by the other experts. The recommendations include an interdisciplinary pain program, various physical and passive therapies, medications Ms. Parmar is currently taking in addition to those that may be tried in the future, psychological therapy, a periodic occupational assessment, a vocational rehabilitation assessment, and regular and seasonal housecleaning services.

***Mr. Harj Dhaliwal, vocational rehabilitation consultant***

**97**  Mr. Dhaliwal's report was filed by Ms. Parmar. Mr. Rink's counsel required Mr. Dhaliwal for cross-examination. He provided Ms. Parmar with vocational services from February to 2018 to January 2019. He was not involved in Ms. Parmar's attempt to return to work at Magic Touch in the autumn of 2017.

**98**  Mr. Dhaliwal arranged for two unpaid work placements in the community. The first was a 12-week placement at a thrift shop as a retail worker. Ms. Parmar enjoyed this job and developed the skills required. However, she was not able to increase her capacity beyond two hours per shift, two days per week, as Ms. Parmar reported the job aggravated her pain, primarily in her right ankle due to walking. The placement was terminated after 12 weeks as Ms. Parmar was unable to increase her work tolerance.

**99**  Mr. Dhaliwal then arranged an unpaid placement at a dollar store as a cashier. Again, Ms. Parmar was not able to increase her work tolerance beyond 1.5 hour shifts twice per week as she reported exacerbation of pain in her neck, upper back, and right ankle. She was given a sit/stand stool and an anti-fatigue mat, but was unable to increase her work tolerance. She also complained of difficulty concentrating on the job because of pain, and had difficulty managing mood and anxiety. She expressed decreased motivation.

**100**  In January 2019, Mr. Dhaliwal administered a test that measured the ability to read, spell, and understand written English and do math. Ms. Parmar scored in the kindergarten to grade 3 level. Her level of English competency does not equip her to be presently enrolled in formal retraining. She would benefit from improving her English skills to optimize her future vocational potential.

**101**  Mr. Dhaliwal opines that without a resolution of the chronic pain and effective management of mood and cognitive challenges, Ms. Parmar will continue to be competitively unemployable in any capacity. Ms. Parmar's current level of English competency will require further language education before she is able to take any formal training for alternate employment. Mr. Dhaliwal recommends continued vocational services.

**102**  In cross-examination, Mr. Dhaliwal agreed he assumed the symptoms Ms. Parmar reported to him were true. He agreed the interviews Ms. Parmar did for the two positions were in English. He agreed the math and language testing he did was in written English. The only oral testing of language skill was in spelling. He did not do any skills testing in Punjabi. He only had Ms. Parmar try two job placements to help him assess her abilities. He knew Ms. Parmar had never trained as a cashier and did not have formal customer service training. When Ms. Parmar was at the dollar store, she told him she had decreased motivation and desire to engage. Her confidence was affected at the dollar store. She liked the job at the thrift store. With respect to Magic Touch's ability to accommodate a family member's work, he said it depends on that person's function and the constraints it places on the company.

***Mr. Curtis Peever, economist***

**103**  Mr. Peever provided two reports making various calculations on sets of assumptions for past and future loss of earning capacity, and the present value of the items listed in the cost of future care section in Ms. Fong's report.

**104**  Mr. Peever calculated the total of a past stream of income assuming Ms. Parmar would have worked full-time, 42 hours per week, initially at $15 per hour (approximately 33,000 per year), with an annual wage increase in accordance with wage inflation, without any deduction for labour market contingencies, from the date of the accident to trial. The total is $97,489, net of deductions. This assumes no residual earning capacity.

**105**  Mr. Peever calculated the present value of a stream of future wage loss based on statistical data of average full-time, full-year earnings of foreign-born B.C. females in the job classification of janitors, caretakers and building superintendents. The average wage used for 2019 was $36,847 per year. Assuming retirement at age 67, the present value without negative labour market contingencies is $689,534, and with contingencies is $611,037. Mr. Peever also calculated the present value of a stream of income of $35,000 per year until the end of 2020 and $40,000 per year until age 67. The present value is $722,170. None of these calculation include any non-wage benefits (which is estimated at 8%) or assume any residual earning capacity.

**106**  Mr. Peever calculated the present value of the future care items listed in Ms. Fong's report. The range was $131,574 to $161,486, depending on whether services were covered by the public health care plan.

***Dr. Preet Chahal, neurologist***

**107**  The only expert report filed by Mr. Rink was that of Dr. Chahal. He was not required for cross-examination by Ms. Parmar's counsel. Dr. Chahal is fluent in both English and Punjabi and was able to assess Ms. Parmar without the assistance of an interpreter. He saw her on one occasion on October 16, 2018.

**108**  Dr. Chahal opines that Ms. Parmar sustained a mild traumatic brain injury, also known as a concussion. Ms. Parmar described ongoing symptoms of headaches, cognitive symptoms including difficulty with concentration and multitasking. Dr. Chahal opines these are a result of the concussion. In his experience, patients with persistent post-concussive symptoms past 12-24 months tend to have persistent symptoms for the foreseeable future which are likely to interfere with their day to day functioning at home and at work. Should the symptoms persist, he recommends neuropsychological testing.

***Experts not called: adverse inference***

**109**  Ms. Parmar attended independent assessments with the following health care providers at the request of the defence: Dr. Brian Scarth, psychiatrist; Dr. Dina Popovic, orthopaedic surgeon; and Ms. Nina Aggarwal, occupational therapist. Mr. Rink did not tender reports from these experts. Ms. Parmar's counsel argues there should be an adverse inference that the reports are consistent with or more favourable to the defence position.

**110**  Mr. Rink's counsel advises that she produced the clinical notes of the experts who conducted assessments. She argues it was open to Ms. Parmar to have called any of the experts as witnesses and she did not do so.

**111**  Generally, an adverse inference should only be drawn against a party bearing the onus of proof on an issue: *Tan v. Mintzler*, [*2016 BCSC 1183*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K63-1M81-FCK4-G039-00000-00&context=) at para. 42. Here, the plaintiff bears the onus of proof of her injuries. Other than Dr. Chahal's report (which reaches similar conclusions to that of Dr. Cameron), Mr. Rink has not called expert evidence. As stated by Mr. Justice Sigurdson in *Reitsema v. Lammers*, [*2017 BCSC 1374*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5P75-P261-FFTT-X4BN-00000-00&context=) at para. 121, the plaintiff's "case and the extent of her injuries is not proven or enhanced by the failure of the defendant to call its own expert evidence". In the circumstances, I decline to draw any adverse inference.

**Non-pecuniary damages**

**112**  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=), Madam Justice Kirkpatrick reiterated the principals of assessing non-pecuniary damages:

[45] Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from *Lindal v. Lindal, supra*, at 637 is a helpful reminder:

Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (*Thornton* at p. 284 of S.C.R.).

[Emphasis added.]

[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:

(g) impairment of family, marital and social relationships

1. impairment of physical and mental abilities;
2. loss of lifestyle; and
3. 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=)).

**113**  Ms. Parmar was 41 years old at the time of the accident. She suffered significant physical injuries in the form of multiple fractures requiring surgeries and which caused a long period of convalescence. She also suffered sprain-strain injuries to her back. Because she had fractures in her leg, wrist and shoulder, she was rendered largely immobile for months and had to depend on others for basic self-care which caused her embarrassment. Her injuries limited her ability to get out and she felt alone. Although the fractures have healed and Dr. Bhargava states she has no orthopaedic impairments, she continues to have pain. She has developed a suspected chronic pain condition, with an adjustment disorder and anxiety. The pain limits sustained walking, standing, sitting, bending, kneeling and reaching, and affects her sleep. She occasionally appeared to have neck stiffness while in the witness stand. Although she has suffered a mild traumatic brain injury, I do not find that it is significantly disabling for her, and I accept Dr. Cameron's comments that the symptoms she reports could be from the adjustment disorder and pain as well. Ms. Parmar testified for 1.5 days and was focused throughout. Her marital and family relationships have been affected although her family is loving and supportive of her. She is unable to do all of the duties of her previous work, and is unlikely to be able to return full time to labour positions in the future. She has been able to return to doing household work, but she requires breaks. She had a sad effect while testifying. She said her "mood is very off" and she is "very angry, sad and I don't want to do anything". She told Ms. Fong, "I'm always angry. I'm never happy." Her statements are consistent with my overall impression that her mood and chronic pain are the most disabling features of her current condition.

**114**  Ms. Parmar's counsel submits that non-pecuniary damages should be in the range of $250,000 to $300,000 and cites: *Zacher v. Prescesky*, [*2019 BCSC 500*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5VVK-8581-F016-S373-00000-00&context=); *Lines v. Gordon*, [*2006 BCSC 1929*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-61K6-00000-00&context=); *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=); and *Gabor v. Boilard*, [*2015 BCSC 1724*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5H2B-YKT1-FGY5-M3ST-00000-00&context=). Mr. Rink's counsel submits non-pecuniary damages should be in the range of $100,000 to 125,000 and cites: *Kweon v. Roy*, [*2016 BCSC 2305*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5MJF-G831-JX3N-B13W-00000-00&context=); *Kim v. Lin*, [*2016 BCSC 2405*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5MJ7-NBJ1-F1WF-M26W-00000-00&context=); *Bellaisac v. Mara*, [*2015 BCSC 1247*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GJP-VFP1-FJM6-60JP-00000-00&context=); *Hill v. Murray*, [*2014 BCSC 1528*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-JSXV-G039-00000-00&context=); and *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=), aff'd on other grounds at [*2012 BCCA 128*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-62B8-00000-00&context=).

**115**  I have reviewed the cases cited by counsel. Although I must consider the individual effect of the injuries on Ms. Parmar, and how an award may provide her with solace, other decisions offer some guidance. In general, the cases cited by Ms. Parmar's counsel involve injuries that in my view involved more functionally disabling injuries, particularly brain and psychological injuries. The cases cited by Mr. Rink's counsel, while addressing chronic pain, did not involve the significant orthopaedic injuries Ms. Parmar suffered. Taking all of the evidence particular to Ms. Parmar into consideration, I assess non-pecuniary damages at $200,000.

**Past and future loss of capacity**

**116**  Ms. Parmar is entitled to be put in the position she would have been in had the accident not occurred. The test to be applied, for both past and future hypothetical events, is whether there is a real and substantial possibility that the events in question would occur. They are given weight according to their likelihood: *Rousta v. MacKay*, [*2018 BCCA 29*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5RJ8-5GM1-JP9P-G0PD-00000-00&context=) at paras. 13 -16.

**117**  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=), Mr. Justice Sewell summarized the principles for assessment of future loss of capacity:

[186] The applicable principles in assessing loss of future income earning capacity have been the subject of a number of recent decisions of our Court of Appeal. In *Parker v. Lemmon*, [*2012 BCSC 27*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1FJ-00000-00&context=), at para. 42, Savage J, as he then was, succinctly summarized the principles set out 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=):

1. A plaintiff must first prove there is a real and substantial possibility of a future event leading to an income loss before the Court will embark on an assessment of the loss;
2. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation;
3. A plaintiff may be able to prove that there is a substantial possibility of a future income loss despite having returned to his or her employment;
4. An inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss;
5. It is not the loss of earnings but rather the loss of earning capacity for which compensation must be made;
6. If the plaintiff discharges the burden of proof, then there must be quantification of that loss;
7. Two available methods of quantifying the loss are (a) an earnings approach or (b) a capital asset approach;
8. An earnings approach will be more useful when the loss is more easily measurable;
9. The capital asset approach will be more useful when the loss is not easily measurable.

[187] In *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=), the Court explained that while assessing an award for future loss of income is not purely mathematical, if available the Court should use factual mathematical anchors as a starting foundation to quantify the future loss of income.

**118**  Ms. Parmar has established that she has suffered physical injuries and the subsequent development of an adjustment disorder, depressed mood and chronic pain, which by all expert evidence has and will continue to impair her ability to work in the future, in particular in physically demanding jobs.

**119**  Ms. Parmar's counsel argues that Ms. Parmar has established a real and substantial possibility that she would have continued to work full time for Magic Touch until she was 67. Counsel points to Ms. Parmar's history of hard work, and her return to the work force as her children grew older. Counsel argues an award should be made based on the calculations made by Mr. Peever, which assumes Ms. Parmar has no residual earning capacity. Counsel says the assumptions Mr. Peever made are conservative based on what current employees are earning in comparable positions. Magic Touch is flourishing, and the earnings approach is the most appropriate method of assessment. Ms. Parmar seeks $97,489 for past loss of capacity and $722,170 for future loss of capacity.

**120**  Mr. Rink's counsel argues that the assumptions underlying Mr. Peever's calculations are not at all likely or realistic and there is no real and substantial possibility that Ms. Parmar would have returned to work full time 42 hours per week starting December 2015 until she was 67. Counsel argues that past work behavior is the best predictor of the future and that any award for income earning capacity should be based on Ms. Parmar continuing to work part time. Counsel points to Ms. Parmar's history of working seasonally and argues that Mr. and Ms. Parmar's evidence that Ms. Parmar did not go to work for Magic Touch in September 2015 because they had already hired employees does not make sense. They knew when they started the business in June that Ms. Parmar's work was seasonal and would end in August. Ms. Parmar had only worked for Magic Touch from December 1-17, 2015 when the accident took place. It is too speculative to say that Ms. Parmar would have continued to work at that pace going forward every day, full time, when this was her first attempt at full time work with three children then aged 7, 11 and 13. As Ms. Parmar was 100% responsible for the children and the household, it is likely she would not have returned to work full time. Further, it is unlikely Ms. Parmar would have worked even to age 65 given the physical nature of the work. Counsel argues Ms. Parmar's loss of capacity should be based on income for the three years prior to the accident less some amount for negative contingencies. The average is $13,000 per year. Mr. Rink's counsel submits that past wage loss should be $35,000. Counsel submits that future wage loss should be $175,000, which is a loss of $8,000 to $10,000 per year for 15-20 years.

**121**  In this case, there is no lengthy established history of full time work, but Ms. Parmar and her husband say they had just started to fulfil this plan. There is uncontroverted evidence of the establishment of Magic Touch six months prior to the accident. However, Ms. Parmar started work for Magic Touch only two weeks prior to the accident, after years of having either no or a small amount of part-time seasonal work outside the summer months. The same pattern of work took place in the autumn of 2015. Mr. and Ms. Parmar explained that Ms. Parmar did not work in Magic Touch during the autumn of 2015 as the business was just starting and they did not want to lay off existing employees.

**122**  What is absent is the lack of any contemporaneous documents or evidence from other witnesses who might have either confirmed Ms. Parmar's evidence or supported Mr. Rink's contention. Magic Touch has the odd practice of not requiring or recording hours of their employees. No documents were filed in evidence of payroll records, work records, or contracts. Such documents would be expected to confirm or refute whether employees were away, whether work had increased, or to show jobs that were done. The only document is a summary Statement of Earnings for Ms. Parmar issued after the accident. In addition to the lack of documentary evidence, no employees of Magic Touch testified.

**123**  Despite the lack of any corroborating documents, I accept Ms. Parmar's evidence that she worked for 17 days for Magic Touch in December 2015. I also accept it was Mr. and Ms. Parmar's plan to have Ms. Parmar work at Magic Touch. That plan makes sense given her work experience, and Mr. Parmar's commitment to his own career. The issue is to what extent and when that would have taken place. Given the history of Ms. Parmar's work pattern, I do not accept nor do I find there is a real and substantial possibility that Ms. Parmar would have worked full time, seven days a week from December 2015 until she was no longer able to do so, or until age 67 as submitted by her counsel. While I find Ms. Parmar worked for two weeks leading up to the accident, I do not find there was a real and substantial possibility that she would have maintained this level of work in the next few years given her responsibilities for the household and her children's activities. However, I do find there is a real and substantial possibility that she would have returned to full time work when her youngest child was older, likely by the time he was 13 years old in 2021. This is consistent with the division of the workload in the household, and with Mr. and Ms. Parmar's plans for one of them to be at home with the children until they were grown up, and consistent with Ms. Parmar's strong work ethic. Contrary to Ms. Parmar's evidence, in December 2015, her oldest child was at least four, not two years away from obtaining a full driver's licence, and this is another reason I do not find she would have immediately returned to full time work during the school year. Until her youngest child was older, I find there is a real and substantial possibility that she would have continued to do part-time work or occasional very short periods of full time work for Magic Touch.

**124**  As for Ms. Parmar's residual capacity for work in the future, I find Dr. Giantomaso's report the most helpful as he practices in the areas of treatment and management of chronic neck, back and extremity pain, headache and brain injury. The other expert opinions were of assistance but addressed discreet areas. Dr. Giantomaso opines that although Ms. Parmar will always have some pain, this may be improved with further treatment. He recommends retraining for a vocation that does not require physical labour, and only requires sedentary to light work.

**125**  I find there is a real and substantial possibility that with further physical treatment to address her pain, and with further psychological or psychiatric treatment to address her anger and mood, her symptoms will improve, although not completely resolve. While Mr. Rink's counsel concedes that Ms. Parmar's actions have not reached the level of failure to mitigate, she could do more. She has not fully explored counselling to improve her ability to cope with her mood and pain. She initially declined to take anti-depressant medication, and when she eventually did, took in incorrectly.

**126**  As for any residual earning capacity, I also find that there is a real and substantial possibility that Ms. Parmar will be able to return to the workforce, either with training in a sedentary to light position, or if she improves enough, possibly with Magic Touch in a supervisory capacity. I consider the latter possibility less likely as Mr. and Ms. Parmar say that supervisors must do cleaning work as well, but as the business grows, I do not rule out the possibility that their may be some lighter position or solely supervisory work she can do. Although Ms. Parmar cannot competitively meet all of the duties of a cleaner, it is clear from the functional testing carried out by Ms. Fong that she is not completely disabled from any work. Ms. Parmar scored at or above the industrial standard and was competitive on almost all physical testing, albeit with some pain. This is consistent with Ms. Parmar's strong work ethic. While Ms. Parmar does not have a complete command of English, she can take courses or simply converse at home in English to improve her skills. There appears to have been almost no consideration of other occupations she might do. Ms. Parmar has made no attempt to look for work outside Magic Touch other than the two voluntary positions she was asked to apply for by Mr. Dhaliwal. There was no evidence of testing for interests or aptitudes, nor any inquiry into other jobs for which she could be retrained. The expressed decreased motivation to do the second job. I do not consider the academic testing carried out by Mr. Dhaliwal to be a reflection of Ms. Parmar's ability, as the testing was almost all based on written as opposed to oral English. It was evident in cross-examination of Mr. Dhaliwal that his opinion of Ms. Parmar's capacity is based on a view of Ms. Parmar's physical and cognitive complaints and prognosis that is more negative than what the functional testing, and examination by medical experts showed.

**127**  Although assessment of past and future work capacity is not a mathematical calculation, I have used the multipliers in Mr. Peever's report as a starting point. I find there is a real and substantial possibility that Ms. Parmar:

1. would have worked for Magic Touch part-time (but at greater hours than seasonal work) until her youngest was older, likely 13 years old. I find a reasonable estimate, taking into account the flexibility she desired and her responsibilities at home is $20,000 per year until 2020. This is about $5,000 more than she earned in 2015;
2. would have proceeded to work full time starting in 2021 at approximately $40,000 per year until age 65; and
3. has a residual earning capacity by pursuing treatment, training, and upgrading her English language skills to work in a more sedentary to light job, or less likely if she improves enough, through limited work that she might be able to do with Magic Touch. Given that she will likely always have some persistent pain I find a reasonable residual capacity income is $15,000 per year starting in 2021. This equates to approximately half time work at what the minimum wage will be in 2021.

**128**  I have considered other potential real and substantial possibilities, which would both increase and decrease an award for lost capacity. For example, that due to the physical nature of the work at Magic Touch, that Ms. Parmar may have retired earlier than 65, or she may have made more than $40,000. Similarly, that her residual capacity for work may be more or less. I have also considered the overall fairness and reasonableness of an award.

**129**  I assess past loss of capacity to the date of trial in the amount of $20,000 gross per year, which equates to $66,660. After deducting 7.4% as the approximate amount of taxes and EI premiums (which I have based on her 2015 tax return), the total is approximately $62,000, and I award that amount. Taking all of the factors above into account, and weighting them according to likelihood, and using the multipliers in Mr. Peever's tables, I assess loss of future capacity in the amount of $425,000. I have considered the overall fairness and reasonableness of the award.

**Cost of future care**

**130**  In *Woelders v. Gaudette*, [*2016 BCSC 1066*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K27-9R71-JWBS-63Y8-00000-00&context=), Madam Justice Balance summarized the principles applicable to the assessment of future care:

[159] Damages for the cost of future care are meant to compensate for the financial loss to be reasonably incurred by an injured plaintiff to sustain or promote his or her mental and physical health: *Bystedt v. Hay*, [*2001 BCSC 1735*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JSC5-M4GD-00000-00&context=), aff'd [*2004 BCCA 124*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S3NW-00000-00&context=); *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 para. 30 [*Gignac*]. The claimed services and items must be medically justified. Being medically justified is not synonymous with the more stringent requirement of being medically necessary: *Aberdeen v. Township of Langley, Zanatta, Cassels*, [*2007 BCSC 993*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21XT-00000-00&context=) at para. 198, rev'd on other grounds *Aberdeen v. Zanatta*, [*2008 BCCA 420*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3RY-00000-00&context=); *Chow v. Nolan*, [*2013 BCSC 1383*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JCRC-B268-00000-00&context=) at para. 71: *Lane v. Pedersen*, [*2014 BCSC 1302*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B16R-00000-00&context=) at para. 397.

[160] Recommendations made by physicians and other health care professionals such as an occupational therapist, are relevant in determining whether an item or service is medically justified: *Gregory* at para. 38; *Jacobsen v. Nike Canada Ltd*. [*(1996), 19 B.C.L.R. (3d) 63*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G26C-00000-00&context=) (S.C.), quoted with approval in *Gregory* at para. 38. However, to successfully advance a future cost of care claim it is not necessary that the health care provider testify to the medical justification of each and every item of care being claimed. What is required is some evidentiary link between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional: *Gregory* at para. 39; *Gignac* at paras. 31-32. General contingencies and those specific to the plaintiff are to be taken into account where and as appropriate: *Gignac* at para. 52. The amount of the award is necessarily affected by the nature of the future care and its anticipated duration.

[161] The standard of proof for an award for future care is the determination of the real and substantial future possibilities: *Anderson v. Rizzardo*, [*2015 BCSC 2349*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HR4-FPP1-JG02-S2B3-00000-00&context=) at para. 209.

**131**  Ms. Parmar seeks the future care costs recommended by Ms. Fong, but concedes exclusions for chiropractic, acupuncture, a number of medications, an occupational ergonomic assessment, an equipment allowance for work, and a vocational rehabilitation assessment. I find the recommendations for medical care and therapy reasonable and justified by the expert reports.

**132**  Even though housekeeping is not a medical expense, I find the recommendations for housekeeping assistance are reasonable as a reflection of Ms. Parmar's current lost housekeeping capacity. However, I find there is a real and substantial possibility that her capacity will increase over time, and therefore the award should be reduced. In my view, there is no need to pay for private medical care. Mr. Peever has also included medication costs for life and I'm not persuaded there is a real and substantial possibility all of the medications will be required for that length of time. Ms. Fong has costed a rehabilitation program, plus physical therapy, plus the interdisciplinary chronic pain management program. There is likely some duplication in those recommendations from different experts, and I have therefore decreased the amount. Despite Ms. Parmar's concession that vocational rehabilitation services will not be required in the future, I find they will be as I find Ms. Parmar has a residual capacity to work. Taking all of these into account, I assess Ms. Parmar's cost of future care at $70,000.

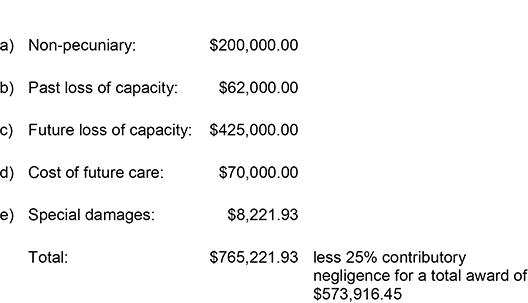
**Special damages**

**133**  The parties agree that special damages are $8,221.93.

**Summary of Disposition**

**134**  Liability for the accident is assessed at 75% to Mr. Rink and 25% to Ms. Parmar.

**135**  I assess damages as follows:



**136**  If the parties do not agree on costs they may make arrangements to appear before me through trial scheduling.

B.J. NORELL J.

**End of Document**

[***Poirier v. Aubrey, [2010] B.C.J. No. 92***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-2563-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

A.M. Stewart J.

Heard: December 7-11 and 14-18, 2009.

Judgment: January 20, 2010.

Docket: M075032

Registry: Vancouver

**[2010] B.C.J. No. 92** | 2010 BCSC 75 | 4 B.C.L.R. (5th) 158 | 185 A.C.W.S. (3d) 97 | 2010 CarswellBC 114

Between Laurie Poirier, Plaintiff, and Fenton W. Aubrey, WS Leasing Ltd. and Canadian Car and Truck Rental Ltd., Defendants

(46 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Body injuries — Back and spine — Neck — Fibromyalgia or chronic pain — Action by motorist for damages for *negligence* arising out of a motor vehicle accident allowed — Plaintiff rear-ended by defendant while stopped in line of traffic — As a result of accident, plaintiff suffered soft tissue damage to neck and upper back, which developed into chronic pain — Plaintiff entitled to global award of $223,504 comprised of $60,000 in non-pecuniary damages, $38,000 for past loss of income earning capacity, $100,000 for loss of future earning capacity, $10,503 in special damages and $15,000 in costs of future care for medications and therapy.**

**Damages — Types of damages — General damages — For personal injuries — Cost of future care — Loss of earning capacity — Special damages — Past loss of income — Expenditures and expenses — Non-pecuniary loss — Action by motorist for damages for *negligence* arising out of a motor vehicle accident allowed — Plaintiff rear-ended by defendant while stopped in line of traffic — As a result of accident, plaintiff suffered soft tissue damage to neck and upper back, which developed into chronic pain — Plaintiff entitled to global award of $223,504 comprised of $60,000 in non-pecuniary damages, $38,000 for past loss of income earning capacity, $100,000 for loss of future earning capacity, $10,503 in special damages and $15,000 in costs of future care for medications and therapy.**

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| Action by a motorist for damages for ***negligence*** arising out of a motor vehicle accident. The plaintiff's vehicle was stopped in a line of traffic when she was hit from behind. As a result of the accident, the plaintiff suffered soft tissue injuries to her neck and upper back and other minor injuries including an injury to her knee. The plaintiff's pain and discomfort from her injuries had been constant, persistent and continuing, such that it had been classified as chronic pain or fibromyalgia. Prior to the accident, the plaintiff was in good health. At the time of the accident, in September 2006, she was employed as an insurance adjuster. After the accident, she took approximately six weeks off work, then returned to work half-time for approximately two months, and finally returned to full-time work. She took an additional two months of work in the summer of 2008 and in May 2009 she stopped working completely. The plaintiff had an active social life prior to the accident, and enjoyed camping, hiking and kayaking. She equally shared the household chores with her husband, from whom she had since separated. However, as a result of her injuries, the plaintiff was no longer able to work as an insurance adjuster and her social activities had been severally curtailed. The plaintiff's prognosis was guarded. The defendants conceded that as a result of the accident, the plaintiff suffered soft tissue injuries to her neck and upper back, but did not concede that the accident was a materially contributing cause to the plaintiff's regional pain condition or fibromyalgia.  HELD: Action allowed.  As a result of the accident, the plaintiff suffered soft tissues damage to her neck and upper back which developed into chronic pain. Given the level of pain and discomfort the plaintiff had endured and the significant impact it had on her life, she was entitled to an award of non-pecuniary damages I the amount of $60,000. As the plaintiff had taken time off work in relation to her injuries, she was entitled to past loss of income earning capacity in the amount of $38,000. The plaintiff's capacity to earn income from all types of employment had been adversely affected, which made her less marketable and attractive as an employee, and entitled her to an award of $100,000 for loss of future earning capacity. The plaintiff was also entitled to $10,503 in special damages and $15,000 in costs of future care for medications and therapy. |

**Statutes, Regulations and Rules Cited:**

Rules of Court, Rule 40A

**Counsel**

Counsel for the Plaintiff: T. Delaney.

Counsel for the Defendants: R. Pearce, J. Suen.

**Reasons for Judgment**

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| --- |
| **A.M. STEWART J.** |

**1**   The plaintiff claims damages for ***negligence*** arising out of a motor vehicle collision which occurred on September 5, 2006 on Highway #1 near the 176 Street exit and approaching the Port Mann Bridge in the City of Surrey. The plaintiff's vehicle was struck from the rear. The defendant admits liability.

**2**  The plaintiff told me that her vehicle was stopped in a line of traffic at the material time and that her vehicle was hit "hard". No other evidence exists as to the severity of the blow. No pictures of the damaged vehicles were placed before me. There is no evidence as to the cost (if any) of repairing the vehicles.

**3**  That the plaintiff was injured as a result of the ***negligence*** of the defendants, is admitted by the defendants. (For the sake of simplicity I will refer hereafter to "the defendant".)

**4**  Paragraph two of the defendant's written submissions reads as follows:

With respect to the plaintiff's injuries resulting from the accident, the defendants concede that the plaintiff suffered soft tissue injury to her neck and upper back, but do not acknowledge that the accident was a materially contributing cause of the plaintiff's current regional pain condition, whether that condition be a regional pain condition or fibromyalgia.

I note that the plaintiff suffered additional minor injuries, such as an injury to her knee, and those injuries are not disputed and have been taken into account by me.

**5**  My task in preparing reasons for judgment at the end of a trial has been settled by the Supreme Court of Canada in a series of cases that encompasses ***R. v. Sheppard***, [*[2002] 1 S.C.R. 869*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4C6-00000-00&context=); ***R. v. Dinardo***, [*2008 SCC 24*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1C4-00000-00&context=); ***R. v. R.E.M.***, [*2008 SCC 51*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1D3-00000-00&context=); and ***R. v. H.S.B.***, [*2008 SCC 52*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B1D4-00000-00&context=). In brief, I am not to produce a form of transcript of the evidence. That is what the taping system is for: ***R. v. Yang***, [*2004 BCCA 235*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F30T-B2F4-00000-00&context=); ***R. v. McDonald***, [*2007 BCCA 224*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JNY7-X3S9-00000-00&context=), para. 7. Nor am I to articulate the "machinations of my mind": ***R. v. Jordan***, [*2004 BCCA 70*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S3J8-00000-00&context=). Instead, I must give reasons for judgment responsive to the live issue or issues and, having regard to the particular circumstances of the case, reasonably intelligible to the parties and productive of a basis for a meaningful appellate review of the correctness of my decision by an appellate court armed with the combined effect of what I say in these reasons for judgment and the record of the trial.

**6**  In ***R. v. R.E.M.***, *supra*, and ***R. v. H.S.B.***, *supra*, the Supreme Court of Canada reversed two decisions of our Court of Appeal, [*[2007] B.C.J. No. 518*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S480-00000-00&context=), [*[2007] B.C.J. No. 579*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S4BW-00000-00&context=). In doing so, the Supreme Court of Canada chose to lay to rest a number of misconceptions about the irreducible content of the duty of a judge in giving reasons after a trial. Both cases bear repeated reading, but the most comprehensive statement by the court appears in ***R. v. R.E.M.***, *supra*, at paras. 15-57. I am bound by the whole of it and have crafted my reasons for judgment in the case at bar in light of what the Supreme Court of Canada has said.

**7**  For present purposes, I choose to note only the following. The Supreme Court of Canada has stated once and for all that the need for a judge to state what he decided and why does not mean the judge must articulate how he made the decision. The "what" is the verdict and the "why" is the basis for the verdict. The judge is not required to set out every step, finding or conclusion taken, made or arrived at by him in the process of arriving at the verdict. Stating the "what" and giving the "why" against the background of the record is a matter of connecting the evidence and the law on one hand with the verdict on the other. Crucially, considering the problematic state of the law in this province prior to October 2, 2008 and the handing down by the Supreme Court of Canada of its decisions in ***R. v. R.E.M.***, *supra*, and ***R. v. H.S.B.***, *supra*, decisions by the trial court judge as to the testimonial reliability of the various witnesses need not be "justified". Interestingly, the Supreme Court of Canada had presaged that ruling in ***R. v. Lifchus***, [*[1997] 3 S.C.R. 320*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3WN-00000-00&context=) at para. 29, amended reasons irrelevant to this point given in January 1998.

**8**  The plaintiff's case is that as of September 5, 2006 she was in good health. The result for her of the defendant's ***negligence*** has been pain and discomfort that has been constant, consistent, persistent and now classified as chronic by the doctors and labelled, by some of them, "fibromyalgia". The future promises to be much like the past. The plaintiff asserts that the effect on her life of the results for her of the defendant's ***negligence*** has been devastating. She can no longer work as an insurance adjuster, a job she says she loved. Her very active life apart from work, has been severely curtailed.

**9**  The defendant's case is more nuanced. At the heart of it, the defendant asserts that the plaintiff's testimonial reliability is such that both her testimony before me and the opinions offered by the doctors called to testify on her behalf are suspect in all areas that matter. The defendant asserts that as of September 5, 2006, the plaintiff was burdened with a chronic intermittent pain condition which may have been exacerbated by the results for her of the defendant's ***negligence*** but was, and would have remained, her lot in any event.

**10**  The Rosetta Stone in the case at bar is recognition that the meaning and effect of the expert opinion evidence placed before me in writing pursuant to Rule 40A changed dramatically after the doctors testified before me. It is not a case in which the experts resiled from positions taken in their Rule 40A written statements. There was a bit of that, but not as to anything of real significance. No, what occurred here is that what I could fairly take from the evidence of the doctors only became clear as they explained to me how they had employed certain terms or exactly what lay behind their conclusions. For example, Dr. Jaworski's referring, at Exhibit 7, Page 3, to a "pre-existent pain condition" was music to the defendant's ears. But it became clear to me that Dr. Jaworski was not using that term in the sense of a prevailing, persistent condition, but only as a way of referring to the fact that just before September 5, 2006 the plaintiff complained of pain and discomfort periodically, as does any adult. He was not referring to a pre-existing chronic pain syndrome. Another example - and something that looms large in what follows - is the laying out by Dr. Watterson as he testified before me of what lay behind his finding of a pre-existing "chronic intermittent musculoskeletal pain". (Exhibit 6, Tab C, Page 2) My analysis of what the doctor accepted as an adequate foundation for his opinion, and the way in which he arrived at one element of that foundation, bears directly on both my conclusion as the trier of fact as to the testimonial reliability of the plaintiff and my conclusion as to the existence - or the lack of it - of a relevant, significant pre-existing condition.

**11**  Against the background of the record and having considered the whole of the evidence together, I say as the trier of fact that:

1. Crucial to the defendant's case is an assertion that I should conclude that the plaintiff has not been candid with the doctors or with me. That is so because, as always in a case such as this, the sheet anchor of a doctor's opinion and of my findings is an acceptance of the plaintiff's statements and testimony as to the state of her health as accurate.
2. The defendant grounds the attack on the plaintiff's testimonial reliability on a number of points. But, for me, the focus narrows. What I conclude about the overarching issue of the testimonial reliability of the plaintiff turns, for this trier of fact, on what I conclude about the accuracy of the plaintiff's assertions to the doctors and to me that as of September 5, 2006 she was, in effect, feeling just fine and suffered no longer from the pain and discomfort that was her lot as a result of what we have come to call the July 18, 2006 bus accident.
3. The defendant relies on bits of circumstantial evidence in building a case to the effect that the plaintiff must have continued to suffer from the effects of the bus accident as of September 5, 2006.
4. I say that for this trier of fact absent my accepting the evidence of the doctor called by the defendant, Dr. Watterson, to the effect that the fact Diazepam was prescribed for the plaintiff on August 3, 2006 by Dr. Smith means that Dr. Smith was of the opinion that he was dealing with a case of not mild or moderate soft tissue damage, but severe soft tissue damage, I do not have a body of circumstantial evidence which looked at cumulatively puts paid to the plaintiff's assertion that as of September 5, 2006 she was feeling just fine.
5. Dr. Smith never testified before me.
6. The evidence that is before me is equivocal.
7. Dr. Watterson said, as above, that the prescribing of Diazepam means that the treating physician, here Dr. Smith, was of the opinion that he was dealing with a case of severe soft tissue damage.
8. Dr. Hunter, a doctor who practices in the same clinic as Dr. Smith, the Thorson Clinic, did testify before me. His evidence came to this - the prescribing by him or another physician in their clinic of Diazepam does not mean that the patient has presented with severe soft tissue damage. He did allow, however, that it is "possible" that the combination of drugs prescribed on August 3, 2006 - of which Diazepam was but one - means that the treating physician was of the opinion he was dealing with severe soft tissue damage.
9. The absence of Dr. Smith from the witness box resulted in a submission by the defendant that I should draw an inference adverse to the plaintiff.
10. The Court of Appeal has underlined in a number of cases just how rarely such an inference should be drawn. The Court of Appeal spoke to this issue in the context of a case such as this in ***Buksh v. Miles***, [*2008 BCCA 318*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F4GK-M33F-00000-00&context=).
11. Applying what was said there about the modern medical system and the transparency of litigation under our Rules to what is thrown up here, I find that it would be wrong to draw an inference adverse to the plaintiff from her not having called Dr. Smith. It was the defendant's doctor, Dr. Watterson, who was the head and source of the theory of the significance of Diazepam and the pre-trial discovery of documents and exchange of expert reports told the defendant that the doctor who dealt with the plaintiff on August 3, 2006 was not Dr. Hunter. The defendant was in as good - I say better - position as the plaintiff to appreciate the significance of Dr. Smith's opinion and of the need to subpoena Dr. Smith into the witness box. It was not done.
12. As made clear, above, Dr. Watterson's opinion about the inference to be drawn by the prescribing of Diazepam for the plaintiff on August 3, 2006 was just one bit of circumstantial evidence bottoming the defendant's submission that, contrary to what the plaintiff says, the fact was that on September 5, 2006 she was still suffering pain and discomfort as a result of the bus accident on July 18, 2006. But, as I made clear above, for me, absent acceptance of Dr. Watterson's opinion about the significance of the prescribing of Diazepam I could not conclude that the truth of the matter about the plaintiff's condition on September 5, 2006 was the opposite of what the plaintiff has asserted before me and to the doctors. And also, as I have made clear, absent finding that the plaintiff was not candid with the doctors and me on that point, this trier of fact could not make the overarching finding that the plaintiff is a litigant whose want of testimonial reliability fundamentally undermines - in all contexts - the weight to be given to the medical evidence placed before me by the doctors and, in addition, her testimony before me as to virtually everything.
13. And I say as the trier of fact that I do not draw the inference from the prescribing of Diazepam that was urged upon me by counsel for the defendant on the basis of Dr. Watterson's opinion.
14. In the result, I proceed on the basis that the plaintiff has been candid with me and with the doctors. Subsumed in that conclusion is a finding by me that the plaintiff does not exaggerate when she describes her aches and pains. She is simply articulate and blessed with a gift for finding a telling analogy, metaphor or simile. Nobody is misled. And Dr. Hunter's allowing on cross-examination that it is possible she exaggerates is of no moment. Of course it is possible that she exaggerates. I find she does not.
15. I turn to the question of whether the evidence reveals that the plaintiff as of September 5, 2006 had a relevant - note the word relevant - significant pre-existing condition for the purposes of the law.
16. I find as the trier of fact that the answer is no.
17. The defendant's submission to the effect that the plaintiff suffered from a relevant significant pre-existing condition rests on a number of too thin reeds. I will speak to the detail of only three of them.
18. First, in pointing to anemia that was the plaintiff's lot before September 5th and until the summer of 2008 when corrective surgery took care of the plaintiff's problem, the defendant ignores the fact that whatever the plaintiff's problem with anemia was the plaintiff, before September 5, 2006, functioned well both at work and in her private life. Her anemia is as significant to the outcome of this case as would be evidence that for a time she suffered from severe hair loss.
19. Next, the defendant's reliance, in asserting that there was a significant pre-existing condition, on the plaintiff's having, over a period of years, sought help from doctors, chiropractors and other caregivers for the results for her of such things as (by way of examples) moving furniture, being robbed at gunpoint, being punched in the face by an irate brother-in-law and falling during the bus incident referred to above, ignores the fact that, as I find it to be, each of these incidents was isolated in nature and resulted in pain, discomfort and anxiety from which the plaintiff recovered and simply got on with her life. A subset here is that evidence of a possibility that repeated attendance upon chiropractors could result in a defect rendering a patient susceptible to future injury never rose above the establishing of only that i.e. a possibility.
20. Next, in asserting that there was a significant pre-existing condition, the defendant relies heavily on the opinion of Dr. Watterson which I find in turn depended heavily on what he made of the results for the plaintiff of the bus accident. And that, in turn, depended overwhelmingly on what he inferred from the prescribing of Diazepam, as above, by Dr. Smith on August 3, 2006. And what I have said, *supra*, puts paid to this aspect of the defendant's case.
21. In light of the findings made thus far by me as the trier of fact, the case becomes one in which the plaintiff is an accurate source of information, there was no relevant significant pre-existing condition and the doctors may differ as to what label should be applied to the plaintiff's condition - fibromyalgia, fibromyalgia-like syndrome, chronic pain condition - but the fact is that she suffers from chronic widespread pain that is, for her, debilitating and with respect to which the prognosis is guarded. An "optimal fibromyalgia based treatment protocol", including biofeedback, is recommended and there is a real and substantial possibility, bordering on likelihood, that her pain and discomfort will be relieved and her functioning improved. (Exhibit 5 Tab B Page 6). But no "cure" is in prospect.
22. Post hoc ergo propter hoc (after this, therefore caused by) reasoning must be avoided. But I find as a fact that the plaintiff's persistent, consistent and, ultimately, chronic pain and suffering arose only immediately after the September 5, 2006 motor vehicle accident. The schism in the expert medical evidence placed before me was not as to whether the September 5, 2006 trauma was a materially contributing cause of the plaintiff's ongoing chronic pain condition but as to whether it so contributed by exacerbating a pre-existing chronic pain condition or by simply triggering a chronic pain condition. It is now a fact that there was no significant pre-existing condition. The only available conclusion in the case at bar is that but for the defendant's ***negligence*** on September 5, 2006 the plaintiff would not be burdened with the chronic pain condition that has been her lot since September 5, 2006.

**12**  I turn to the assessing of damages.

**13**  The plaintiff's date of birth is June 20, 1971. She was 35 on September 5, 2006. She is now 38 years of age. She had her first child, a girl, when she was 17. Her second child, also a daughter, came along a year later. A third child was born in 1992 and placed for adoption. In 2000, she married Rene Poirier. He brought a daughter into the marriage. As of September 5, 2006, she and her husband lived with one of her daughters and her husband's daughter. In the fall of 2007 she and her husband separated. They got back together in the spring of 2008. In November 2009 they separated again.

**14**  The plaintiff believes that the split is permanent and blames the effects on her of the September 5, 2006 motor vehicle accident for her husband's deciding to leave her. The husband did not testify before me. All I have as to the reason for their separating is the plaintiff's conclusory opinion. The evidence revealing what the husband had to say about his beliefs of the moment was not placed before me in a way that provides a decent foundation for the forming of an objective opinion by me. The testimony of Dawn Fiorante, who knows both the plaintiff and her husband, took the form of hearsay statements by him of what he said the plaintiff had said to him. It was not a coherent statement of his present state of mind. I find that the plaintiff has not convinced me that the sad state of her marriage was caused by the results for her of the September 5, 2006 motor vehicle accident.

**15**  The plaintiff's education was interrupted by her having her first child. But she persisted and received the equivalent of a high school diploma in 1992. She has had some post-secondary education. She has training in Computerized Accounting and Automated Office Technology. In 1993 she took some introductory university courses.

**16**  The plaintiff told me that she entered the workforce in 1992. By 1998 she was working for an office equipment company. From 2000 to 2003, she worked for first one restoration service company and then another. From 2003 to 2006 she worked for the Brick.

**17**  In a nutshell, the plaintiff's work history prior to her entering the world of claims adjusting in 2006 is that of someone who works well and consistently and reveals no evidence of her being a slacker.

**18**  In February 2006, the plaintiff joined an insurance adjusting firm, CGI Adjusters. On weekends she attended courses and, in the result, obtained her level one licence. On September 5, 2006 she was injured in the motor vehicle accident that bottoms the litigation in the case at bar. She was off work for roughly six weeks. Then she returned to work half-time for approximately two months. Then she returned to full-time work. Early in 2007 - but not because anyone at CGI was unhappy with her work - she went to work for another firm of adjusters, SCM. She was away from work for two months in the summer of 2008. In mid-August 2008 she returned to work and remained at work until May 11, 2009 when she stopped working. She has not worked since.

**19**  The combined effect of the evidence of the plaintiff and of her mentor, Mike Parsons, her boss, Pierre Chavigny, her fellow junior adjuster, Julie Sykes and the senior adjuster to whom she reported toward the end of her working at SCM, Monique Aisler, is that I am satisfied that the plaintiff enjoyed her work, was good at it, did all she could by way of taking courses to improve her position as an adjuster, and worked through the pain and discomfort that was her lot as a result of the September 5, 2006 motor vehicle accident but was eventually worn down by her pain and discomfort. The fact that she was observed to lift this or that or was able to drive to her assignments is entirely consistent with the picture painted by the witnesses. It is obvious to me that the plaintiff was valuable to the firm and her duties were adjusted in an attempt to permit her to remain at work. In spite of her making her best effort, and Pierre Chavigny's doing all he could, ultimately she wilted. And I find that she did so because of the results for her of the September 5, 2006 motor vehicle accident.

**20**  I turn to the plaintiff's life apart from the workplace. I find that she enjoyed camping and hiking. She owned her own kayak. Her husband was an avid fisherman. She was not. But she would accompany him and walk the dogs while he fished. She and her husband split household duties 50:50.

**21**  What I have described is her life prior to September 5, 2006 save for the brief period that followed the bus accident in July 2006.

**22**  I find that all of this has been lost to her, or severely curtailed, because of the effect on her of the defendant's ***negligence*** on September 5, 2006. The plaintiff's pain and suffering on and after September 5, 2006 has varied between what I would describe as severe and what I would describe as simply significant.

**23**  Soft tissue damage is the source of her problems. I have kept ***Maslen v. Rubenstein*** [*(1993), 83 B.C.L.R. (2d) 131*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-FD4T-B0MF-00000-00&context=) (C.A.) in mind. I find that the plaintiff is one of that small percentage of people, well known to the law, whose pain and suffering continues long after science would say that the injured tissue must have healed. I have cautioned myself about the need to be slow to rely on what are uncorroborated reports of long-standing pain and discomfort. But, on the whole of the evidence I have decided that her complaints of pain are true reflections of a continuing injury and are not a product of desire by the plaintiff for things such as care, sympathy, relaxation or compensation and that she has used every ounce of willpower she has to overcome her problems and could not reasonably be expected to have achieved more by her own inherent resources or willpower. (***Maslen v. Rubenstein***, *supra*, paragraphs 8 and 15).

**24**  I turn to the future.

**25**  To use language employed by Dr. Jaworski, the prognosis is "guarded". Taken together, the evidence of Dr. Hyams, Dr. Shuckett and Dr. Jaworski bottoms the conclusion that what is now in place - an ongoing, positive, pro-active approach, to echo Dr. Shuckett - means that there is a real and substantial possibility that significant improvement is in the offing. To date, the plaintiff has sought help in such things as prescription drugs, chiropractic treatments, physiotherapy, massage, acupuncture and trigger point injections. Only now is the plaintiff in the course of an organized effort to both alleviate her pain and discomfort to the extent possible and teach her techniques and methods of dealing with and surmounting her pain and discomfort.

**26**  I turn to the assessing of non-pecuniary damages. The plaintiff has been burdened thus far for 39 months. Her prospects are not bleak, but guarded. The level of the pain and discomfort she has endured was such that her life apart from work has been turned from one full of activity to one devoted to rest and recovery. She is not housebound. She drives a car for up to 20 hours a week and makes herself useful in the lives of her children. The level of her pain and discomfort resulted in this woman - whom I am convinced is not a slacker and enjoyed her job in the world of insurance adjusting - being off work for six weeks, returning to work at half-time for two months and, ultimately, stopping work after having her employer cooperate in every way possible to reduce the demands of the job so that she could continue working. That speaks volumes about her condition. Additionally, the fact she actually enjoyed her work and has had it curtailed as a result of the defendant's ***negligence*** must weigh heavily in the assessment of non-pecuniary damages. I have considered the cases placed before me by counsel. To track some of the language used in ***Knauf v. Chao***, [*2009 BCCA 605*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-24XN-00000-00&context=), I classify this as a case in which there is a real and substantial possibility that the plaintiff's soft tissue injury will prove to be "permanent" but the degree of pain and discomfort cannot be considered to be "the most severe in nature" when compared with that of plaintiffs in other such cases. Taking into account not just what I have said here but the whole of the evidence and all I have said thus far in these reasons for judgment, I award the plaintiff $60,000 by way of non-pecuniary damages.

**27**  I turn to the claim for loss of the capacity to earn income to the date of trial.

**28**  Real and substantial possibilities hold sway here and proof on a balance of probabilities is not afoot: ***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=).

**29**  The plaintiff claims $38,000, basing that submission on the report of an economist, Mr. Turnbull, which report appears before me at Exhibit 5, Tab 4B. I am satisfied that Mr. Turnbull took a conservative approach in arriving at lost earnings of $4,700 in 2006, $8,500 in 2008 and $25,000 in 2009.

**30**  The $8,500 figure for 2008 relates to the time the plaintiff took off work in the summer, June 14 to August 18 to be exact. It is only that $8,500 that the defendant disputes. The defendant submits that the time off work should be laid at the feet of things such as the flu and ablation surgery undertaken during the time off work. I disagree. I find that the plaintiff's pain and suffering as a result of the events of September 5, 2006 resulted, albeit indirectly, in her taking the two months off because of what began as the side effects of one medication and became the side effects of a concoction she took - Ralivia - in the hope it would improve her lot. In the result under the heading past loss of income earning capacity, I award the plaintiff $38,000.

**31**  I turn to the plaintiff's claim for damages for loss of the capacity to earn income in the future.

**32**  Here I am driven back to utter basics. The plaintiff is entitled to be returned to the position she would have been in absent the defendant's ***negligence***. In addition, all real and substantial possibilities - both pro and con - must be taken into account. Subsumed within what I have just said is recognition that the contingencies of life - both pro and con - must be reflected in the final award: ***Andrews v. Grand & Toy Alberta Ltd.*** [*(1978), 83 D.L.R. (3d) 452*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250W-00000-00&context=) (S.C.C.) at page 470.

**33**  The defendant points to the absence of a discrete body of evidence - such as a vocational assessment or functional capacity assessment or work capacity evaluation - that gets at the plaintiff's capacity to earn income. The defendant also points to the fact that the plaintiff has done nothing useful by way of seeking work in any field. The defendant then points to case law, such as ***Brown v. Golai*** [*(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.), ***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=) (C.A.), ***Palmer v. Goodall*** [*(1991), 53 B.C.L.R. (2d) 44*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JBT7-X23F-00000-00&context=) (C.A.) and ***Parypa v. Wickware*** [*(1999), 169 D.L.R. (4th) 661*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-21RK-00000-00&context=) (C.A.) and takes the position that here the plaintiff has established neither lost capacity to earn income nor reduced capacity to earn income and has not established on a balance of probabilities (***Parypa v. Wickware***, *supra*) that she is not able to mitigate by pursuing other lines of work.

**34**  Every award of damages is peculiar to the case before the trier of fact. Here I find that I am confronted with a case that comes to trial at a time when the plaintiff is at the beginning of a course of treatment which will put the plaintiff in a position to do what she cannot do now - understand just what her usefulness in the marketplace is.

**35**  No vocational assessment, etc., undertaken to date would be of any assistance. No flurry of resumes mailed off to sundry businesses would produce anything of value.

**36**  As things stand I know this:

1. The plaintiff's physical problems, including but not limited to her pain, her inability to look up and down easily and her inability to reach out easily - and her lack of stamina - make her now unfit for a job of the sort or kind she was engaged in on September 5, 2006. That eliminates office work. And she has worked, in the main, in an office since at least 2000.
2. The plaintiff's pain and discomfort was of a kind and at a level where for the 32 months between September 2006 and May 2009 she was gainfully employed, albeit at the price of periods of time off, reduced working hours at one point, struggling to handle a regular workload for a long period and having her assigned work altered in kind for perhaps four months.
3. Her caregivers are hopeful that the course of treatment she is embarking upon will - in at least two ways - result in her being able to cope much better.
4. The raw material placed before me in Exhibit 3 and summarized in Exhibit 5 at Tab 4 convinces me that prior to September 5, 2006 the plaintiff had demonstrated that she had the capacity to earn a significant income and that between September 5, 2006 and the date of trial the plaintiff's efforts to continue working resulted in her demonstrating a capacity to earn call it $50,000 per year.
5. It may be that the plaintiff will be able to mitigate her loss by retraining (***Bradley v. Bath***, [*2010 BCCA 10*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-251K-00000-00&context=), para. 39).

**37**  It is obvious to me that the plaintiff's capacity to earn income from all types of employment has been adversely affected and will be adversely affected, although the extent of the problem defies description. It is obvious that as she is, the plaintiff is less marketable or attractive as an employee to potential employers and that the extent to which she will become - hopefully - more attractive defies description. It is obvious that as things are, and as they very may well prove to be in the future, the plaintiff has at least a reduced capacity to take advantage of all job opportunities that might be open to her. It is obvious that as she is now, and as she may very well be in the future, the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market. At that point my crystal ball clouds over.

**38**  That is the plaintiff's loss. It is very real. That it defies calculation is not only obvious, but the opposite of a bar to the assessing of substantial damages, as the Court of Appeal makes clear in the recent case of ***Campbell v. Banman***, [*2009 BCCA 484*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-24R0-00000-00&context=) at para. 26. "The essential matter that engages the attention of a court making an assessment in this area is to endeavour to quantify the financial harm accruing to the plaintiff over the course of his or her working career." (***Bradley v. Bath***, *supra*, at para. 40.)

**39**  I have kept the need for caution in settling on a figure in a case such as this front and centre. By the use of an economist's tool, and by making assumptions unlike what I have just finished outlining, the plaintiff arrives at a submission that an award of $600,000 to $700,000 would be appropriate. The defendant submits (closing submissions of the defendant para. 136) that "the plaintiff has not proven on a balance of probabilities that she has suffered a future income earning loss". In the alternative (para. 137), the defendant submits that "a calculation similar to that in ***Chamberlain v. Giles*** [[*2008 BCSC 171*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JWR6-S1K1-00000-00&context=)], should be used". With respect, that case reveals no universally applicable method of calculation but, instead, an assessment peculiar to the evidence in that case made by a trial judge confronted - as am I - with a situation that defies calculation.

**40**  An "estimate based on prophesies" in a case of "general impairment" results in my "sense of what is fair compensation" settling on the figure $100,000. That is the award (***Morris v. McEachran*** [*(1996), 23 B.C.L.R. (3d) 256*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DY89-M3P5-00000-00&context=) (C.A.)).

**41**  I turn to the claim for special damages. Here the claim was for $10,564. The defendant disputes only one item, and that for $61. That relates to a payment for Weight Watchers. I find that the defendant is right. The plaintiff's problems with gaining weight preceded September 5, 2006. I reduce the award accordingly and award $10,503.

**42**  I turn to the claim for the cost of future care. That the plaintiff will require Ketamine gel ($80 per bottle) every three months for some time is established. That neurofeedback therapy (perhaps $1,500 to $4,000) will likely be useful is established. That Botox injections applied periodically over perhaps two years ($200 to $800) may assist the plaintiff has been established. The plaintiff's out-of-pocket portion of the cost of her prescription drugs (perhaps $200 per year) over an unspecified period must be taken into account. The plaintiff seeks an award of $30,000. The defendant submits that no award should be made, or, if it must be let it be in or about $10,000 at the maximum. I assess damages under this heading at $15,000.

**43**  I turn to the claim for loss of housekeeping capacity.

**44**  The plaintiff claims $50,000. The defendant is right, i.e. the evidence as to this claim is woefully inadequate. Whether a discreet award should be made under this heading or the plaintiff's loss, if any, taken into account elsewhere is a function of the state of the evidence in a given case. (***Foran v. Nguyen***, [*2006 BCSC 605*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B20P-00000-00&context=), para. 115). As was the case in ***Morrison v. Gauthier***, [*2009 BCSC 1271*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-62G0-00000-00&context=), the lack of precision in the evidence in the case at bar combines with the fact, as I find it to be, that the plaintiff's real loss is her frustration at having to live with lower standards than she did before September 5, 2006 and convinces me that the plaintiff's loss should be reflected in the award for non-pecuniary damages. I have taken that fact into account in the award I made earlier for non-pecuniary damages. Here see ***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=), paras. 125-128.

**45**  As demanded by the case law I "step away" and look at the overall award for reasonableness in the circumstances. In my opinion, in light of the results for the plaintiff of the defendant's ***negligence***, a global award of $223,503 is reasonable: ***Ruiz v. Bouaziz***, [*2001 BCCA 207*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-FH4C-X2KY-00000-00&context=).

**46**  Counsel may arrange, if necessary, to speak to the issue of costs or to any other ancillary matter.

A.M. STEWART J.

**End of Document**

[***Pringle v. Pringle, [2020] B.C.J. No. 79***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5Y2W-6P51-K0HK-24SY-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

G.B. Gomery J.

Heard: December 9-13 and 16, 2019.

Judgment: January 21, 2020.

Docket: M145697

Registry: Vancouver

**[2020] B.C.J. No. 79** | 2020 BCSC 75

Between Joshua Pringle, Plaintiff, and Tracy Pringle, Stanley Lawrence Amor, and Honda Canada Finance Inc., Defendants

(92 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Arm injuries — Wrist — Considerations impacting on award — Contributory *negligence* — Action by 38-year-old plaintiff for damages for personal injuries sustained in motor vehicle accident in 2012 allowed in part — Plaintiff and defendant, his mother, were arguing — As defendant drove away, vehicle collided with plaintiff, whose back and buttocks struck windshield — Plaintiff fell to ground and broke his wrist — Defendant had opportunity to stop or take evasive action to avoid hitting plaintiff and failed to do so — Plaintiff's failure to give way immediately to approaching vehicle was negligent — Fault was attributed equally to plaintiff and defendant — Defendant was liable for $25,000 in non-pecuniary damages.**

**Damages — Types of damages — General damages — For personal injuries — Non-pecuniary loss — Pain and suffering — Action by 38-year-old plaintiff for damages for personal injuries sustained in motor vehicle accident in 2012 allowed in part — Plaintiff and defendant, his mother, were arguing — As defendant drove away, vehicle collided with plaintiff, whose back and buttocks struck windshield — Plaintiff fell to ground and broke his wrist — Defendant had opportunity to stop or take evasive action to avoid hitting plaintiff and failed to do so — Plaintiff's failure to give way immediately to approaching vehicle was negligent — Fault was attributed equally to plaintiff and defendant — Defendant was liable for $25,000 in non-pecuniary damages.**

**Transportation law — Motor vehicles and highway traffic — Rules of the road — *Negligence* — Yielding — Right of way — Liability — Civil actions — Breach of rules of the road — *Negligence* — Contributory *negligence* — Action by 38-year-old plaintiff for damages for personal injuries sustained in motor vehicle accident in 2012 allowed in part — Plaintiff and defendant, his mother, were arguing — As defendant drove away, vehicle collided with plaintiff, whose back and buttocks struck windshield — Plaintiff fell to ground and broke his wrist — Defendant had opportunity to stop or take evasive action to avoid hitting plaintiff and failed to do so — Plaintiff's failure to give way immediately to approaching vehicle was negligent — Fault was attributed equally to plaintiff and defendant — Defendant was liable for $25,000 in non-pecuniary damages.**

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| Action by the 38-year-old plaintiff for damages for personal injuries sustained in a motor vehicle accident in 2012. The plaintiff and the defendant, his mother, were arguing while the defendant was in her vehicle. As the defendant drove away, her vehicle collided with the plaintiff, whose back and buttocks struck the windshield. The impact broke the windshield. The plaintiff fell to the ground and broke his left wrist. The defendant and the plaintiff's sister testified that the plaintiff leapt into the windshield. The plaintiff testified he leapt to avoid being hit. At the time of the accident, the plaintiff was unemployed and was the fulltime caregiver for his infant child. He smoked marijuana daily for aches and pains related to past sports injuries. The plaintiff's broken wrist required surgery. He suffered permanent limitations to the range of motion in his wrist.  HELD: Action allowed in part.  None of the witnesses' accounts of the accident were reliable. Even though the defendant had the right of way, she was still obliged to avoid hitting the plaintiff if she could do so by the exercise of reasonable care. It was implausible that the plaintiff attempted to attack the vehicle with his hare hands or crash into it backside first. The defendant had an opportunity to stop or take evasive action to avoid hitting the plaintiff and failed to do so. The plaintiff's failure to give way immediately to the approaching vehicle was negligent. It was not possible to say which party was at greater fault for the accident. Fault was attributed equally to the plaintiff and the defendant. The plaintiff's non-pecuniary damages were fixed at $50,000. The defendant was liable for $25,000. There was no real and substantial possibility the plaintiff would suffer a future loss of income by reason of his wrist injury. The defendant's conduct was not high-handed, malicious, insulting, or oppressive and did not require punitive damages. |

**Statutes, Regulations and Rules Cited:**

Motor Vehicle Act, [*R.S.B.C. 1996, c. 318, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5X76-XJ31-JKB3-X2FB-00000-00&context=), s. 119(1), s. 180, s. 181

***Negligence*** Act, [*R.S.B.C. 1996, c. 333, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JBDT-B066-00000-00&context=)(1), s. 1(2)

Supreme Court Civil Rules, Rule 9-1, Rule 9-1(5), Rule 11-7(1), Rule 14-1(10)

**Counsel**

The Plaintiff appearing in person: J. Pringle.

Counsel for the defendants: A.P. Zacharias, C.D. Drinovz.

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**Introduction**

**1**  Joshua Pringle was injured when he collided with an automobile driven by his mother, Tracy Pringle. Mr. Pringle's back and buttocks struck the passenger side windshield of Mrs. Pringle's Acura. The impact broke the windshield. Mr. Pringle fell to the ground and broke his wrist.

**2**  The collision took place after midnight, in a roundabout driveway just outside Mr. Pringle's apartment building. Mrs. Pringle had driven over to speak with Mr. Pringle. Mr. Pringle's sister, Emily Pringle, accompanied her mother. The visit had not gone well. It ended when Mr. Pringle told his visitors to leave and threatened to call the police. They did as he asked, but Mrs. Pringle accidentally took Mr. Pringle's keys with her when she left. They met in the driveway a short while later to return the keys.

**3**  Immediately before the collision, Mrs. Pringle was at the wheel of her car with the ignition on. Emily was sitting in the front seat on the passenger side. Mr. Pringle was standing outside the car. Mr. Pringle and Mrs. Pringle were arguing through an open window.

**4**  Mr. Pringle testifies that what happened next was that Mrs. Pringle began to drive away, circling the roundabout, while he was standing on the roadway. Mrs. Pringle was driving angrily and recklessly. When he realized that she was driving back towards him and was not going to veer away, he jumped and was hit by the moving car's windshield.

**5**  In view of the manner in which this case was presented and argued, it is important to emphasize that Mr. Pringle's case is not that Mrs. Pringle assaulted him with her vehicle. The only claim alleged in the notice of civil claim is the conventional one that Mr. Pringle was injured through the negligent operation of a motor vehicle operated by Mrs. Pringle and owned by the other defendants. There is no doubt that Mr. Pringle was injured through a collision with a motor vehicle operated by Mrs. Pringle. There is no issue as to the vicarious liability of the other defendants. The central question in this action is whether Mrs. Pringle was negligent.

**6**  The defendants deny that Mrs. Pringle was negligent. Mrs. Pringle and Emily Pringle testify that Mrs. Pringle was just putting the car into motion when Mr. Pringle leapt from the sidewalk into the windshield. As an alternate theory of the case, the defendants' counsel suggested to Mr. Pringle in cross-examination that he projected himself into the path of the moving car in an attempt at self-harm. Mr. Pringle denied the suggestion.

**7**  Mr. Pringle and his mother have a complicated, difficult relationship. The challenges of their relationship are exacerbated by the fact that Mr. Pringle is the father of a beloved grandson of Mrs. Pringle. In the course of the trial, Mr. Pringle and his mother each attacked the other's character and gave evidence spanning the course of their relationship from Mr. Pringle's childhood. I need not address most of their accusations. My task, in these reasons for judgment, is to resolve just three issues:

1. Did the accident occur as a result of Mrs. Pringle's ***negligence***?
2. If so, was Mr. Pringle contributorily negligent?
3. What are Mr. Pringle's damages?

**Background**

**8**  The accident took place on September 12, 2012.

**9**  Mr. Pringle was 31 years old at the time. He was living with his wife and their infant son in an apartment building on McCallum Road in Abbotsford. On the night of the accident, Mr. Pringle's wife and child were away visiting her parents in Williams Lake.

**10**  Mr. Pringle was unemployed. His full-time occupation at the time was as a caregiver for his child. His marriage was in difficulty.

**11**  In the early morning hours of September 12, Mrs. Pringle and Emily Pringle arrived at Mr. Pringle's apartment building. They had not called in advance and Mr. Pringle was not expecting them. They gained entrance to the building because someone who was leaving held the door for them. They knocked on Mr. Pringle's door. He did not answer the door until Emily telephoned to tell him who was knocking. He answered the door and let them in. Mr. Pringle viewed the visit as an intrusion.

**12**  Mr. and Mrs. Pringle spoke in the kitchen of the apartment. Emily Pringle did not participate in the conversation. It probably lasted for about 45 minutes.

**13**  Mr. Pringle recorded the conversation without Mrs. Pringle's knowledge. In pre-trial proceedings, he was ordered to produce the recordings, but only produced some of them prior to trial. He produced the rest at the commencement of the trial. Allowing the defendants' objection, I did not allow Mr. Pringle to put in evidence or rely upon the recordings that he had not produced prior to trial. I should say that I doubt that the recordings Mr. Pringle was not permitted to use would have added much to my understanding of what occurred that night.

**14**  Both Mr. Pringle and Mrs. Pringle were emotional and their discussion became heated. Mr. Pringle expressed a desire for more distance from his family. Mrs. Pringle expressed concern for his marriage, his emotional state, and her grandson. At the end, Mr. Pringle said that he wanted her to leave him alone. She responded that, if he felt that way, he should return to her a family ring. Mr. Pringle got the ring from his bedroom, gave it to her, and told her to leave. He threatened to call the police if she and Emily did not leave.

**15**  Mrs. Pringle and Emily left the apartment. In gathering up her things, Mrs. Pringle picked up Mr. Pringle's keys. I find that she did so unintentionally.

**16**  A few minutes after Mrs. Pringle and Emily had left the apartment, Mr. Pringle telephoned Mrs. Pringle to tell her that he wanted to come by her house in a few days' time to pick up things belonging to his son. Mrs. Pringle told him that she had his keys. They agreed that she would return the keys to him in the driveway in front of his building.

**17**  They met there. Mrs. Pringle and Emily were in Mrs. Pringle's car. Mrs. Pringle handed Mr. Pringle the keys through her window. They argued some more. It is at this point that the witness's accounts of what happened diverge quite dramatically.

**First issue: Did the accident occur as a result of Mrs. Pringle's *negligence*?**

**The starting point**

**18**  Four witnesses testified who were present at or immediately after the accident. Before turning to an assessment of the reliability and credibility of their accounts of the accident, it is helpful to assess what can be discerned from evidence that is undisputed.

**19**  I have already noted some of this evidence. On all accounts, immediately before the accident, Mrs. Pringle was at the wheel of the car and Mr. Pringle was outside it on foot. The ignition was on and the car was in gear. They were arguing through an open window, either the driver's side window (on Mr. Pringle's account) or the passenger window (on Mrs. Pringle and Emily's account). Both Mr. Pringle and Mrs. Pringle were emotional.

**20**  At the moment of impact, Mr. Pringle's back and buttocks struck the passenger side windshield of Mrs. Pringle's vehicle hard enough to break the glass, though not hard enough to smash through it and end up in Emily's lap. There is no evidence of damage to the hood or front bumper. I infer that Mr. Pringle was in the air when he made contact with the windshield. The car was moving forward towards him, or he was moving towards the car from the side, or both.

**Witness accounts of the accident**

**21**  I turn to the testimony of the witnesses. I must say at the outset that, in my view, none of the accounts of the accident offered by witnesses is particularly reliable.

**22**  I begin with Mr. Pringle. He says that Mrs. Pringle pulled away from him, accelerated around the roundabout, and struck him in the roadway. He says that he saw the car coming towards him and considered that he and Mrs. Pringle were engaged in a power struggle. At the last moment he realized that she was not going to turn the car away and leapt into the air in an attempt to avoid being hit.

**23**  Mr. Pringle's account of the accident includes implausibly dramatic elements. He says that Mrs. Pringle was "flying" and her tires were screeching. He says that his mother was calling out, "You'll be sorry" and, just before the impact, he heard Emily screaming "No mom, don't!". Adopting evidence given on discovery, he says that the impact launched him 25 feet in the air and that he flew into the grass. Inconsistently, he says that he does not remember the impact, just that he woke up on the ground.

**24**  Mr. Pringle has given different accounts of his mother's speed at different times. Immediately following the accident, he was taken to a hospital by ambulance. Clinical notes record his complaint that he was struck at 5 to 10 kph. On discovery, he testified that she was probably travelling at 30 or 40 kph. In cross-examination, he estimated that she was travelling at 25 to 30 kph.

**25**  Mr. Pringle gave a statement to an ICBC adjuster on September 20, 2012. In it, he said that the car struck him while he was in the roundabout, facing its centre, and he thought that the car would drive by him. The front end of the car hit his left side and he flew into the grass. This cannot be correct, because the physical evidence establishes that he struck the windshield, not the front end of the car, and he now says that he does not remember the impact. Mr. Pringle now says that he was not facing the centre of the roundabout, rather he was standing next to the curb, facing outside it towards his building. He acknowledges other inaccuracies in the statement given to the adjuster. For example, he concedes that his denial to the adjuster that he had consumed alcohol or drugs that evening was false.

**26**  It is plain from Mr. Pringle's presentation of his case in court and from text messages sent to Mrs. Pringle since the litigation began that he blames her for most everything that is wrong in his life and is using this lawsuit as a vehicle for the vindication of his perspective on their relationship. He unsuccessfully sought to have charges laid against his mother after the accident. He is deeply invested in being proved right. He has been dwelling on the accident for more than seven years.

**27**  Taking all this into account, I do not take Mr. Pringle's account of how he came to collide with the windshield of his mother's car at face value.

**28**  I turn to Mrs. Pringle. She began by testifying that her car was not in motion. She says that Mr. Pringle was standing on the sidewalk beside the car, arguing with her through the open passenger side window. She estimates that he was about 1.5 feet away from the car. He said to her, three times, in a rage, that she should say goodbye to her grandson because she would not see him again. When she would not engage with Mr. Pringle, he jumped onto the car, landing with his back and his buttocks on the windshield, and then jumped off again, and she drove away.

**29**  In cross-examination, Mrs. Pringle was shown a statement she gave to the police in March 2013. In it she offered the following account of the incident, beginning with the car in the roundabout:

So he came over here and was talking to me, yadda yadda yadda and screaming, yelling and - so I said, "Josh, I'm not fighting with you. Here's the keys." I said, "I'm not fighting any more with you." And so he took off and as he's running up there, he says to me, "Kiss your grandchildren goodbye 'cause it's gonna be the last time you see them." And I said, "Josh, not going here with you." And I started to leave and he started running up for me and I kept going. With that, he jumped off the curb, cause there's a curb in the roundabout, ... and jumped on my car.

[Emphasis added]

Mrs. Pringle was asked where Mr. Pringle started running from and she said it was from the sidewalk. In further questioning, she acknowledged that the car was in motion, and she could not say how fast she was going.

**30**  That Mr. Pringle was running towards the car from the sidewalk is inconsistent with a starting point on the sidewalk across from a stationary car that was less than two feet away. One cannot start running towards an object that one could reach out and touch. Moreover, if the car was moving, it must have been moving towards Mr. Pringle. There is no other explanation for the impact on the front windshield.

**31**  In her evidence in chief, Mrs. Pringle testified that she was afraid of her son, so much so that, when he telephoned her after the meeting in the apartment to say that he would want to come by to pick up his son's things, she told him that it would have to be at a time when her husband was present. In cross-examination, it was pointed out to her that, in her statement to the police, she said that her response to the request was, "No problem, anytime you want to come get it, hey man, it's here". Her response was telling. She said, "I guess I wasn't as afraid of you then as I am now". In other words, she acknowledged that her assertion in chief that she insisted on her husband's presence was a colourful false detail in her account.

**32**  For these reasons, I do not accept Mrs. Pringle's account of the accident.

**33**  I turn to Emily Pringle's account of the accident. It is similar to that given by Mrs. Pringle in her evidence in chief. Emily describes the car at a complete stop in the roundabout, while Mr. Pringle stood outside the car to her right and argued with her mother through her passenger window. He was, she says, beside her but a few steps forward, and the vehicle was a few feet away from the curb. Her mother started to pull away, putting the vehicle in motion, and Mr. Pringle came off the sidewalk and jumped onto the vehicle. Emily says that she saw Mr. Pringle's left shoulder hit the windshield, his hip hit the windshield wiper, and his left leg on the hood. Then he rolled off.

**34**  While Emily Pringle's description of Mr. Pringle's impact with the vehicle is exceptionally detailed, even when she is shown a photograph of the windshield, she is unable to say whether the glass was broken through. This was the portion of the windshield she was looking out through as she and her mother drove off. She maintains that she is unable to recall anything at all of the argument that was taking place across from her, not even what it was about. She was generally an unforthcoming witness, except as it concerned the things she wanted to say.

**35**  Once it is accepted that the car was in motion at the moment of impact, it is exceptionally difficult to visualize how the accident could have occurred as described by Emily Pringle. The starting point is that Mr. Pringle was beside the stationary car, a few feet away, arguing through the open passenger side window. He would have to be pursuing the car as it started to move. He would have to keep up with it, leap sideways to land on the windshield, and come down with sufficient force to break the windshield.

**36**  Even if one supposes that the car was only barely moving at the moment of impact, it is difficult to see how Mr. Pringle could have broken the windshield by hurling himself onto the car. The entire force of the collision would have to have come from Mr. Pringle having propelled himself upwards above the windshield in order to come down upon it. There is evidence that he was an athletic man, but I do not think it could have been to that extent.

**37**  For these reasons, I do not accept Emily Pringle's account of the accident.

**38**  The fourth witness is a former neighbour and friend of Mr. Pringle, Mr. Gluschko. Mr. Gluschko's present account of what he heard and observed on September 12, 2012 is limited. He says that he heard screaming in the parking lot and he cannot say whether it was Mr. Pringle or Tracy Pringle who was screaming.

**39**  Mr. Gluschko provided completely inconsistent accounts of the evening in two statements to the police. In the first statement, he said that he saw the car strike Mr. Pringle from his balcony. In the second statement, he said that he did not see the accident, and alleged that Mr. Pringle bribed him with the offer of a television to give the first statement. In giving evidence, Mr. Gluschko explained that he gave the second statement because Mr. Pringle made advances towards Mr. Gluschko's fiancé and he did not like Mr. Pringle anymore. He said that he was not prepared to perjure himself for someone who was not even his friend or family.

**40**  Based on his evidence and his conduct, I doubt that Mr. Gluschko feels an obligation to tell the truth under oath. He is an unreliable witness and I do not give any weight to his evidence of the events of September 12, 2012 or his dealings with Mr. Pringle.

**Legal framework**

**41**  The legal framework governing pedestrian-vehicle collisions is found in the *Motor Vehicle Act*, *R.S.B.C. 1996, c. 318* [*MVA*] and in the common law. The relevant common law was reviewed by Chief Justice Hinkson in *Wotherspoon v. Hameluck*, [*2014 BCSC 2137*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-JGHR-M4P4-00000-00&context=) at paras. 16-29 [*Wotherspoon*]. For present purposes, the material elements are as follows.

**42**  The driveway roundabout where the accident occurred was part of a "highway" as defined in s. 1 of the *MVA*, that is, it was a "private place or passageway to which the public, for the purpose of the parking or servicing of vehicles, has access or is invited". There is no evidence that Mr. Pringle was struck in a crosswalk, as that term is defined in s. 119(1).

**43**  Section 180 of the *MVA* requires a pedestrian who is crossing a highway at a point not in a crosswalk to yield the right of way to a vehicle. Accordingly, as between Mr. Pringle and Mrs. Pringle, Mrs. Pringle had the right of way.

**44**  However, s. 181 qualifies s. 180 by requiring that a driver of a vehicle must exercise due care to avoid colliding with a pedestrian who is on the highway. Even though Mrs. Pringle had the right of way, she was still obliged to avoid hitting Mr. Pringle if she could do so by the exercise of reasonable care.

**45**  The obligation of a driver to take appropriate evasive action to avoid a collision, even where she has the right of way, is recognized in the cases. In *Wotherspoon* at para. 20, the Chief Justice adopted the following passage from the judgment of Justice Dickson in *Hmaied v. Wilkinson*, [*2010 BCSC 1074*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JWXF-20XW-00000-00&context=) at para. 23:

[23] Regardless of who has the right of way, however, there is a duty upon drivers and pedestrians alike to keep a proper lookout and take reasonable precautions in response to apparent potential hazards: *Nelson (Guardian ad litem of) v. Shinske* [*(1991), 62 B.C.L.R. (2d) 302*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F4W2-619X-00000-00&context=) (B.C.S.C.); *Karran v. Anderson*, [*2009 BCSC 1105*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-624K-00000-00&context=). Depending on the circumstances, from a driver's perspective one such hazard may be a jaywalking pedestrian: *Ashe v. Werstiuk*, [*2003 BCSC 184*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7B1-F7ND-G567-00000-00&context=), upheld [*2004 BCCA 75*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S3MK-00000-00&context=); *Claydon v. Insurance Corp. of British Columbia*, [*2009 BCSC 1077*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-623D-00000-00&context=). If it is reasonably foreseeable or apparent that a pedestrian will disregard the law and thus create a hazardous situation, a driver is obliged to take all reasonable steps to avoid a collision. In such circumstances, if the driver has a sufficient opportunity to avoid the collision, but does not take appropriate evasive action, the driver will be found negligent: *Karran, supra; Beauchamp v. Shand*, [*2004 BCSC 272*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S3N8-00000-00&context=).

[Emphasis added.]

**Findings of fact**

**46**  While I do not accept any of the witness accounts of the accident at face value, the testimony and photographs of the vehicle and the scene enable me to make the following findings of fact on a balance of probabilities.

**47**  As I noted above, Mrs. Pringle was driving the car and Emily Pringle was seated in the front passenger seat. Mr. Pringle made contact with the windshield, backside first, on the passenger side. He was in the air at the moment of impact.

**48**  I find that the vehicle was in motion at the moment of impact. I come to this conclusion taking into account the force of the impact, Mr. Pringle's evidence, and that Mrs. Pringle and Emily Pringle ultimately conceded that the vehicle was in motion. Considering the force of the impact, I find that the vehicle was not barely in motion but was substantially underway.

**49**  I reject the defence thesis that Mr. Pringle leapt at or in front of the moving vehicle. It is simply implausible that Mr. Pringle would attempt to attack a car with his bare hands or, if he did, that he would crash into it backside first. Having heard Mr. Pringle's evidence and considering his conduct before and after the accident, I do not think that he leapt in front of the moving vehicle in an attempt at self-harm.

**50**  The vehicle struck Mr. Pringle in the driveway and I find that he was standing in the driveway as it approached him. Mrs. Pringle should not have been driving so quickly in the roundabout that she was unable to avoid hitting Mr. Pringle. I find that she had an opportunity to stop or take evasive action to avoid hitting Mr. Pringle and failed to do so. This was not an inevitable accident. Mrs. Pringle was negligent.

**Second issue: contributory *negligence***

**51**  I accept Mr. Pringle's evidence that, as he saw the car approaching him, he viewed himself as engaged in a power struggle with Mrs. Pringle and failed to give way to the approaching vehicle until it was too late, at which point he leapt in the air and made contact with the windshield.

**52**  Mrs. Pringle had the right of way and Mr. Pringle's failure to give way immediately to the approaching vehicle was negligent.

**53**  Where damage has been caused through the fault of the plaintiff and the defendant, s. 1(1) of the ***Negligence*** *Act*, *R.S.B.C. 1996, c. 333* provides that the defendant is only liable in proportion to the degree to which she was at fault. Section 1(2) provides:

1. Despite subsection (1), if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.

**54**  I am unable to say which of Mr. Pringle and Mrs. Pringle bears the greater fault for the collision. Pursuant to s. 1(2), I apportion their fault equally at 50% each. The defendants are liable for 50% of Mr. Pringle's damages.

**Third issue: what are Mr. Pringle's damages?**

**55**  Mr. Pringle accepts that he has not suffered any income loss to this point or special damages. He seeks non-pecuniary damages of $80,000 and an award for loss of earning capacity. He also claims aggravated and punitive damages.

**56**  The defendants say that Mr. Pringle's damages are in the range of $25,000 to $50,000 for non-pecuniary losses. They deny that he is entitled to damages for loss of earning capacity, aggravated damages, or punitive damages.

**Non-pecuniary loss**

***Legal framework***

**57**  Non-pecuniary damages are awarded as compensation for past and future pain, suffering, disability and loss of enjoyment of life. The court must take into account both the seriousness of the injury and the ability of the award to ameliorate the condition or offer solace to the victim; *Stapley v. Hejslet*, [*2006 BCCA 34*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1M7-00000-00&context=) at para. 45, leave to appeal to S.C.C. 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*]. In *Stapley*, at para. 46, the Court noted a non-exhaustive list of factors to be considered: age of the plaintiff; nature of the injury; severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and stoicism as a factor that should not, generally speaking, penalize the plaintiff.

**58**  The evidence of Mr. Pringle's injuries consists of Mr. Pringle's own evidence and the observations of his condition contained in clinical records that were tendered in evidence. There is no expert opinion evidence. Although the clinical records contain the opinions of physicians who examined and treated Mr. Pringle, in the absence of expert reports as required by *Supreme Court Civil Rules*, R.11-7(1), I cannot rely on the records as evidence of those opinions; *Edmondson v. Payer*, [*2011 BCSC 118*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G2XC-00000-00&context=) at para. 38, aff'd [*2012 BCCA 114*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-626V-00000-00&context=).

**59**  There is no legal rule requiring a plaintiff to put forward expert opinion evidence to substantiate a claim for damages for personal injuries; *Jalava v. Webster*, [*2017 BCCA 378*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5PWM-06C1-JX8W-M4Y3-00000-00&context=) at para. 11, leave to appeal to S.C.C. ref'd, 38119, [*[2018] S.C.C.A. No. 190*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5SJ6-S5X1-F8KH-X10B-00000-00&context=) (10 January 2019). The defendants do not dispute that Mr. Pringle suffered a significant injury in the form of a badly broken wrist. I must do the best I can to assess its effects on the evidence before me.

***Mr. Pringle's injuries***

**60**  Mr. Pringle played sports in high school and through his twenties. These included baseball, basketball, lacrosse and golf. He lifted weights. He enjoyed outdoor activities such as bicycling, snowboarding, wakeboarding, and riding all terrain vehicles. Over the years, he suffered a number of sports injuries, including a broken wrist, a pulled rotator cuff that ended his baseball playing, and a compression fracture in his back. His past injuries caused him to suffer aches and pains from time to time. In the period leading up to the accident, he smoked marihuana daily, at least in part to deal with his aches and pains.

**61**  When he fell to the ground in the accident, Mr. Pringle broke his left wrist. He is right-handed.

**62**  Immediately after the accident, Mr. Pringle was taken by ambulance to Abbotsford Regional Hospital. X-rays were taken confirming breaks in the two bones of the upper arm, the radius and the ulna, where they meet the small bones of the wrist. The admitting nurse noted bruising on the left hip and abrasions to the left knee.

**63**  Mr. Pringle's broken bones required surgical reduction which took place later on September 12, 2012. The surgeon's operative note indicates that he observed:

... a very comminuted intraarticular distal radius fracture. In fact, the fracture mostly involved the radial styloid, and a piece of the cartilage has been sheared off the junction of the styloid and the ulnar fossa. A rim of the ulnar fossa was also fractured off in multiple pieces.

The surgeon inserted two wires to hold the bones in place until the fractures healed. Mr. Pringle was discharged on September 13.

**64**  The surgeon removed the wires and placed Mr. Pringle's left arm in a cast in an outpatient procedure on October 24, 2012. The cast was removed three weeks later.

**65**  On November 27, 2012, an occupational therapist examined Mr. Pringle and noted that he had a significantly limited range of motion in his left wrist by comparison to his right.

**66**  Two years after the accident, on September 9, 2014, an orthopedic surgeon noted significant continuing limitations in Mr. Pringle's range of motion in his left wrist. He reported:

Plain x-rays ... show a healed radial styloid fracture. There has been complete collapse of the lunate fossa and lunate with complete obliteration of the articular cartilage. There is also degenerative changes of the distal radial ulnar joint and there is an ulnar positive variance. Mid carpal joint appears to be preserved. Scaphotunate fossa appears to be preserved but the scaphoid is in abnormal position.

**67**  I approach Mr. Pringle's testimony concerning his physical condition cautiously. Some of it is coloured by hindsight, and some of his descriptions of ongoing functional limitations imposed by his injuries are overstated.

**68**  It is clear that Mr. Pringle experienced pain and inconvenience in the first two months after his accident, when wires were inserted and, later, when he was wearing a cast. It appears that the superficial injuries to his left hip and knee healed uneventfully.

**69**  Mr. Pringle testified that, for two years or so after the accident, his grip strength in his left hand and the flexibility of his left wrist were so badly impaired that he could not hold a jug of milk, open a doorknob, use a kitchen whisk or flip an egg, ride a bicycle or lift his son in the air. He testified that he can now do most of those things, but he still cannot turn a screwdriver with his left hand. I accept Mr. Pringle's evidence in this regard. I find that he has suffered permanent limitations to the range of motion in his left wrist. Associated with those limitations is a certain degree of discomfort resulting from his wrist injury that he will always experience.

**70**  Mr. Pringle's quality of life has diminished, but it is not at all the case that he is unable to use his left hand effectively. He accepts as accurate a description of himself in a resume prepared in February 2014 as "physically able to perform repetitive, labour-intensive work". In August 2015, he went wakeboarding on a family holiday at Cultus Lake. Photographs of him taken then show him freely holding onto the tow rope with his left hand, and I do not accept his evidence that he was laid up and had to put his left arm in a cast for several days afterwards. In 2016 and 2017, he held a job with Paramount Components that required him to lift at one end and vigorously shake wide sheets of metal weighing 40 to 100 lbs. He was not hampered by his wrist in performing that work.

**71**  Mr. Pringle is not receiving treatment for injuries suffered in the accident. Medical Services Plan records show that he had not seen a physician in the two years before the trial began.

**72**  Mr. Pringle testified that he can no longer rock climb, snowboard, or engage in other sporting activities that he used to enjoy. I accept that he has suffered some reduction in his sporting abilities as a result of the accident.

**73**  Mr. Pringle testified that, in addition to his physical injuries, he suffered psychological injuries: nightmares, panic attacks and recurrent thoughts of the accident. Mr. Pringle was seeing a counsellor for more than a year before the accident. He testified that he continued seeing the counsellor for many months afterwards, but the counselling records only show two further visits, and there are no records to confirm that he has sought counselling since October 2012. I am not persuaded that Mr. Pringle suffered distinctively psychological injuries resulting from the accident.

***Authorities***

**74**  Mr. Pringle brought forward four cases. The one bearing the closest resemblance to this case is *Jang v. Ritchie*, [*2013 BCSC 2459*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1RW-00000-00&context=) [*Jang*]. Like Mr. Pringle, the plaintiff in *Jang* suffered a comminuted fracture involving his left distal radius and ulna. The long-term outcome was worse: Mr. Jang's left hand was permanently "fixed in a somewhat claw-like position" (para. 6). He was unable to carry on with the work he had had for 25 years as a sushi chef. He could no longer carry out simple household tasks such as carrying a laundry basket, opening a jar, or vacuuming. Justice Fenlon awarded Mr. Jang $80,000 for pain, suffering and loss of enjoyment of life.

**75**  The defendants cite *Azam v. Bilaya*, [*2014 BCSC 1615*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-JSXV-G06R-00000-00&context=) [*Azam*], *Knezevich v. Cannon*, [*2000 BCSC 841*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G276-00000-00&context=) [*Knezevich*], *Patoma v. Clarke*, [*2009 BCSC 1069*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-623B-00000-00&context=) [*Patoma*], *Michaud v. Machtaler*, [*2004 BCSC 829*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X44C-00000-00&context=) [*Michaud*] and *Wernicke v. Logan*, [*2007 BCSC 1899*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-FCYK-20FD-00000-00&context=) [*Wernicke*].

**76**  The plaintiff in *Azam* suffered a series of injuries in various incidents. She was awarded $10,000 for a simple fracture of the wrist and a knee injury. The injuries did not require surgery. The plaintiff suffered other injuries as well and there is little discussion of the wrist injury in the reasons. Justice Gerow found that the plaintiff's evidence of her pain and suffering was not particularly credible. I do not find this case helpful as a guide to the case at hand.

**77**  *Michaud* is a case in which the plaintiff was awarded damages equivalent to approximately $45,000 in 2019. It is not a helpful analogue to this case because that plaintiff's most significant injuries were soft tissue injuries to his neck and back, in addition to a broken wrist in his non-dominant arm. The plaintiff's wrist did not require surgery and does not appear to have caused him ongoing difficulty.

**78**  The plaintiff in *Knezevich* suffered a lower back injury that resolved within two years and a broken left wrist. Surgery was not required and Justice Halfyard characterized the wrist injury as "minor". The plaintiff was substantially recovered from the wrist injury three years after the accident. Justice Halfyard awarded the plaintiff non-pecuniary damages of $22,500 (equivalent to approximately $32,000 in 2019).

**79**  In *Patoma*, the plaintiff's only injury was a fractured left wrist. As in this case, surgery was required to set the bones in place and pins or wires were inserted that were later removed. The plaintiff, who was 68 years old at the time of the accident, was almost fully recovered two years after the accident. In that two-year period, he was disrupted in his recreational activities. Among other things, he was unable to play a musical instrument, the bagpipes, which he had formerly played twice daily. Justice Fenlon awarded non-pecuniary damages of $38,000 (equivalent to approximately $45,000 in 2019).

**80**  In *Wernicke*, the plaintiff was 27 years old at the time of the accident. His injuries were a broken wrist and mid-back pain that persisted two years following the accident. He worked as a heavy duty mechanic and was able to return to work four months after the accident, but was limited in the kind of work he would be able to take on in the future. His recreational activities were limited following the accident, and he would suffer ongoing discomfort in the future. Justice Loo awarded non-pecuniary damages of $45,000 (equivalent to approximately $55,000 in 2019).

***Assessment***

**81**  In my view, the overall impact of Mr. Pringle's injuries on his life is less serious than that suffered by the plaintiff in *Jang*. It is more serious than that suffered by the plaintiff in *Knezevich*. This suggests that an appropriate award will be significantly less than $80,000 and significantly more than $32,000. *Patoma* and *Wernicke* are closer on their facts to this case and involve awards equivalent to $45,000 and $55,000.

**82**  Taking everything into account, I assess Mr. Pringle's non-pecuniary damages reflecting compensation for past and future pain, suffering, disability and loss of enjoyment of life at $50,000.

**Loss of future earning capacity**

**83**  The burden is on Mr. Pringle to prove that there is a real and substantial possibility that he will suffer a future loss of income by reason of his injuries; *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. The amount of the loss is determined by assessing its probability, bearing in mind that it is ultimately a question of what is fair and reasonable in the circumstances; *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.

**84**  Mr. Pringle has not suffered any income loss to date. While the range of motion in his left wrist is limited, this limitation did not constrain his ability to work for Paramount Components in 2016 and 2017. He left Paramount Components following a disagreement with the owner, and found work with Ralph's Auto Recyclers, earning a higher hourly wage. He testified that his present employer likes him.

**85**  I am not persuaded that there is a real and substantial possibility that Mr. Pringle will suffer a future loss of income by reason of his wrist injury. His claim for damages for loss of future earning capacity is not made out.

**Aggravated and punitive damages**

**86**  Aggravated damages seek to compensate a plaintiff for high-handed, malicious, insulting or oppressive conduct of a defendant that has aggravated the injury suffered by the plaintiff; *Bob v. Bellerose*, [*2003 BCCA 371*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JS0R-227W-00000-00&context=) at paras. 26-32, leave to appeal to S.C.C. ref'd, [*[2003] S.C.C.A. No. 408*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SF1-JKPJ-G2MD-00000-00&context=) [*Bob*]. Aggravated damages can be awarded in a ***negligence*** case, although it is unusual; *Bob*; *Iachetta v. Ioannone*, [*2005 BCSC 566*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FC6N-X0JK-00000-00&context=) at paras. 65-74; *Morrow v. Outerbridge*, [*2009 BCSC 433*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S45D-00000-00&context=) at paras. 254-259. As Cory J. put it in *Hill v. Church of Scientology*, [*[1995] 2 S.C.R. 1130*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3K1-00000-00&context=) at para. 189 (quoted by Huddart J.A. in *Bob* at para. 31), they express the "natural indignation of right-thinking people" at the defendant's conduct.

**87**  Punitive damages are awarded in exceptional cases, not to compensate the plaintiff, but to punish the defendant for "'malicious, oppressive and high-handed' misconduct that 'offends the court's sense of decency'" representing "a marked departure from ordinary standards of decent behaviour"; *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. 36, quoting *Hill v. Church of Scientology* at para. 196.

**88**  I have found that Mr. Pringle and Mrs. Pringle were both at fault in the accident. I do not accept Mr. Pringle's dramatic account of his mother's conduct leading to the collision. The details of the events leading to the collision are murky. I am not persuaded that Mrs. Pringle's conduct in striking Mr. Pringle with her vehicle was high handed, malicious, insulting or oppressive. It did not represent a marked departure from ordinary standards of decent behaviour. Mrs. Pringle's conduct was not such as to require an additional award to fully compensate Mr. Pringle or to require a punitive award.

**89**  Accordingly, I dismiss Mr. Pringle's claims for aggravated and punitive damages.

**Disposition**

**90**  For these reasons, I assess Mr. Pringle's damages at $50,000 and order that the defendants are liable to pay Mr. Pringle 50% of his damages, or $25,000.

**91**  Mr. Pringle has recovered judgment within the jurisdiction of the Small Claims Court (currently $35,000). In the ordinary course, pursuant to the *Supreme Court Civil Rules*, R. 14-1(10), he would not be entitled to costs, other than disbursements, "unless the court finds that there was sufficient reason for bringing the proceeding in the Supreme Court and so orders". Mr. Pringle may wish to apply for an order that he recover costs on the ground that there was sufficient reason to bring the proceeding in this Court rather than the Small Claims Court. Mr. Pringle or the defendants may wish to bring to my attention offers made pursuant to R. 9-1 and ask me to exercise my discretion pursuant to R. 9-1(5).

**92**  If either party wishes to apply for an order concerning costs, they may schedule a hearing before me through the Registry at 9:00 a.m. on a regular sitting day. The parties should file their authorities and any written argument they wish to rely upon at least three days in advance of the hearing. Unless a hearing concerning costs is requested within 14 days of the issuance of these reasons for judgment, Mr. Pringle will recover only his disbursements.

G.B. GOMERY J.

**End of Document**

[***Russell v. Parks, [2012] B.C.J. No. 1588***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S25T-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Cranbrook, British Columbia

P. Abrioux J.

Heard: June 12-15 and 18-20, 2012.

Judgment: July 27, 2012.

Docket: 19093

Registry: Cranbrook

**[2012] B.C.J. No. 1588** | 2012 BCSC 1128

Between Lenord Russell, Plaintiff, and Kenneth Manson Parks, Defendant

(104 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Leg injuries — Knee — Foot — Action by plaintiff for damages suffered when he was struck by defendant's van while walking in parking lot allowed — Defendant failed to keep proper lookout — Plaintiff contributorily negligent — Liability apportioned 66.7 per cent to plaintiff and 33.3 per cent to defendant — Plaintiff suffered soft tissue injury to right knee and fracture of left foot — Plaintiff overweight and poorly conditioned before and after accident — Plaintiff worked odd jobs — Plaintiff awarded 33.3 per cent of non-pecuniary damages of $45,000, $10,000 for past loss of earning capacity, $30,000 for future loss of earning capacity.**

**Damages — Types of damages — General damages — For personal injuries — Loss of earning capacity — Special damages — Past loss of income — Non-pecuniary loss — Action by plaintiff for damages suffered when he was struck by defendant's van while walking in parking lot allowed — Defendant failed to keep proper lookout — Plaintiff contributorily negligent — Liability apportioned 66.7 per cent to plaintiff and 33.3 per cent to defendant — Plaintiff suffered soft tissue injury to right knee and fracture of left foot — Plaintiff overweight and poorly conditioned before and after accident — Plaintiff worked odd jobs — Plaintiff awarded 33.3 per cent of non-pecuniary damages of $45,000, $10,000 for past loss of earning capacity, $30,000 for future loss of earning capacity.**

**Tort law — *Negligence* — Contributory *negligence* — Apportionment of liability — Action by plaintiff for damages suffered when he was struck by defendant's van while walking in parking lot allowed — Defendant failed to keep proper lookout — Plaintiff contributorily negligent — Liability apportioned 66.7 per cent to plaintiff and 33.3 per cent to defendant — Plaintiff suffered soft tissue injury to right knee and fracture of left foot — Plaintiff overweight and poorly conditioned before and after accident — Plaintiff worked odd jobs — Plaintiff awarded 33.3 per cent of non-pecuniary damages of $45,000, $10,000 for past loss of earning capacity, $30,000 for future loss of earning capacity.**

**Transportation law — Motor vehicles and highway traffic — Liability — Civil actions — *Negligence* — Contributory *negligence* — Action by plaintiff for damages suffered when he was struck by defendant's van while walking in parking lot allowed — Defendant failed to keep proper lookout — Plaintiff contributorily negligent — Liability apportioned 66.7 per cent to plaintiff and 33.3 per cent to defendant — Plaintiff suffered soft tissue injury to right knee and fracture of left foot — Plaintiff overweight and poorly conditioned before and after accident — Plaintiff worked odd jobs — Plaintiff awarded 33.3 per cent of non-pecuniary damages of $45,000, $10,000 for past loss of earning capacity, $30,000 for future loss of earning capacity.**

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| --- |
| Action by Russell for damages suffered in an August 2008 motor vehicle accident. Russell was walking in a mall parking lot when he was struck by Parks' van. Russell was 51 years old and lived with his mother, who had suffered a series of strokes. Prior to the accident, he worked odd jobs. His 2008 income was $11,500. Prior to the accident, he was an avid outdoorsman. Russell sustained a soft tissue injury to his right knee and a fracture of the fifth metatarsal of his left foot. He was in a wheelchair for two or three months. The foot injury was resolved in three to four months. Russell claimed that he continued to suffer disabling pain in his right knee up to the time of trial, which greatly impeded his ability to perform his usual activities and to find work.  HELD: Action allowed.  Parks was in breach of both his statutory and common law duties to Russell. Parks failed to keep a proper lookout. Had he been keeping a proper lookout, he would have seen Russell. Russell was contributorily negligent by walking in the driving portion of the parking lot and not keeping a proper lookout. Liability was apportioned 33.3 per cent to Parks and 66.7 per cent to Russell. Russell was overweight and poorly conditioned, and had been prior to the accident. Russell suffered an injury to his right knee that continued to affect his ongoing reduced functioning. Russell was awarded 33.3 per cent of non-pecuniary damages of $45,000, $10,000 for past loss of earning capacity, $30,000 for future loss of earning capacity and zero for costs of future care. |

**Statutes, Regulations and Rules Cited:**

Court Order Interest Act, *RSBC 1996, CHAPTER 79*,

Motor Vehicle Act, [*RSBC 1996, CHAPTER 318, s. 1*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5X76-XJ31-JKB3-X2FB-00000-00&context=), s. 179(1), s. 179(2), s. 180, s. 181

**Counsel**

Counsel for the Plaintiff: W. Simpson.

Counsel for the Defendant: C. Cavanagh.

**Reasons for Judgment**

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| **P. ABRIOUX J.** |

**I INTRODUCTION**

**1**  Lenord Russell seeks damages for the injuries he sustained in a motor vehicle accident which occurred on August 21st, 2008 (the "Accident").

**2**  The Accident occurred at the Trackside Mall in Cranbrook B.C. after Mr. Russell had exited a bakery store. He had just crossed over a concrete barrier which delineates parking stalls and entered onto the mall's parking lot. He was struck by a vehicle owned and operated by the defendant which was in the process of being parked.

**3**  Liability for the Accident is in issue. The plaintiff seeks damages for pain and suffering, past and future loss of earning capacity and cost of future care.

**II THE PLAINTIFF PRIOR TO THE ACCIDENT**

**4**  Mr. Russell was born in Cranbrook on November 17, 1960. He is now 51 years old. He has lived in Cranbrook most of his life. Since 2006 he has lived with his mother, Margaret Russell, in the family home. Mrs. Russell has sustained a series of strokes. According to the plaintiff she is "not too good on her own". The plaintiff's father passed away before the plaintiff moved back in with his mother.

**5**  Mr. Russell graduated from Mt. Baker Senior Secondary in Cranbrook in 1979. He was in the Specified Employment Training Program. This provided the student with work experience in various occupations. In Mr. Russell's case this involved labouring work including removal of railroad ties, working on a Christmas tree farm, etc.

**6**  Following high school, the plaintiff worked in these and other occupations including a saw mill, fire fighting and fire suppression. He also worked at a wrecking yard stripping cars for parts to be resold, doing "slashing", that is clearing land for the installation of gas lines, and other forms of heavy physical work.

**7**  The plaintiff's pre-Accident earnings history was modest. Although he did have a union paid position many years prior to August of 2008, in the years leading up to the Accident his income was derived from doing yard work in the summer, primarily mowing lawns, snow shovelling in the winter, and performing motor vehicle repairs from time to time for family and friends.

**8**  Mr. Russell did file income tax returns for some of the years prior to the Accident. He reported little or no income. In 2009, he filed an income tax return for 2008. He reported total earnings from employment of $11,500 for that year. It was his evidence this was his approximate income for the years leading up to the Accident and he probably should have reported his correct income but had not done so. The plaintiff did not have any documents substantiating the amounts he received for the work he had done such as invoices or receipts for expenses incurred. There was evidence led on his behalf, however, from a number of individuals, including family members, who had hired him over the years. By and large, the plaintiff was paid $10 per hour.

**9**  There was considerable variation in the amounts the plaintiff would earn on a monthly basis prior to the Accident. This is shown by the fact he would pay his mother $300 to $400 per month for room and board when he could. When he had extra money he would contribute additional monies to the household expenses. He had not owned his own vehicle for some time.

**10**  Mr. Russell was described by several of the witnesses as a big man or "big guy". At the time of the Accident he weighed approximately 280 pounds. He is 6' 4" tall. His weight increased to as much as 320 pounds after the Accident. It was the plaintiff's evidence his weight had remained stable for approximately 10 years prior to August 2008. He was described by his family physician as being deconditioned prior to the Accident although the extent of this deconditioning on his day-to-day activities is in dispute.

**11**  When Mr. Russell was working in the bush, either while performing his fire fighting or suppression duties or slashing trails, he had to transport equipment. This included hoses, generators, and other pieces of heavy equipment. It was his evidence he would often be required to carry equipment for a considerable distance. At times he had also worked for a moving company, which involved moving deep freezers. He had been able to perform all of these activities.

**12**  The plaintiff says he was an avid outdoorsman. He hunted, did river fishing, and would go on hikes, some of which would last as long as eight hours over difficult terrain. His fishing would involve going up and down steep river banks. The hunting activities included having to transport large game animals such as deer and elk back to his vehicle. It was his evidence and that of friends who testified on his behalf, that he could perform these activities with little or no difficulty. Although he was big, he could keep up with most of them.

**13**  The plaintiff's pre-Accident medical history is relevant to the following extent. He sustained an injury to his left leg as a youth when a car apparently rolled over on him. In addition, he had two left ankle ligament injuries in 1981 and 1984. Furthermore, in May 2004 he sustained a fracture to the left ankle. This latter injury caused him to be off work for approximately seven months. According to Mr. Russell, his left leg/ankle did continue to be painful from time to time prior to the Accident but he did not let the pain bother him. He did walk with a slight limp but the injury did not impede his ability to do the work he was performing or interfere with his strenuous recreational activities.

**14**  It became known as a result of medical imaging taken following the Accident that the plaintiff had osteoarthritis in both knees. Mr. Russell denied having any symptoms to his right knee prior to the Accident and there is nothing in the pre-Accident records which suggests otherwise.

**15**  In July 2009, prior to the plaintiff undergoing arthroscopic surgery for an injury to the right knee alleged to result from the Accident, it was noted he had a markedly elevated blood pressure. This resulted in his being treated for hypertension. The evidence of the cardiologist Dr. Saul Isserow was that the hypertension was longstanding and predated the Accident. Furthermore the onset of this condition was not caused or contributed to by the injuries sustained in the Accident.

**III THE ACCIDENT**

**16**  The plaintiff testified the Accident occurred around 11:00 a.m. He had walked to the Trackside Mall. He had been there on many occasions over the years. There was a bakery he would go to eight to ten times a year. There was also a Windsor Plywood store at the mall which he would attend from time to time to purchase supplies.

**17**  The mall generally runs in a north-south direction. Windsor Plywood is the last store on the south side. The last business on the north side is a medical supply store. The bakery in question is several doors down, to the north of Windsor Plywood.

**18**  As a person exits from any of the stores at the mall, there is a walkway of approximately four and a half feet in width. The boundary of the walkway is a series of low concrete blocks which form a barrier from the parking area. This walkway also goes in a north-south direction and is parallel to the store fronts of the various businesses.

**19**  On the parking lot side of the barrier are painted lines which indicate parking spaces. The lines are angled to the north of the mall, that is, in the general direction of the medical supply store. There are lined parking spaces on the other side of the parking lot. They are also angled towards the north.

**20**  The plaintiff stated that as he left the bakery, he turned to his left and proceeded down the walkway in the direction of Windsor Plywood. He stayed in the walkway and then proceeded on a diagonal and onto the parking lot. He was approximately six feet down one of the parking spaces when the Accident occurred. He recalled getting hit on the right knee by the front passenger side of the defendant's van. He fell down and to his left. He could not say what the defendant's speed was. The impact "chewed up" the sole of his left shoe. He was sitting on the ground after he was hit. He could not recall much else.

**21**  On cross examination Mr. Russell acknowledged there was good visibility that day and he was aware there could be traffic in the mall. He stated he could not recall if he was looking up or down just before the impact. He was then referred to his evidence on examination for discovery and in particular his statement to the effect that immediately prior to the Accident he "just looked up and was hit . . . Kind of looking down and looked up, bang, and I walked right into it. The van was right there." He said this evidence was "pretty well true".

**22**  Robin Webber also testified. Mr. Webber serviced dry cleaning machines. His employer had an office at the mall. He said he was just about to enter the office. He did not actually see the Accident occur. He looked up and saw the plaintiff on the hood of a car. He rolled off the side of the car and fell into an empty parking space. He was screaming in pain and holding his knee. Mr. Webber estimated the plaintiff and defendant were approximately 10 feet away from the buildings in the mall.

**23**  The defendant Kenneth Parks testified. He was well familiar with the mall. His business had previously had its office there. In the time frame leading up to August 2008 he would still attend the mall two or three times a year to go to Windsor Plywood.

**24**  Mr. Parks testified that he entered the mall from the south entrance way. He was intending to park in front of Windsor Plywood. There was one vehicle which was parked in front of the store. He decided to park in the neighbouring stall. He did a shoulder check over his right shoulder as he made the wide turn to get around the parked vehicle. In doing so he observed a man in front of the entrance to Windsor Plywood. He then did two additional shoulder checks before starting to enter the parking space. He estimates he was proceeding at approximately one to two miles per hour.

**25**  As he entered the parking space "the next thing I know he was right in front of me." He said the plaintiff put his hands on the front of his van. He immediately braked. When he got out of his van the plaintiff was on the ground. His mouth was full of food. Mr. Parks was concerned the man would choke. Mr. Parks stated that when he first observed the plaintiff he was in front of his van. By the time he reached him, the plaintiff was to the right of the front fender.

**26**  On cross examination, the defendant agreed that due to the angling of the parking stalls, it would have been easier to park had he entered the mall at the northern entrance. He acknowledged he wore progressive lenses and did not have good peripheral vision when looking to the right.

**IV THE PARTIES' POSITION REGARDING LIABILITY**

**27**  The plaintiff's position is that although the defendant was entitled to enter the mall parking lot where he did, he was negligent in that he failed to see the plaintiff who was clearly there to be seen. The parking lot met the definition of "highway" as set out in section 1 of the *Motor Vehicle Act*, *R.S.B.C. 1996, c. 318* (the "*Act*"), which was the applicable legislation in effect at the date of the Accident. Section 181 of the *Act* imposed "an overriding duty" on the defendant to take proper care not to injure the plaintiff. He should bear the entire or, in the alternative, the majority of the responsibility for the Accident. I note the words "overriding duty" do not appear in the *Act*.

**28**  The defendant's position is that he was there to be seen. The plaintiff had left a place of safety, being the walkway. Pursuant to section 180 of the *Act* he had to yield the right of way to the defendant. The plaintiff breached both his statutory and common law duties, the latter including the obligation to take reasonable steps in the furtherance of his own safety. He submits the plaintiff was entirely responsible for the Accident. In the alternative, a comparison of the parties' relative blameworthiness should result in an apportionment of liability of 75% to 90% against the plaintiff and 10% to 25% against the defendant.

**V DISCUSSION AND ANALYSIS REGARDING LIABILITY**

**29**  The applicable sections of the *Act* are the following:

**Rights of way between vehicle and pedestrian**

179 (1) Subject to section 180, the driver of a vehicle must yield the right of way to a pedestrian where traffic control signals are not in place or not in operation when the pedestrian is crossing the highway in a crosswalk and the pedestrian is on the half of the highway on which the vehicle is travelling, or is approaching so closely from the other half of the highway that he or she is in danger.

1. A pedestrian must not leave a curb or other place of safety and walk or run into the path of a vehicle that is so close it is impracticable for the driver to yield the right of way.

**Crossing at other than crosswalk**

180 When a pedestrian is crossing a highway at a point not in a crosswalk, the pedestrian must yield the right of way to a vehicle.

Duty of driver

181 Despite sections 178, 179 and 180, a driver of a vehicle must

1. exercise due care to avoid colliding with a pedestrian who is on the highway,
2. give warning by sounding the horn of the vehicle when necessary,

. . .

**30**  Breach of a statutory duty under the *Act* is neither ***negligence*** per se nor *prima facie* evidence of ***negligence***. Rather it is simply evidence of ***negligence***. *Canada v. Saskatchewan Wheat Pool*, [*[1983] 1 S.C.R. 205*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JGHR-M278-00000-00&context=) at 222-26.

**31**  Although I was referred to several authorities which deal with the competing duties of pedestrians and the operator of a motor vehicle, these types of cases are highly fact specific.

**32**  In my view, the defendant was in breach of both his statutory and common law duties which he owed the plaintiff. His breach of his statutory duties is evidence from which I can conclude in consideration of all the evidence that he was negligent. In particular, although Mr. Parks did have the right of way, he failed to keep a proper lookout for persons, such as the plaintiff, who he either saw or, acting reasonably, ought to have seen prior to the Accident occurring.

**33**  I find that Mr. Parks was proceeding slowly immediately prior to the Accident. He was likely going somewhat faster than his estimate of one to two miles per hour but still at a safe and slow speed considering the fact he was bringing his vehicle to a stop while in the process of parking.

**34**  I accept he made three separate checks over his right shoulder, the first as he made his wide turn to get around the vehicle which was parked, the others after he saw the individual in front of the Windsor Plywood store. But I also find it was likely the last two checks took place just before and as the defendant entered the parking space which diverted his attention from the fact the plaintiff had crossed over the concrete barrier and had placed himself directly in front of his van. Had the defendant been keeping a proper lookout he would have seen the plaintiff who was clearly there to be seen.

**35**  In so far as causation is concerned, I find that the defendant, at the speed he was travelling, could have brought his vehicle to a stop without coming into contact with the plaintiff had he been keeping a proper lookout as to what was taking place in front of him.

**36**  I also conclude the plaintiff was contributorily negligent. I find he left a place of safety, being the walkway, and stepped over the concrete barrier. By doing so, he immediately placed himself right in front of the defendant's vehicle which was in the process of being parked. Mr. Russell was unable to provide any explanation for his actions. His counsel suggested there may have been an open door to one of the businesses which impeded the plaintiff's passage or a concern that at the end of the walkway near Windsor Plywood there was a 'blind corner" as a reason for the plaintiff's actions. He then indicated it would be shear speculation to conclude this was the reason for the plaintiff acting as he did. I agree.

**37**  Based on the plaintiff's evidence on examination for discovery referred to above, I conclude he was looking downwards as he stepped over the concrete barrier and, when he looked up, realized the defendant's vehicle was right in front of him. He was not, in my view, paying attention when he did so and, accordingly, failed to take reasonable care for his own safety.

**38**  The issue then becomes how liability should be apportioned. In considering this question from the perspective of relative blameworthiness, some of the criteria referred to in *Aberdeen v. Langley (Township)*, [*2007 BCSC 993*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21XT-00000-00&context=), varied on other grounds [*2008 BCCA 420*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3RY-00000-00&context=), are germane. These are summarized at para. 62 and 63:

[62] Thus, fault is to be determined by assessing the nature and extent of the departure from the standard of care of each of the parties. Relevant factors that courts have considered in assessing relative degrees of fault were summarized by the Alberta Court of Appeal in ***Heller v. Martens***, [*[2002] A.J. No. 638*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9361-JYYX-63KP-00000-00&context=), *supra*, at para. 34 as follows:

1. The nature of the duty owed by the tortfeasor to the injured person ...
2. The number of acts of fault or ***negligence*** committed by a person at fault ...
3. The timing of the various negligent acts. For example, the party who first commits a negligent act will usually be more at fault than the party whose ***negligence*** comes as a result of the initial fault ...
4. The nature of the conduct held to amount to fault. For example, indifference to the results of the conduct may be more blameworthy ... Similarly, a deliberate departure from safety rules may be more blameworthy than an imperfect reaction to a crisis ...
5. The extent to which the conduct breaches statutory requirements. For example, in a motor vehicle collision, the driver of the vehicle with the right of way may be less blameworthy ...

[Authorities omitted.]

See also ***Vigoren v. Nystuen***, [*[2006] S.J. No. 293*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K711-FJM6-642G-00000-00&context=), *supra*, at para. 90 (summarizing these same factors).

[63] Many of the above-noted factors are discussed in Chiefetz, *Apportionment of Fault in Tort*, *supra*, at pp. 102-104. Considering that, I conclude it would be appropriate to add the following as relevant factors:

1. the gravity of the risk created;
2. the extent of the opportunity to avoid or prevent the accident or the damage;
3. whether the conduct in question was deliberate, or unusual or unexpected; and
4. the knowledge one person had or should have had of the conduct of another person at fault.

**39**  In *Aberdeen*, it was stated that, "[a]nother important factor in assessing the relative degree of blameworthiness of the parties is the magnitude of the departure from the standard of care" (para. 66).

**40**  I conclude the plaintiff's degree of fault is greater than the defendant's. The defendant was entitled to take the route he did in order to park his vehicle. He was travelling at an appropriate rate of speed under the circumstances. Ironically, it was his performance of a safety check to his right which resulted in his momentarily not seeing what was occurring in front of him.

**41**  The plaintiff, on the other hand, had no reason to leave the walkway when he did. He was looking down as he was in the process of crossing the concrete barrier and entering the parking lot. When he looked up the defendant's vehicle was right in front of him.

**42**  In my opinion liability should be apportioned 66 ?% against the plaintiff and 33 ?% against the defendant.

**VI DAMAGES**

**A The Nature and Extent of the Injuries Sustained by the Plaintiff**

**43**  The plaintiff sustained a soft-tissue injury to the right knee and a fracture of the 5th metatarsal of the left foot. The consensus of the medical evidence is the Accident did not cause an acceleration of the osteoarthritis in the right knee which predated the Accident. In dispute, however, is whether it caused the right knee which was asymptomatic before the Accident to become symptomatic.

**44**  When Mr. Russell was admitted to East Kootenay Regional Hospital following the Accident his immediate complaints related to his right knee. The following day when he went to see his family physician, Dr. Cutler, he had a bruised and tender left foot. He was then re-admitted to hospital where the diagnosis of the fracture was made. His foot was placed in a cast. Approximately a month later it was placed in an air cast boot.

**45**  The plaintiff's injuries resulted in his being in a wheel chair for two to three months. His knee problems did not improve. He was referred to an orthopedic specialist, Dr. Chan, who was of the view there should be a right knee arthroscopy.

**46**  Within three to four months of the Accident the plaintiff no longer had any complaints relating to the left foot. It was now back to its pre-Accident state. By February 2009, however, Mr. Russell was experiencing pain in both knees. In fact the left knee pain was said to be worse than the right. MRIs of both knees were performed in May 2009. They were interpreted to show a torn medial meniscus of the right knee with degenerative changes in both knees. Arthroscopic surgery of the right knee was performed in December 2009. Dr. Chan's operative report noted there was not, in fact, a meniscus tear. A subsequent MRI which was performed in June 2010 had similar findings as the first.

**47**  It was the plaintiff's evidence that he continued to have disabling right knee pain up to the time of trial. This has greatly impeded his ability to perform his usual activities. With the exception of some sporadic lawn cutting for family and friends from whom he obtained only a nominal income, he has been unable to work. He can no longer participate in the activities he performed regularly prior to the Accident. Although he has increased his ability to walk and can now do so for up to two miles a day, he has to take rests. He has become deconditioned and his weight has increased significantly. His life is not at all what it was prior to the Accident.

**48**  At the request of his counsel the plaintiff was examined by the orthopedic specialist, Dr. Richardson, on January 27, 2012. At that time Mr. Russell stated the following:

1. right knee: pre-Accident he had no pain. Immediately post Accident it was 8 on a pain scale of 0 to 10. Since the surgery it will vary from 3 out of 10 to 8 out of 10 depending on his activity level.

\* left knee: prior to the Accident the pain was 3 on the pain scale. In 2008 it was also at 3 out of 10 and that remained the situation at the date of the assessment.

1. left foot and ankle: pre-Accident this pain was 7 out of 10. Following the Accident it increased to 8 out of 10 and then went back to 7 out of 10.
2. back pain: Dr. Richardson noted the plaintiff had some low back pain prior to the Accident as documented in the chiropractor's records. Following the Accident he had back pain which varied from a 0 out of 10 to 8 out of 10. He had not had any low back pain for several months prior to the assessment.

**49**  What the plaintiff reported to Dr. Richardson is generally consistent with his evidence at the trial with the exception of increased pain to the left knee after the Accident. His description of pain and the manner in which it continues to affect his day-to-day activities was corroborated, to a large extent, by the lay evidence led on his behalf.

**50**  Dr. Richardson's evidence at the trial was to the effect that the ongoing pain in the left leg originates in the ankle and is not causally related to the Accident.

**51**  Furthermore, the ongoing pain in the right knee results from the effect of the Accident on a pre-existing degenerative condition which was quiescent or asymptomatic. In his opinion the causal relationship to the Accident is shown by the fact there were no complaints to the right knee beforehand.

**52**  Dr. Richardson was of the opinion Mr. Russell could perform housekeeping and other activities around the home. The only rehabilitation which could be helpful would be a three-month aqua fit program.

**53**  In December 2010 the plaintiff was assessed at the request of his counsel by the physiatrist Dr. Craig. When he testified, Dr. Craig indicated he recalled Mr. Russell since it was unusual to see a person out of breath when getting on and off an examination table. It was his understanding the plaintiff was overweight and deconditioned prior to the Accident. He was unable to link the chondromalacia (irritation of the cartilage under the kneecap) to the Accident.

**54**  Dr. Craig agreed with Dr. Richardson and Dr. Leith, who assessed the plaintiff on behalf of the defendant, that normally a soft-tissue injury to the right knee would not lead to a long-term disability. He was of the view, however, that the plaintiff's pre-existing right knee and left ankle osteoarthritis, together with obesity and deconditioning, made him susceptible to a poorer outcome from the injuries sustained in the Accident. The cause of the injuries was "multifactoral" but the pre-existing osteoarthritis played a role. It was hard to say what ongoing symptoms were caused by the direct injury of the Accident and what had occurred over time.

**55**  It was also Dr. Craig's opinion that Mr. Russell was at risk of a total right knee replacement even if the Accident had not occurred.

**56**  In July 2010, Mr. Russell was due to undergo a functional capacity evaluation by the occupational therapist Tatiana Petrov. This had been arranged by his counsel. After the assessment commenced, Ms. Petrov ascertained the plaintiff was feeling unwell and had high blood pressure. She stopped the assessment and it was rescheduled to September of that year. By that time she was aware of his "cardiac issues".

**57**  In both September 2010 and March 2012 Ms. Petrov concluded the plaintiff was exhibiting full effort. She was of the view he perceived himself to be capable of being more functional than was the case.

**58**  It was Ms. Petrov's opinion that further vocational or rehabilitation intervention would not assist the plaintiff in improving his overall work capacity or level of employability. She was of the view that certain care items such as nutritional and weight reduction counselling, a recumbent bicycle, and short-term physiotherapy and kinesiology treatments would be beneficial. She recommended braces for the right knee and left ankle together with some assistance for yard maintenance and snow removal.

**59**  The orthopaedic specialist Dr. Leith assessed the plaintiff on behalf of the defendant in October 2011. He concluded Mr. Russell's arthritis in the right knee had not been rendered symptomatic by the Accident. He based this conclusion on the fact the arthritis was located in the medial, that is the inside portion of the knee. The direct injury had occurred to the lateral or outside portion which was also the location of the plaintiff's ongoing right knee complaints.

**60**  It was also Dr. Leith's opinion that the Accident likely caused a minor soft-tissue injury to the right knee together with a fracture to the left foot. The pre-existing osteoarthritis was causing some of the ongoing disability but the Accident had not altered its natural progression. He would have expected the prognosis for recovery from an accident of this minor nature to be excellent. The plaintiff's overall health and general lack of physical fitness were the main reason for his lack of ability to sustain any form of exertion. He also had osteoarthritis involving the right knee more than the left and osteoarthritis to the left ankle absent the Accident would still be causing him symptoms and problems. The Accident had not contributed "all that much" to these symptoms or to Mr. Russell's overall ability to work.

**61**  Dr. Leith opined that the right-knee injury caused by the Accident could reasonably have resulted in an absence from work of two to six weeks with up to 12 weeks for the left foot fracture.

**B Conclusions on the Evidence**

**62**  There was much lay evidence led which pertained to the plaintiff's level of functioning several years prior to the Accident. But there was very little detail provided, even by Mr. Russell himself, as to what his day-to-day activities consisted of in the year or so before August 2008.

**63**  I make the following findings of fact based on my consideration of the evidence both lay and expert as a whole:

1. the plaintiff's "original position" immediately prior to the Accident included the following:
2. being significantly overweight and deconditioned;
3. having a hypertension condition which had existed for many years;
4. asymptomatic degenerative osteoarthritis to both knees, more significant to the right than the left; and
5. symptomatic left foot and ankle difficulties.
6. prior to the Accident, the plaintiff's weight and deconditioning, together with the left foot and ankle difficulties caused him to live a rather sedentary lifestyle. Although he was able to work from time to time and participate in certain leisure activities, these were lessening as he grew older.
7. the Accident did not cause the degenerative osteoarthritis in the right knee to become symptomatic. It did, however, cause a soft-tissue injury which continued to affect the plaintiff to some extent at the time of trial.
8. the plaintiff's ongoing difficulties are multifactoral. They include:
9. his ongoing weight and conditioning problems. Although Mr. Russell's pre-Accident weight and lack of conditioning would likely have affected his work and enjoyment of the amenities of life even if the Accident had not occurred, the injuries which he did sustain exacerbated that pre-existing condition;
10. the plaintiff's pre-existing but quiescent cardiac condition would have materialized the way it did even if the Accident had not occurred. This condition would have affected his long term day-to-day functioning including his ability to earn an income;
11. notwithstanding this, the injuries sustained in the Accident, particularly the right knee, continue to affect his ongoing reduced functioning. This will continue indefinitely, to some degree, although some weight loss and an exercise rehabilitation program will likely assist him;
12. an exercise and weight loss program would have been of benefit to the plaintiff even if the Accident had not occurred.

**C Discussion and Analysis**

**64**  In *Dhaliwal v. Tomelden*, [*2010 BCSC 612*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JKHB-6300-00000-00&context=), Russell J. stated:

[148] The role that damages plays is to place the plaintiff, as much as possible, in his original position. It is not the obligation of the defendant to put the plaintiff in a better condition than he was in. As noted in *Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=) at 473-474, [*140 D.L.R. (4th) 235*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=), per Mr. Justice Major:

The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not for the pre-existing damage. ... Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's ***negligence***, then this can be taken into account in reducing the overall award. ... This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

[149] Also, as noted by the British Columbia Court of Appeal in *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, [*2003 BCCA 670*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60TP-00000-00&context=) at para. 28, [*22 B.C.L.R. (4th) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60TP-00000-00&context=):

[28]. .... a pre-existing condition, whether it is quiescent or active, is part of the plaintiff's original position.

The Court goes on, at para. 48, to say:

[48]. .... Whether manifest or not, a weakness inherent in a plaintiff that might realistically cause or contribute to the loss claimed regardless of the tort is relevant to the assessment of damages. It is a contingency that should be accounted for in the award. Moreover, such a contingency does not have to be proven to a certainty. Rather, it should be given weight according to its relative likelihood.

**65**  It is within the context of these legal principles and the findings of fact I have made that the plaintiff's damages should be assessed:

**Non pecuniary Damages**

**66**  The plaintiff submits the award for general damages for pain and suffering should be in the range of $60,000 to $80,000.00. The defendant's position is that an appropriate award would be $40,000 to $45,000 less a significant reduction to take into account the plaintiff's original position, the measurable risk it would have detrimentally affected his life in the future and the fact the cardiac condition did in fact materialize post-Accident. Under the circumstances $15,000 would represent fair compensation under this heading.

**67**  Both parties referred to various authorities in support of their respective positions.

**68**  I have found that the plaintiff lived a somewhat sedentary life prior to the Accident. Yet his evidence, that of his mother, his niece Tanya Abbey and to a limited extent the other lay witnesses, has led me to the conclusion the Accident did cause the plaintiff some significant difficulties in the first year or so after it had occurred.

**69**  The defendant submits, based in part on Dr. Leith's opinion referred to above, that the injuries caused by the Accident were of a limited duration. I disagree. I have concluded they still do affect his day-to-day functioning and will continue to do so into the future. Yet the ongoing effects are not as significant an element in Mr. Russell's ongoing difficulties as he alleges. In relation to the "multifactoral" causes which continued to the time of trial, those which are related to the Accident, in my view, are outweighed by those which are not.

**70**  In *Jackson v. Jeffries*, [*2012 BCSC 814*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F06F-247P-00000-00&context=), Greyell J. summarized the law with respect to non-pecuniary damages :

[77] In *Trites*, [*[2010] B.C.J. No. 1251*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-22C1-00000-00&context=), Madam Justice Ker outlined the purpose and principles of non-pecuniary damages at paras. 188-189.

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 and reasonable to both parties ...

For the purposes of assessing non-pecuniary damages, 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 ...

[Citations omitted.]

[78] 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* [*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=), [*2005 BCCA 54*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S131-00000-00&context=)).

[79] 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 that experience": *Dilello v. Montgomery*, [*2005 BCCA 56*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S13K-00000-00&context=) at para. 25.

**71**  There is a useful summary of the potential range of damages for injuries similar to those sustained by the plaintiff in *Gray v. Ellis,* [*2006 BCSC 1808*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JBT7-X33P-00000-00&context=). Taking into account inflation, the range would now be approximately $45,000 to $75,000.

**72**  In my view, the plaintiff's situation, before contingencies are taken into account is generally comparable to the midpoint of this range. They are less serious than those described in *Ibbitson v. Cooper*, [*2010 BCSC 1916*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F528-G2XM-00000-00&context=), being $70,000; and *Zimmerman v. Beattie*, [*2005 BCSC 502*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FC6N-X0FJ-00000-00&context=); they are generally more similar to those in *Lipinski v. Mein*, [*2004 BCSC 1389*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G09S-00000-00&context=) (the latter two awards requiring an adjustment for inflation).

**73**  From the mid range amount of approximately $60,000 I must take into account the plaintiff's original position and the measurable risk the pre-Accident condition would have affected the plaintiff's life had the Accident not occurred. Accordingly, I award non pecuniary damages in the amount of $45,000.

**Past Loss of Earning Capacity**

**74**  Claims for damages for past and future loss of earning capacity are based on the recognition that a plaintiff's capacity to earn money was an asset which has been taken away: *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. 23 - 24.

**75**  As was stated in *Rowe* at paras. 30 - 31:

... 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.

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*.

[Underlining added in *Rowe.*]

**76**  The plaintiff's position is that his 2008 income tax return reported income for the year of $11,500 or approximately $1000 per month. He recognized prior returns had been inaccurate but submitted that when the evidence regarding what he had in fact earned in the past for mowing lawns, shovelling snow, performing mechanical work for friends and family, etc. was taken into account this was a "bottom end of the range" amount. Forty-six months had elapsed since the Accident. Accordingly damages under this heading should be $46,000.

**77**  The defendant's position is that the acute phase of the injuries caused by the Accident was over within three to four months. Even if the Court were to accept a pre-Accident monthly income of $1000, then the award should be restricted to this timeframe. In any event it had been admitted by the plaintiff that he received the following amounts from social assistance:

\* 2008: $2361

\* 2009: $7355

\* 2010: $1220

It is submitted these amounts should be deducted from any award for past loss of earnings or earning capacity *McIntyre v. Forsythe*, [*2000 BCSC 461*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JWBS-61GD-00000-00&context=).

**78**  There is a paucity of evidence upon which any precise conclusions can be reached as to the plaintiff's income in the timeframe of a year to two years prior to the Accident. What the evidence on this issue really comes down to is that Mr. Russell would get paid $10 per hour from a variety of friends and family members for the various services he provided to them. In the summer of 2006 he did earn approximately $600 per month when he was employed by his friend, George Nelligan, cutting lawns. Mr. Nelligan did not hire the plaintiff the summer before the Accident, being 2007. Rather he hired the plaintiff's brother. Mr. Nelligan's business is now dormant.

**79**  Several of the lay witnesses testified they would have hired the plaintiff after the Accident as they had before had he been capable of doing the work. An example is his sister, Laurie Russell. She did hire her brother in the summer of 2011 to mow her lawn. She testified it took him much longer to do the work as a result of his physical condition. As for payment, she stated: "I gave him $20 or $30, whatever he wants".

**80**  It was the plaintiff's evidence he has not done any heavy jobs since the Accident. He has tried to mow the grass for his mother but it takes twice the time it did before. His left leg is "not too bad". It is the right knee which makes it difficult to walk. He can walk up to two miles a day but only if he "breaks it up". He stated that walking on grass is easier than on a hard surface such as concrete. He can now not squat like he could prior to the Accident. This makes it impossible for him to get under vehicles to do repairs.

**81**  When I consider this evidence within the context of the legal principles to which I have referred, I conclude the plaintiff has established a loss of earning capacity to the date of the trial which is causally related to the injuries sustained in the Accident. But I am unable to accept that in the timeframe of approximately a year or so leading up to the Accident the plaintiff was earning $1,000 per month. That would be approximately $250 per week. If one assumes an hourly wage of $10 and that the average length of the grass mowing or snow shovelling jobs was two to three hours then that would amount to two jobs per day, five days a week. The evidence led by the plaintiff, in my view, could not form the basis for such a conclusion.

**82**  I consider a monthly income of $600, that is 60 hours of work per month or approximately 15 hours or $150 per week as being reasonable. That would amount to gross loss of income to the time of trial of approximately $27,500.

**83**  When I take into account the findings of fact I have made as to the plaintiff's original position and the multi-factoral causes of his difficulties at the time of the trial, I conclude $21,000 is appropriate compensation under this head of damages. After making a deduction for the approximate amount of $11,000 for the social assistance benefits received, that results in an award of $10,000.

1. **Loss of Future Earning Capacity**

**84**  The law with respect to this head of damages was also recently summarized in *Jackson* above :

**106** In *Simmavong v. Haddock*, [*2012 BCSC 473*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-62H4-00000-00&context=), I discussed the law regarding future loss of income:

[95] A claim for loss of future earning capacity raises two key questions:

1. has the plaintiff's earning capacity been impaired by his or her injuries; and, if so,
2. what compensation should be awarded for the resulting financial harm that will accrue over time?

[96] The assessment of loss must be based on the evidence and is a matter of judgment. It is not an application of a purely mathematical calculation. The appropriate means of assessment will vary from case to case: *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.); *Pallos v. Insurance Corp. of British Columbia* [*(1995), 100 B.C.L.R. (2d) 260*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-FFFC-B0K2-00000-00&context=) (C.A.); *Pett v. Pett*, [*2009 BCCA 232*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JNS1-M2G2-00000-00&context=); *Rosvold v. Dunlop*, [*2001 BCCA 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JN14-G2PR-00000-00&context=).

[97] The essential task of the court is to compare the "likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened": *Gregory v. Insurance Corporation of British Columbia*, [*2011 BCCA 144*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1K8-00000-00&context=) at para. 32. I also note that "insofar as is possible, the plaintiff should be put in the position he or she would have been in if not for the injuries caused by the defendant's ***negligence***": *Lines v. W & D Logging Co. Ltd.*, [*2009 BCCA 106*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-F016-S3X8-00000-00&context=) at para. 185.

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

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

[99] The test is set out 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=), at para. 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*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa*, [*[1999] B.C.J. No. 270*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-21RK-00000-00&context=). But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss. [Emphasis in original.]

[100] There are two possible approaches to assessment of loss of future earning capacity: the "earnings approach" discussed 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" discussed in *Brown*. As noted in the above quote from *Perren*, both approaches are correct and will be more or less appropriate depending on whether the loss in question can be quantified in a measureable way: at para. 32.

[101] The earnings approach and the capital asset approach were described 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=), by Madam Justice Dickson, at para. 233:

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=), Garson J.A. identified the two approaches to assessment of loss of future earning capacity commonly adopted by courts in British Columbia. One is the "earnings approach" described in *Pallos*; the other is the "capital asset approach" described in *Brown*. The earnings approach involves a form of math-oriented methodology such as i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value or ii) awarding the plaintiff's entire annual income for a year or two. The capital asset approach involves considering factors such as i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; ii) is less marketable or attractive as a potential employee; iii) has lost the ability to take advantage of all job opportunities that might otherwise have been open; and iv) is less valuable to herself as a person capable of earning income in a competitive labour market.

**85**  The plaintiff's position is that the starting point of the analysis should be an assumed loss of $1,000 per month until his 65th birthday. Based on the multiplier contained in the economist Robert Carson's report of February 14, 2012, being $11,020, this results in a loss of approximately $110,000. The plaintiff submits his income could have been above $1000 per month. Offsetting that would be the impact of his hypertension on his ability to work and the possibility of there being less work for him to do in the future. The positive and negative contingencies essentially offset each other. He seeks $110,000.

**86**  The defendant points to the lack of evidence pertaining to this issue. In particular, he says there were no invoices substantiating work done prior to the Accident, no receipts pertaining to expenses incurred in relation to the work, such as gas, equipment purchases or rentals, etc. He submits any amount awarded would be speculative.

**87**  The defendant's alternative submission is that in considering the value of the loss of a real and substantial possibility the following should be taken into account:

1. the plaintiff's mother's evidence which was to the effect that when he moved back into the family residence in 2006, her son "was not doing much for work";
2. the lay witness' evidence regarding the sporadic work performed before the Accident;
3. the causal link between any future loss and the injuries sustained in the Accident;
4. the weight and conditioning issues identified by Ms. Petrov in her reports and the apparent improvement in the plaintiff's condition at the time of her second assessment in March of 2012.

**88**  In my view the plaintiff has proven a real and substantial possibility of a future event leading to a financial loss which is causally related to the injuries sustained in the Accident. His inability to earn an income in the future and to which the Accident's injuries have contributed is not mere speculation. Although others may have recuperated from a soft-tissue injury to the right knee in the timeframe identified by Dr. Leith, that is not the appropriate barometer. I have found that of the multifactoral causes of the plaintiff's ongoing condition and disability, these include the injury to the right knee. This conclusion is supported by the opinions of Dr. Richardson, Dr. Craig and Ms. Petrov. Although the plaintiff's weight did apparently return to its pre-Accident level a few months after the Accident, it then increased significantly. More recently it has been reduced. This is consistent with the plaintiff being inactive, then attempting to exert himself more as he perceived his knee condition to be improving.

**89**  The right knee, however, is not what it was prior to the Accident and the Accident injuries which continued at the time of trial are one of the causes of the situation in which Mr. Russell now finds himself.

**90**  I am of the view the loss of a capital asset approach as outlined 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.), is the approach to be used in valuing this future loss. The plaintiff has been rendered less capable of earning an income overall as a result of the Accident. He is also less marketable and has lost many if not all of the opportunities which were previously available to him. Finally, he is less valuable to himself as a person capable of earning an income in a competitive labour market.

**91**  In arriving at an amount which I consider to be fair to both parties I have considered the same factors I outlined above with respect to the claim for loss of past earning capacity. In addition, I am of the view that if the plaintiff does increase his level of conditioning he will likely be able to accept some of the mowing and other work opportunities which are still available to him.

**92**  Dr. Richardson and Ms. Petrov were of the view Mr. Russell was capable of sedentary work. Yet there was no evidence before me that such work was available and/or the plaintiff was a suitable candidate for retraining. In fact, with the plaintiff's educational background and work history, Ms. Petrov was of the view the plaintiff could not be retrained. I accept that evidence.

**93**  Notwithstanding the above, I do not consider the $110,000 amount sought by the plaintiff based on Mr. Carson's multiplier as being reasonable in this case. First of all, it is an actuarial not economic multiplier. It does not take into account labour market contingencies. Secondly, and more importantly, is that the estimate of $10,000 income per year, for the reasons I outlined in paragraphs 81 and 82 above, does not accord with the evidence led on this issue, in particular, the amounts earned in the year or two prior to the Accident.

**94**  I am also unable to accept the range submitted on behalf of the defendant. Although there are other causes to the plaintiff's ongoing inability to earn an income, the right-knee injury remains and will likely continue to be a factor to some extent.

**95**  I conclude a reasonable amount for this head of damages, taking into account the measurable risk of certain of the components of the plaintiff's pre-Accident condition materializing and the certainty of the cardiac condition having occurred is $30,000.

**Cost of Future Care**

**96**  Greyell J. also summarized the law in this area in *Jackson*:

**124** The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-accident condition in so far as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* [*(1985), 49 B.C.L.R. (2d) 33*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JB7K-21F4-00000-00&context=) (S.C.); *Williams 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 et al. v. Beazley et al.*, [*2002 BCSC 1104*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-JCJ5-251B-00000-00&context=).

**125** In his text *The Law of Damages*, loose-leaf ed. (Toronto: Canada Law Book, updated November 2011, release 20), Professor Waddams states, at 3-63:

. . . the tenor of Dickson J.'s judgment in *Andrews v. Grand & Toy*, [*[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=), makes it clear that the court will lean in favour of the plaintiff in judging the reasonableness of his 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.

**126** The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care: (1) there must be a medical justification; and (2) the claims must be reasonable: *Milina*, at 84. Furthermore, future care costs must be likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in future. If a plaintiff has not used a particular item or service in the past it may be inappropriate to include its cost in a future care award: *Izony v. Weidlich*, [*2006 BCSC 1315*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JX3N-B19D-00000-00&context=) at para. 74.

**127** Contingencies must also be considered when assessing cost of future care. In *Gilbert*, the court discussed adjusting for contingencies at para. 253:

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: see *Spehar (Guardian ad litem of)*. 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: see *Morrison (Committee of)*, [*[1998] B.C.J. No. 3279*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S751-JGHR-M273-00000-00&context=). Each case falls to be determined on its particular facts.

**128** 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.

**97**  The plaintiff's position is that damages should be awarded in accordance with the recommendations of Ms. Petrov in her report of March 12, 2012. These include one-time costs for such items as nutritional and weight reduction counselling, physiotherapy, a recumbent bicycle and braces totalling $6829. Annual future costs for weight reduction maintenance, physiotherapy, yard maintenance and snow removal etc. were also recommended.

**98**  The defendant submits there was little, if any, medical evidence with respect to this head of damages. His position is that the plaintiff had not proven medical justification for the items claimed. Furthermore, the plaintiff's evidence was that he had discontinued physiotherapy since it was not assisting him. He had also not established the causal relationship between what was claimed and the injuries sustained in the Accident.

**99**  Several of the medical experts were of the opinion the plaintiff would benefit from significant weight loss. The only medical evidence, however, pertaining to the need for assistance outside the home was that of Dr. Craig and Dr. Richardson. Dr. Craig opined the plaintiff would require some help with heavy yard work but was capable of doing light to medium yard tasks, although with some discomfort. He recommended a referral to an orthodist such that braces for the left leg and right knee could be considered. There was no evidence from such an expert led at the trial. As referred to above, Dr. Craig was also of the view the plaintiff was at risk of a total right knee replacement even if the Accident had not occurred, although the risk had been heightened by the Accident.

**100**  For his part, Dr. Richardson recommended an exercise and rehabilitation plan although no details were provided.

**101**  When I consider this evidence in light of my findings of fact and the legal principles referred to above, I conclude the plaintiff has failed to satisfy the onus to prove medical justification for his claim for future care costs causally related to the Accident.

**V CONCLUSION**

**102**  I award the plaintiff the following:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Non-pecuniary damages: | $45,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Past loss of earning capacity: | $10,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Loss of Future earning Capacity: | $30,000.00 |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | **TOTAL:** | **$85,000.00** |  |

**103**  In accordance with my conclusions regarding liability for the Accident, the plaintiff will recover 33 1/3% of this amount. In addition there will be court order interest pursuant the *Court Order Interest Act*, *R.S.B.C. 1996, c. 79*, on the award for past loss of earning capacity.

**104**  The parties shall have their respective costs of this action at Scale B in accordance with the apportionment of liability unless there are other factors which may impact the question of costs. If such is the case either party has liberty to apply to speak to the matter of costs.

P. ABRIOUX J.

**End of Document**

[***Schipilow v. Minch, [2006] B.C.J. No. 3169***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JBT7-X353-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Kamloops, British Columbia

Beames J.

Heard: September 11 - 15 and 18 - 20, 2006.

Oral judgment: October 13, 2006.

Released: December 11, 2006.

Kamloops Registry No. 33189

**[2006] B.C.J. No. 3169** | 2006 BCSC 1786

Between Lora Linda Schipilow, Plaintiff, and Kevin Minch, Greater Vancouver Transportation Authority and Coast Mountain Bus Company Ltd., Defendants

(50 paras.)

**Case Summary**

**Tort law — *Negligence* — Motor vehicles — Liability of driver — Pedestrians — Contributory *negligence* — Apportionment of liability — Action by the plaintiff for damages for *negligence* allowed in part — The plaintiff was standing near two parked cars when she was struck by the side of a bus driven by the defendant — The court held that the driver was negligent, as the bus likely moved marginally into the parking lane and struck the plaintiff — The plaintiff failed to take reasonable steps to ensure her own safety — Liability was apportioned 60 per cent to the defendants.**

**Damages — General damages — For personal injuries — Considerations — Employment status — Cost of future care — Loss of earning capacity — Non-pecuniary damages, including pain and suffering — Action by the plaintiff for damages for *negligence* allowed in part — The plaintiff, age 46, was struck by a bus and sustained ongoing injuries to her wrist, neck and jaw — She suffered symptoms of chronic pain syndrome and depression — General damages were assessed at $75,000 — Special damages were fixed at $3,891 — Past loss of income was assessed at $35,000 — Future loss of capacity to earn income was assessed at $100,000 — Future cost of care was assessed at $40,852.**

**Damages — Physical injuries — Arm injuries — Wrist — Body injuries — Neck — Head injuries — Jaws — Age of claimant — 46 to 55 — Non-pecuniary award — $60,001 to $80,000 — Action by the plaintiff for damages for *negligence* allowed in part — The plaintiff, age 46, was struck by a bus and sustained ongoing injuries to her wrist, neck and jaw — She suffered symptoms of chronic pain syndrome and depression — General damages were assessed at $75,000 — Special damages were fixed at $3,891 — Past loss of income was assessed at $35,000 — Future loss of capacity to earn income was assessed at $100,000 — Future cost of care was assessed at $40,852.**

|  |
| --- |
| Action by the plaintiff, Schipilow, against the defendants, Minch, and his employer, the Greater Vancouver Transportation Authority and Coast Mountain Bus Company, for damages for ***negligence*** -- The plaintiff was struck by a transit bus driven by Minch -- It was nighttime on a busy street -- The plaintiff emerged from two parked cars and stood, waving to her sister in a car across the street -- The front of the bus passed by the plaintiff and its side struck her, knocking her to the ground -- The driver testified that he never saw the plaintiff and was unaware that he had hit her until a passenger told him to stop the bus -- The plaintiff broke her wrist and sustained injuries to her shoulder, chin, face and knee -- Six years later, the plaintiff, age 46, continued to experience lessened mobility in her neck, and pain in her jaw, shoulder and wrist -- She had symptoms of chronic pain syndrome, including disturbance of sleep and depressed mood -- She no longer participated in sports and hobbies, and was unable to undertake household chores, vehicle maintenance, and house or home renovation work that she previously performed -- The plaintiff earned under $10,000 annually at a variety of jobs -- She had completed a course and started a computer business just prior to the accident -- HELD: Action allowed in part -- On a balance of probabilities, the bus moved marginally into the parking lane and struck the plaintiff -- The driver was negligent, however, he was not solely liable for the accident -- The plaintiff's failure to take reasonable care for her own safety was a contributing cause of the accident -- Accordingly, liability was apportioned 60 per cent to the defendants and 40 per cent to the plaintiff -- The plaintiff proved that she suffered, and would continue to suffer, ongoing physical and mental problems caused by the accident -- General damages were assessed at $75,000 -- Special damages were fixed at $3,891 -- Past loss of income was assessed at $35,000 -- Future loss of capacity to earn income was assessed at $100,000 -- Future cost of care was assessed at $40,852. |

**Counsel**

Counsel for the Plaintiff: R. Garner and E. Hughes

Counsel for the Defendants: T. Decker

|  |
| --- |
| **BEAMES J. (orally)** |

**1**   On July 10, 2000, the plaintiff, Lora Schipilow, was struck by a transit bus while it travelled westbound on West Broadway in Vancouver, driven by the defendant Kevin Minch. Both liability and quantum are in issue.

**2**  The accident occurred between 8:30 and 9 p.m. The weather was clear and dry and it was still daylight out. The accident took place in the 600 block of West Broadway in the vicinity of a London Drugs store. That area of West Broadway is busy, with lots of vehicle and pedestrian traffic, and it was bustling that evening in particular. West Broadway, in the 600 block, is six lanes wide in total. At that time of day, the lanes adjacent to each curb on the north side, which is the London Drugs side, and on the south side, are parking lanes, so that there are two driving lanes for travel westbound and two driving lanes for travel eastbound.

**3**  The plaintiff and her sister had been travelling eastbound on West Broadway and decided to stop so that the plaintiff could go into London Drugs. The plaintiff's sister let the plaintiff off just before the intersection of West Broadway and Heather. The plaintiff crossed West Broadway at Heather and walked east to London Drugs. The plan was for the plaintiff's sister to try to get a parking spot somewhere along the south side of West Broadway in the 600 block. She had to circle the block once and then was able to park on West Broadway just slightly to the east of the London Drugs store.

**4**  The plaintiff finished shopping, paid for her purchases and left London Drugs. She testified that as she exited the store she realized that she had forgotten to buy cigarettes. She decided she would ask her sister if there was a convenience store on their way home, that is, towards the sister's home, in hopes that she could avoid returning to London Drugs, which was quite busy at that time. She saw her sister's car parked across the street. She walked between two parked vehicles and then walked a little bit to the east, so that she was standing across from her sister's car. She waved and got her sister's attention. It was her plan, she says, to call across to her sister to ask about a convenience store as soon as the traffic cleared.

**5**  As she stood beside a parked car, several vehicles passed her, including a bus. She had seen the bus driven by the defendant from approximately half a block away, and saw it a couple of times as she glanced to her left and glanced to her right to watch traffic. The front of the defendant's bus passed her safely, but as the bus, which was an articulated transit bus 60 1/2 feet long, passed her, there was an impact between her and the side of the bus. The plaintiff was knocked to the ground as a result of the impact and sustained several injuries.

**6**  The plaintiff maintains that at the time of the accident she was standing still beside a parked car and between that parked car and the dotted line which divided the parking lane from the closest lane of traffic, which was the middle lane of the three westbound lanes. She does not know precisely how far she was from the parked vehicle she was standing beside, but she maintains that she was closer to the parked vehicle than to the dotted line.

**7**  The plaintiff's sister saw the plaintiff standing across the road on the opposite side from where she was parked on West Broadway. She testified that she saw the plaintiff wave and she saw more than one, but less than ten vehicles pass the plaintiff without incident. She is unable to pinpoint where the plaintiff was standing in relation to the lane lines as a result of the traffic between herself and her sister. She saw the defendant's bus pass the plaintiff and next saw the plaintiff whirling through the air. Based on her observations before the accident occurred, she formed the impression that the plaintiff was waiting for traffic to clear so that she could cross West Broadway.

**8**  Mr. Minch, the defendant bus driver, had been driving articulated buses for approximately two years before the accident. He testified that he was driving the 99B route in Vancouver on the day in question and that he was driving in the middle lane of the three westbound lanes heading towards U.B.C. at the time. He did not see the plaintiff at any time before impact. As he was driving along West Broadway one of his passengers came running towards him from the back of the bus, telling him to stop the bus, because he had hit someone. He thought the passenger was on drugs and told the passenger to sit down. It was only when the passenger persisted that he stopped the bus and went back to investigate. By the time he got back to the area of the impact, the police and the ambulance were there and the plaintiff was already on a stretcher.

**9**  The evidence of Mr. Minch is of very little value. In his direct evidence he seemed very confident and very sure of his recollection of events on July 10, 2000. However, on cross-examination he was confronted with numerous conflicts between his evidence at trial and his evidence at examinations for discovery. When counsel for the plaintiff suggested that he had no specific recollection, and that he was speculating, he agreed. He also agreed when counsel for the plaintiff suggested that the bottom line was that Mr. Minch simply had no idea how the accident happened.

**10**  John Mallon is a transit bus driver. He was following the bus driven by Mr. Minch. Both his bus and Mr. Minch's bus were travelling in the middle of the three westbound lanes. He testified that he did not see Mr. Minch's bus cross the lane lines to the left or to the right. He brought his bus to a stop behind Mr. Minch's bus after the accident. Until that moment he had not seen anything unusual. He had not seen the plaintiff and he did not see the impact between the plaintiff and the defendant's bus. He was focused, obviously and appropriately, primarily on his own bus: scanning the road, watching his passengers, watching traffic and the like. It would not have surprised him or caught his attention if the bus ahead of him had drifted over the lane lines a few inches. He conceded that it was possible that the defendant's bus left his lane and struck the plaintiff, but he did not see the impact, so he cannot say and does not know what happened.

**11**  The only other evidence from the defence with regard to liability comes from a passenger, Eric Sunstrum, who was riding on the defendant's bus at the time of impact. He testified that he heard a loud bang on the side of the bus and immediately another passenger called for the driver's attention saying, "Stop the bus. You have hit someone." Before the bang, Mr. Sunstrum had noted nothing unusual about the way the bus was being driven. He has no recollection of the rear of the bus swaying side to side. There had been no recent stop and no change of lanes immediately prior to the impact. As he was sitting sideways in the bus, towards the rear of the bus, and, as he described it, staring vacantly, he has no idea where the bus was in relation to the lane lines and he did not see the impact.

**12**  That is the evidence before the court with regard to liability. The law imposes a duty on every user of a highway to take reasonable care for the safety of him or herself and for the safety of other users of the highway. In addition to the common-law principles, there are of course statutory provisions with regard to the use of public highways and the respective rights of way and duties of users of the highway.

**13**  Each case must be decided on its own facts. In this case I accept the plaintiff's evidence that she was standing next to a parked car when she was hit by the defendant's bus and that she did not walk into the side of the bus or head butt the bus. Her evidence in that regard is believable. It accords with the evidence of her sister, at least with respect to the fact that the plaintiff was on the roadway, stationary, while at least a few vehicles passed her, and it accords with commonsense.

**14**  The plaintiff was there to be seen. The defendant driver did not see her and cannot offer any explanation as to how the accident occurred. Beyond the speculation, which I do not accept, that the plaintiff essentially ran into the bus, the defence offers no explanation for how the accident occurred.

**15**  I am satisfied, on a balance of probabilities, that the defendant's bus moved at least marginally into the parking lane and struck the plaintiff as she stood in the parking lane. Even if the plaintiff was standing close to the lane line, she was stationary. She had been in that position for a period of time. She was there to be seen, had the defendant driver been paying sufficient attention, and there is no evidence to suggest that the defendant driver, had he seen the plaintiff, could not have taken steps to avoid hitting her.

**16**  I find that the defendant driver was negligent and that his ***negligence*** contributed to the accident. However, I am not satisfied that the defendant was solely liable for the accident.

**17**  The plaintiff, as I have said, had a duty to take reasonable care for her own safety. In my view, she did not do so. She should not have entered out onto the street to attempt to shout across the street to her sister. She left the safety of the sidewalk, and indeed she left the relative safety of a position between two parked cars to walk to the edge of the parking lane and the middle lane of moving vehicles. The street was very busy. The lanes are relatively narrow and the defendant's bus, which she had seen from approximately half a block away and then again on a couple of additional occasions, was very large. She stood beside a parked car without regard to where she was in relation to the lane line. She held both a purse and a shopping bag in front of her. I am satisfied that she, too, was negligent, and that her ***negligence*** contributed to the accident.

**18**  Taking into account all of the evidence in this case, I apportion liability 60 percent to the defendants and 40 percent to the plaintiff.

**19**  I turn now to damages.

**20**  The plaintiff is 46 years old. She was an active, outgoing and energetic person before the accident. On the evidence, I accept that she was generally physically well and that she was not having any medical issues prior to the accident.

**21**  After being struck by the bus, the plaintiff was flung to the ground, landing on her elbows, followed by her chin. She was taken to the Vancouver General Hospital by ambulance. She was observed to have abrasions on her cheek and chin and on one knee. Her elbows were bruised and tender. Her right wrist was severely fractured. A closed reduction was performed and her wrist was casted. She was discharged from the hospital that same night, with instructions to return for a repeat assessment in a week. The plaintiff stayed at her sister's in Vancouver for a couple of weeks. She had, immediately following the accident, headaches, jaw pain, sore gums and mouth, and of course pain in her right arm up to her shoulder and pain in her right collarbone.

**22**  Today, more than six years after the accident, the plaintiff still suffers from the effects of the accident. Dr. McCann, the physical medicine and rehabilitation specialist retained by the defence, examined the plaintiff on August 21, 2006. He found that the plaintiff had restrictions in the flexion, extension and rotation of her neck, pain and tenderness in her right shoulder and right shoulder region, right temporal mandibular jaw pain and clicking and right wrist pain. He found she had symptoms of chronic pain syndrome, including disturbance of sleep and depressed mood. He is of the opinion that her symptoms in her wrist are consistent with early degenerative changes in the joint. He recommends that she avoid repetitive wrist motion and that she exercise the wrist and take anti-inflammatory medications as required.

**23**  Dr. McCann attributes the plaintiff's wrist pain, her neck pain and her chronic pain induced sleep and mood disorders to the accident. He is not a specialist within the area of temporal mandibular jaw pain and he does not express an opinion on causation with regard to that diagnosis or those symptoms.

**24**  Dr. Le Nobel, the plaintiff's specialist in physical medicine and rehabilitation, made similar findings with regard to symptoms currently being suffered by the plaintiff and provided similar opinions with regard to diagnosis and causation.

**25**  The plaintiff was also seen by a neuropsychologist, Dr. Krywaniuk. He concluded that the plaintiff suffers from emotional distress, depression, anxiety and stress and diminished self-confidence, which have had a significant effect on her life.

**26**  Finally, the plaintiff has seen a specialist with regard to jaw and dental issues. The plaintiff says that after the accident she spit out some small pieces of teeth and that afterwards she suffered mouth pain and jaw pain. She has had extensive dental treatment since September of 2000. The plaintiff has no expert evidence with regard to dental, and specifically teeth related issues. The defendants retained an expert, Dr. Goldstein, who examined the plaintiff in 2001. He is of the opinion that it is unlikely that the plaintiff's dental issues were caused by the accident. He points to the plaintiff's pre-existing dental disrepair and breakdown and expresses the view that the plaintiff's dental problems are associated with chronic neglect and chronic long-term periodontal disease. He was not called for cross-examination and his opinion is not contradicted. Although the plaintiff filed a report from an orthodontist, that orthodontist expressed no opinion about causation or about the plaintiff's dental issues aside from her jaw. No evidence is before the court from the plaintiff's treating dentist.

**27**  Consequently, I find that with the exception of some minor chipping, none of the plaintiff's complaints with regard to her teeth and the treatments on her teeth are related to the accident. With regard to the problems with her temporal mandibular jaw, I do not doubt that the plaintiff had jaw pain immediately following the accident and that she continues to have jaw pain now. With regard to the jaw pain, Dr. Goldstein is of the opinion that the jaw pain, neck pain and headaches experienced by the plaintiff are related. I am satisfied that at least some of the plaintiff's jaw pain is related to the accident.

**28**  In sum, I find that the plaintiff has proved that as a result of the accident she has suffered and will likely continue to suffer from problems with regard to her right wrist, and that she has ongoing difficulties with daily headaches, neck pain, shoulder pain and some jaw pain. She has convinced me that she is suffering from a low mood and that she has difficulty sleeping.

**29**  As a result of the accident, the plaintiff has had significant changes in her life. She suffers daily, I accept, from the aftermath of the accident. Those members of her family and friends who testified say that she is a changed person, and she feels that she is a changed person as well. She no longer participates in many of her pre-accident activities from which she drew much of her sense of self, including her sports and hobbies, and she is restricted in such things as household chores, vehicle maintenance, and house or home renovation work that she previously performed. I accept that her ability to focus and concentrate is somewhat diminished. I conclude that she has had a dramatic change in her life and that she continues to suffer the effects of the accident.

**30**  Taking into account the circumstances of this case, and having read the case law submitted by both counsel in closing argument, I set the general damages in this case at $75,000.

**31**  I turn now to special damages. Many of the expenses incurred by the plaintiff as a result of the accident have been paid for. The plaintiff claims an additional $14,497.89 in special damages. The defendants agree that $3,789.22 of the amount claimed relates to the accident but dispute the balance.

**32**  The vast majority of the disputed expenses relate to dental expenses incurred by the plaintiff. As I have said, the plaintiff has not proved that the issues she has had with her teeth are as a result of the accident. Consequently, those expenses are not properly recoverable in this action.

**33**  In terms of the disputed expenses, I find the following are recoverable: Vitamin E gel: $6.83; Vitamin E cream: $10.25; exercise rope: $6.42; weights, ice pack and exerciser: $10.22; massager: $45.59; and gel wrist support: $22.89, for a total of $102.20. In total, I fix the special damages at $3,891.42[**1**](#Forward_fnref_fnr-1). The defendants agree that there will be no deduction from that for amounts previously paid to the plaintiff for expenses she incurred before trial.

**34**  I turn now to wage loss. At the time of the accident the plaintiff was self-employed, working in the computer industry. She had started her own business after three years of self-study, during which she developed her skills by using the computer, reading and taking web-based courses, and practising her skills on the computers owned by friends and family. From the time the plaintiff's business started, which was September of 1999, to the date of the accident on July 10, 2000, her business revenue was $6,239. She had agreed to perform another job for $7,000, which job had been delayed and which, following the accident, she was unable to do.

**35**  Prior to starting her own business, and the self-study that preceded it, the plaintiff had had several jobs. She had worked in the insurance business, she had sold life insurance and mutual funds, she had refuelled airplanes at the Kamloops Airport, and she had done residential painting jobs. She had also been self-employed since approximately 1988 as a sales consultant through a franchise which offered some form of training and development products or programs to companies.

**36**  As I understand the plaintiff's evidence, she had not filed an income tax return for many years, dating back to the late 1980s and up to the date of the accident, because her income had not warranted it. She had not earned more than $5,000 per year since approximately 1987.

**37**  Since the accident, the plaintiff has continued to do some computer related work and she has done some office related work for her common-law spouse's company. Her earnings have been as follows: zero income after the accident for the balance of 2000; $1,100 in 2001; $4,140 in 2002; $6,200 in 2003; $6,700 in 2004; and $7,250 in 2005.

**38**  The plaintiff's economist has made calculations with regard to the average earnings of computer web technicians and of B.C. female high school graduates. Using those comparators, the plaintiff's counsel submits that the plaintiff should be awarded past wage loss of between $107,000 and $113,000. Alternatively, he seeks an assessment of general past loss of capacity to work in a similar range. The defence submits that other than the loss of the $7,000 contract, the plaintiff should be awarded little or nothing for past wage loss, as her post-accident earnings have been similar to her earnings in the more than ten years prior to the accident.

**39**  With regard to future loss, the plaintiff relies on the same comparators provided by the economist and urges me to award future loss of income in the range of $200,000 to $330,000, and alternatively urges me to assess the plaintiff's loss of capacity in a similar range. The defendants say that any future pecuniary award should be nominal.

**40**  The plaintiff, as I have said, had just started her business shortly before the accident. She had a couple of major contracts and otherwise performed small jobs. She did not have an established track record or an established client base. She did not have any recognizable credentials or any formal education degrees or diplomas or certifications. The business she was entering into is a competitive one and the risks of failure are high, as pointed out by the plaintiff's vocational consultant.

**41**  I am not satisfied that the plaintiff has proved a loss of income, either past or future, in the range suggested by her counsel. She has not convinced me that she would have earned income commensurate with the average earnings of a computer web technician or with the average earnings of a B.C. female with high school graduation, particularly given her past employment and earning history.

**42**  On the other hand, it is clear that the plaintiff has lost a capacity to earn income, both prior to trial and into the future. It is also clear that she, at least, believed that she had finally found an occupation that she was interested in and committed to, and that she had decided she needed to become more focused with respect to earnings.

**43**  I am satisfied that the plaintiff has been rendered less capable overall of earning income from all types of employment, that she is less marketable as an employee to potential employers, that she 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 that she is less valuable to herself as a person capable of earning income in a competitive labour market: ***Price-Wright v. Copeman***, [*[2005] B.C.J. No. 1997*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FFFC-B1GR-00000-00&context=) (C.A.).

**44**  Her losses, aside from the loss of the $7,000 contract, cannot be calculated. Her losses must be assessed based on a consideration of the real possibilities that the plaintiff might have earned more income, both before the trial and into the future, and then assessing the probability that that would have occurred: ***Steenblok v. Funk***, [*[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=) (C.A.).

**45**  Doing the best that I can with the evidence before me, I assess the plaintiff's past loss, including the loss of the $7,000 contract, at $35,000.

**46**  With regard to future loss, the plaintiff remains restricted in her ability to work and to earn income and her prognosis for full recovery is guarded at best. She may have some improvement in the future, particularly if she is able to implement some of the recommendations made for more ergonomically appropriate working conditions. She has been able to increase her employment earnings in each year since the accident. Again, taking all of the evidence into account, I assess the plaintiff's future loss of capacity to earn income at $100,000.

**47**  Finally I turn to future cost of care. The plaintiff relies on the cost of future care analysis prepared by Ms. Scullion. Most of Ms. Scullion's recommendations are reasonable, and, I accept, are necessitated by the plaintiff's injuries. With reference to Ms. Scullion's report, Exhibit 3, Tab H, I accept that the plaintiff needs the professional services set out on page 9 of the report, with the exception that the plaintiff has not established, in my view, the need for attendance at a pain clinic, nor the need for the skills training. With regard to medications and medical services, on page 9 and 10 of the report, I accept all of the costs, with the exception of the dental surgeries and treatment for the reasons I have previously given. I accept all of the claims for adaptive equipment on page 10 of the report.

**48**  Using the economist's report with respect to the present value of costs to be incurred in the future, and adjusting the gym membership costs to age 75 rather than for life, I award total costs for future care of $40,852.

**49**  In summary, I fix the plaintiff's damages as follows: non-pecuniary general damages, $75,000; special damages, $3,891.42; loss of capacity/loss of income in the past, $35,000; loss of capacity future, $100,000; cost of future care, $40,852. The plaintiff will be entitled to recover 60 percent of those sums, based on the apportionment of liability I have made.

**50**  Counsel, if necessary, have leave to speak to issues with regard to interest, costs, tax gross up and management fees. Arrangements to do so may be made through the trial coordinator's office in either Kelowna or Kamloops.

BEAMES J.

[**1**](#Backward_fnref_fnr-1) Math error in total corrected

**End of Document**

[***Ward v. Vancouver (City), [2007] B.C.J. No. 9***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JFKM-61KM-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Tysoe J.

Heard: November 6 - 10 and 22, 2006.

Judgment: January 2, 2007.

Vancouver Registry No. S030038

**[2007] B.C.J. No. 9** | [*2007 BCSC 3*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X21V-00000-00&context=) | [*[2007] 4 W.W.R. 502*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X21V-00000-00&context=) | [*63 B.C.L.R. (4th) 361*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X21V-00000-00&context=) | [*45 C.C.L.T. (3d) 121*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X21V-00000-00&context=) | [*154 A.C.W.S. (3d) 722*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X21V-00000-00&context=) | [*2007 CarswellBC 12*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-JGPY-X21V-00000-00&context=)

Between Alan Cameron Ward, Plaintiff, and City of Vancouver, Her Majesty the Queen in Right of the Province of British Columbia, as represented by the Ministry of Attorney General and Ministry of Public Safety and Solicitor General, Her Majesty in Right of Canada, Attorney General of Canada, Sergeant Kelly, Constable Prasobsin, Constable Fodor, Sergeant Gatto, Constable Cope and other unidentified members of the Vancouver Police Department, Royal Canadian Mounted Police and Jail Staff of the Vancouver Jail, Defendants

(131 paras.)

**Case Summary**

**Constitutional law — Canadian Charter of Rights and Freedoms — Legal rights — Life, liberty and security of person — Principles of fundamental justice — Protection against arbitrary detention or imprisonment — Protection against unreasonable search and seizure — Remedies for denial of rights — Specific remedies — Damages — Declaration of rights — Plaintiff was awarded damages against the City of Vancouver for wrongful imprisonment and unreasonable seizure of his vehicle in the amount of $5,100 — He was also awarded damages against the provincial government in respect of an unlawful strip search, in the amount of $5,000 — Plaintiff was arrested after police received a report that a white male was intending to attempt to throw a pie at Prime Minister Chretien during a ceremony — Plaintiff was detained for approximately four-and-a-half hours — No charges were laid against the plaintiff — Canadian Charter of Rights and Freedoms, 1982, ss. 7, 8, 9, 24(1).**

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| Action commenced by Ward seeking declarations that certain of his rights under the Charter were infringed, as well as damages, following an alleged assault, battery, and false imprisonment. In August 2002, Prime Minister Chretien attended a ceremony in an area known as the Chinatown section of Vancouver. During the ceremony the police obtained a report that someone was intending to attempt to throw a pie at the Prime Minister, as had occurred two years earlier in Charlottetown. The suspect was described as being a white male, 30 to 35 years of age, 5'9", with short dark hair, and wearing a white golf shirt or t-shirt with some red on it. The plaintiff, who was a white male, was wearing jeans and a t-shirt with some red on it, but his t-shirt was predominantly grey, his hair was grey or silver and collar length, and he was in his mid-40's. The plaintiff was arrested in the vicinity of the location where the ceremony was taking place. He was taken by paddy wagon to the Vancouver City jail. Once at the jail the plaintiff was informed that he was going to be charged with breach of the peace and "assault (HPI)", which was meant to hold the plaintiff pending investigation of an assault. He was required to remove all of his clothes except his underwear, and was held in jail for approximately four-and-a-half hours. His car was impounded and searched by police. The plaintiff was never charged with the commission of an offence in connection with the events which occurred. He had not received an apology from the Vancouver Police Department. The plaintiff was a lawyer who had practiced in the Vancouver area for more than 22 years.  HELD: The plaintiff was awarded damages against the City of Vancouver for wrongful imprisonment and the unreasonable seizure of his vehicle in the amount of $5,100.  He was also awarded damages against the provincial government in respect of the strip search in the amount of $5,000. The court declared that the plaintiff's rights under ss. 7 and 9 of the Charter were infringed as a result of the wrongful imprisonment, and that his rights under ss. 7 and 8 of the Charter were infringed as a result of his strip search and the unreasonable seizure of his vehicle. The police were entitled to imprison the plaintiff when he was lawfully arrested for breach of the peace. There was no lawful arrest for assault or attempted assault. However, the plaintiff was unlawfully imprisoned for a period of three-and-a-half hours after the Prime Minister left the ceremony. He was falsely imprisoned by the police during that period. His right under s. 9 of the Charter not to be arbitrarily imprisoned was infringed when he was kept in jail after the Prime Minister had left. With respect to the search of the plaintiff, his Charter right under s. 8 to be secure against unreasonable search was infringed because his strip search was not in accordance with the Corrections Branch's written policy or, if it was conducted in accordance with it, the policy was unreasonable to permit searches of persons being held for a breach of the peace in the absence of any threat to the safety and security of the Jail. Respecting the seizure of the plaintiff's vehicle, that seizure could not be justified on the basis that the plaintiff was under arrest for breach of peace. His right under s. 8 of the Charter was therefore infringed. The police conduct was not regarded as being malicious, high-handed, or oppressive. In all of the circumstances, there was no proper basis to award aggravated, exemplary, or punitive damages. |

**Statutes, Regulations and Rules Cited:**

Canadian Charter of Rights and Freedoms, 1982, s. 7, s. 8, s. 9, s. 10(a), s. 10(b), s. 15, s. 24(1)

Correctional Centre Rules and Regulations, B.C. Reg. 284/78, s. 19

Criminal Code, s. 24(1), s. 25, s. 31, s. 495

Police Act, [*R.S.B.C. 1996, c. 367, s. 20*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JPGX-S0S5-00000-00&context=), s. 21

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[Editor's Note: Supplementary reasons for judgment were delivered February 8, 2007. See [*[2007] B.C.J. No. 259*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S3VN-00000-00&context=).]

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| **TYSOE J.** |

INTRODUCTION

**1**  On August 1, 2002, Prime Minister Chrétien attended a ceremony for the opening of a structure called the Millennium Gate, which is located on East Pender Street near Taylor Street in the area known as the Chinatown section of Vancouver. There was a report to the police during the ceremony that someone was intending to attempt to throw a pie at the Prime Minister, as had apparently occurred two years earlier in Charlottetown.

**2**  Mr. Ward was arrested by the police on Taylor Street and taken by a paddy wagon to the Vancouver City Jail behind the Provincial Courthouse at 222 Main Street (the "Jail"). He was required to remove all of his clothes except his underwear, and he was held in the jail for approximately 4 1/2 hours. His car was impounded and searched by the police.

**3**  In this action, Mr. Ward sues the police officers involved in his arrest, the police officer in charge of the jail, the City of Vancouver and Her Majesty the Queen in Right of the Province of British Columbia (the "Provincial Government"). Mr. Ward seeks declarations that certain of his rights under the *Canadian Charter of Rights and Freedoms* (the "*Charter")* were infringed, as well as damages. In addition to infringement of his *Charter* rights, Mr. Ward alleges that his treatment by the police constituted assault, battery and false imprisonment. Mr. Ward's Statement of Claim also pleads ***negligence*** against the City of Vancouver and the Provincial Government.

BACKGROUND

**4**  Mr. Ward has practiced as a lawyer in the Vancouver area for the past 22 years. He has gained public attention as a result of his involvement as legal counsel for clients in high profile situations. These clients have included political protesters and persons who have made complaints against the police. On a personal level, Mr. Ward unsuccessfully ran for a seat in the 1993 federal election and has a continuing interest in politics.

**5**  On August 1, 2002, Mr. Ward decided to attend the ceremony for the opening of the Millennium Gate by Prime Minister Chrétien. He parked his car on Keefer Street, which is the street running parallel and to the south of East Pender Street, near the intersection with Taylor Street. Mr. Ward walked to East Pender Street, where he listened to the beginning of Prime Minister Chrétien's speech. He then traveled south on Taylor Street. This occurred shortly after the following broadcast over the police radio made by Sergeant Huffsmith, a Vancouver police officer assigned as a liaison with the R.C.M.P. for the purpose of the Prime Minister's visit:

There's a, uh, white male overheard, uh, planning to, uh, throw a pie at the Prime Minister. I'll just give you a description. He was last seen in the area of the King Kong Kit Kat, uh, sign, uh, on the corner of, uh, Pender and Taylor. Break. ... He's described as a white male, 30 to 35 years, 5 9, dark shorter hair wearing a white golf shirt or t-shirt with some red on it. Break. ... He, uh, was wearing, uh, either jeans or shorts, they weren't sure, and I guess he was, uh, overheard planning to, uh, throw a pie at the Prime Minister. If anybody locates this individual, can you let us know.

At the time, Mr. Cameron, who is a white male, was wearing jeans and a t-shirt with some red on it, but his t-shirt was predominately grey, his hair was grey or silver in colour and collar length, and he was in his mid-40s.

**6**  Shortly thereafter, there was another radio broadcast from an unidentified officer to the effect that a male matching the description was running southbound on Taylor Street, from Pender Street. Mr. Ward was arrested on Taylor Street and taken away in a paddy wagon within the next few minutes, but the testimony with respect to the events occurring on Taylor Street varied greatly. Mr. Ward testified on his own behalf, and Sergeant Cope, Sergeant Kelly and Constable Prasobsin testified on behalf of themselves and the City of Vancouver about these events.

Testimony of Mr. Ward

**7**  Mr. Ward testified that when he was on Pender Street, he observed a man standing behind the Prime Minister holding up a homemade sign reading "please retire" and that he also noticed men in suits near this man. He was curious to see how this man would be treated by the men in suits, and he walked towards them. When Mr. Ward could not get through the crowd to get close to the man, he walked south on Taylor Street and saw an opening that he believed would allow him to go around the block and come up behind the man with the sign. He took a few steps in the direction of the area and came upon a uniformed officer who said that an officer behind him wanted to speak with him.

**8**  Mr. Ward testified that he walked back to the officer who was behind him and that the officer was immediately aggressive or confrontational, asking whether Mr. Ward was going to throw a pie at the Prime Minster and why Mr. Ward was running away from him. The officer asked in a demanding way for Mr. Ward to produce his identification and Mr. Ward responded that he did not have to produce identification.

**9**  Mr. Ward testified that he heard the officer call for backup over the police radio and, after two or three other police officers arrived, his hands were handcuffed. Mr. Ward asked if he was under arrest and for what he was under arrest. He got no response and then said that he wanted to call his lawyer. Mr. Ward pulled his cell phone out of one of his pockets but it was taken away from him by the police officers. He continued to ask whether he was under arrest and why he was arrested, but got no responsive answer. In addition to his cell phone, the police took his wallet, keys and watch.

**10**  Mr. Ward testified that he did not raise his voice until he was forcibly moved down Taylor Street towards Keefer Street, where he was put into a police wagon which transported him to the Jail.

Testimony of Sergeant Cope

**11**  Sergeant Cope was a constable with traffic patrol on the day in question and I will refer to him by his rank at the time. He had been assigned to lead the Prime Minister's motorcade out of the area after the ceremony. He was waiting with his motorcycle on Taylor Street, approximately halfway between East Pender Street and Keefer Street and across the street from the Prime Minister's motorcade, which was located in an area off an alley called Shanghai Alley.

**12**  Constable Cope had heard the radio broadcast giving the description of the suspect. He testified that he first noticed Mr. Ward running eastbound on the south sidewalk of East Pender Street and that Mr. Ward then walked quickly into the crowd watching the ceremony. After he heard the second radio broadcast to the effect that a male matching the description was running southbound on Taylor Street, Constable Cope looked towards Pender Street and saw Mr. Ward running down the street in his direction. At the time, Constable Cope was not sure whether or not a pie had already been thrown. The Constable moved to the middle of Taylor Street with the intent of stopping Mr. Ward. Constable Cope testified that Mr. Ward veered away from him and headed for Shanghai Alley. Constable Cope yelled at him to stop but Mr. Ward kept running. Constable Cope then yelled at the people stationed at the motorcade to stop him and one of them stopped Mr. Ward and walked him back towards Constable Cope.

**13**  Constable Cope testified that he said words to the effect of whether Mr. Ward had some identification he could show him. Mr. Ward became immediately agitated and angry, and told Constable Cope in a loud voice that he had no right to ask for his identification. Constable Cope explained that he was investigating an assault and believed that Mr. Ward may be involved in some sort of pie throwing incident. Mr. Ward said loudly that Constable Cope couldn't investigate him or screamed "what am I under arrest for" every time the Constable attempted to say something to him. Mr. Ward was screaming so loudly that pieces of phlegm were spraying from his mouth and landing on the Constable's face. Constable Cope then radioed for backup assistance, and Sergeant Kelly arrived on the scene.

**14**  Constable Cope briefed Sergeant Kelly, who then started to walk away in order to find a witness or the officer who made the original radio broadcast. Mr. Ward was becoming louder and more aggressive. A group of 7 or 8 people on Taylor Street had gathered to watch and the part of the crowd near the intersection of Taylor Street and East Pender Street were also looking in their direction. Mr. Ward was directing his yelling at the crowd. Constable Cope made the decision to handcuff Mr. Ward because Mr. Ward was becoming more aggressive and the Constable was concerned that Mr. Ward may attempt to escape or assault him. Constable Cope put a handcuff on Mr. Ward's right wrist, and Mr. Ward then pulled his right arm away so that the free handcuff was hanging from his wrist.

**15**  By this time, Sergeant Kelly had come back and two other officers, Constable Prasobsin and his partner, had arrived. They assisted Constable Cope in putting the free handcuff on Mr. Ward's left hand in a fashion that left Mr. Ward's handcuffed hands in front of him. Mr. Ward continued to scream "what am I under arrest for" very loudly, and Constable Cope noticed a camera crew nearby.

**16**  Constable Cope recalled that Mr. Ward took a cell phone out of his pocket after he was handcuffed and that Sergeant Kelly took it away from him before a call was made. Constable Cope told Mr. Ward at some point that he could phone a lawyer as soon as practical.

**17**  The other officers escorted Mr. Ward down Taylor Street to its intersection with Keefer Street, where he was placed in a paddy wagon when it arrived. Mr. Ward was resisting in the sense of pulling back. Constable Cope cannot recall if Mr. Ward was saying anything at this point.

Testimony of Sergeant Kelly

**18**  Sergeant Kelly was the general supervisor of patrol officers in the Downtown Eastside on the day in question. He was standing in the general area of East Pender and Taylor Streets, and he went to assist Constable Cope after he heard Constable Cope's radio broadcast that he had the guy running down Taylor Street who kind of matched the description.

**19**  Sergeant Kelly testified that as he approached Constable Cope and Mr. Ward, he observed that Mr. Ward appeared to be quite hysterical and was flailing his arms while Constable Cope appeared to be trying to calm him down. Mr. Ward was shouting words to the effect of "am I under arrest" and "why are you stopping me". Sergeant Kelly checked with Constable Cope and decided to leave in order to attempt to determine the origin of the initial radio broadcast. However, he came back to assist Constable Cope because the situation had become more agitated and Constable Cope was beginning to apply handcuffs. While Sergeant Kelly was assisting Constable Cope in putting on the handcuffs, Mr. Ward was screaming hysterically and spit from his mouth was landing on the two police officers.

**20**  Sergeant Kelly saw that Mr. Ward had a cell phone in his right hand and removed it from him. He offered to dial a number for Mr. Ward but got no response. Mr. Ward continued to yell and scream, and he was drawing the attention of the media and the crowd towards him. Constables Prasobsin and Crawford arrived, and the police decided to move Mr. Ward towards Keefer Street. Sergeant Kelly wanted to remove Mr. Ward from the area because he was breaching the peace and the Sergeant wanted to prevent further breach, and there was also an investigation of assault to conduct. Mr. Ward was not listening when the police tried to explain what was happening, including the fact that he was under arrest for breach of the peace and was being investigated for assault. Mr. Ward continued to yell and scream as Sergeant Kelly and Constable Prasobsin walked him to Keefer Street, where he was put into the paddy wagon for transport to the Jail.

Testimony of Constable Prasobsin

**21**  Constable Prasobsin was walking patrol on the Downtown Eastside with his partner, Constable Crawford, on August 1, 2002. Upon arriving in the area of the ceremony, they were told by a woman stationed at a barricade that there were rumours of an attempted "pieing" of the Prime Minister. After Constable Cope had a suspect in custody, Constable Prasobsin and Crawford were assigned to the assistance he requested, and they went to Taylor Street.

**22**  As Constable Prasobsin arrived in the area, he observed Sergeant Kelly and Constable Cope with Mr. Ward. Mr. Ward was yelling "what are you arresting me for" or "am I under arrest". Constable Prasobsin saw Constable Cope wiping his face from the spit coming from Mr. Ward's mouth. The police decided to handcuff Mr. Ward but he was spinning around and not allowing his arm to be handcuffed. The officers were able to handcuff Mr. Ward's hand in front of his body, not behind his body as Constable Prasobsin would have preferred as his normal practice. During the handcuffing process, Mr. Ward was yelling at the crowd "what am I under arrest for", and Constable Prasobsin stated "breach of the peace".

**23**  Constable Prasobsin and Sergeant Kelly escorted Mr. Ward down to Keefer Street to meet up with the paddy wagon. Mr. Ward continued to yell and complained that the police were manhandling him or roughing him up. Constable Prasobsin replied that they were not doing that. The paddy wagon then left to transport Mr. Ward to the Jail.

Events at the Jail

**24**  The evidence regarding the events relating to Mr. Ward which occurred at the Jail is not materially in dispute. At the time, the Jail was a shared facility operated jointly by the City of Vancouver and the Provincial Government. The Jail was staffed by one police officer, who is called the officer in charge, and employees of the British Columbia Corrections Branch. The officer in charge when Mr. Ward was at the Jail was Sergeant Gatto.

**25**  The paddy wagon carrying Mr. Ward entered the loading bay of the Jail, and Mr. Ward was kept in the back of the wagon until the arrival of Constable Prasobsin, who had walked from Keefer Street to the Jail. The Constable read Mr. Ward his *Charter* rights in respect of his arrest for breach of the peace, which he explained was not a criminal offence, and told him that he was under investigation for assault. Mr. Ward indicated that he wished to consult counsel, and the Constable advised him that he would be given the opportunity to contact his counsel once he was inside the Jail.

**26**  Constable Prasobsin then completed a form called Vancouver Jail Arrest Report. On the form, the Constable indicated that the charges were for breach of the peace and "assault (HPI)", which meant to hold Mr. Ward pending investigation of an assault. An officer with a rank of sergeant or higher has to authorize the holding of a prisoner without charges pending an investigation, and it was authorized by Sergeant Kelly in this instance. Sergeant Kelly had telephoned Sergeant Gatto and told him that Mr. Ward was to be held on the breach of peace arrest until the Prime Minister left the area and that the length of time for which Mr. Ward was to be held pending investigation of an assault would be up to the officers who were assigned to conduct the follow-up investigation.

**27**  The handcuffs were taken off Mr. Ward and he was taken into the Jail. He made requests to contact his lawyer but Sergeant Gatto responded with words to the effect that "we can do this the hard way or the easy way, you're not helping things". Mr. Ward was put in a holding cell for a brief period of time, and he was then escorted into a room by two of the corrections staff, who told him to remove his clothes. This request was made in accordance with the policy of the Corrections Branch in place at the time. The written policy read as follows:

A strip search will be done for new prisoners; it is deemed necessary because of the following:

1. the seriousness of the offence
2. charges against the prisoner are associated with evidence hidden on the body
3. at the time of the arrest, weapons were involved
4. the accused is known to be violent and/or to carry weapons
5. there is possible danger to personnel and prisoners in the Jail

*A strip search will not usually be done on a Bylaw offender unless there is a threat to the safety and security of the Jail.*

The practice actually in effect at the Jail was that all new entrants into the Jail were strip searched with the exception of bylaw offenders and severely intoxicated persons in a public place who were brought to the Jail to sober up (who I will refer to as "drunken persons").

**28**  Mr. Ward removed all of his clothes except his underwear. He objected to disrobing further and told the corrections staff that he was a lawyer and knew that they had no right to strip search him. The corrections staff consulted with Sergeant Gatto, who authorized a deviation from the policy, and the balance of the strip search was not conducted. Mr. Ward was allowed to put his clothes back on.

**29**  Mr. Ward was then placed in a small cell labeled "Intox". The cell was small, only 3 feet wide and 6 feet long. It had no furnishings. With the exception of two occasions when Mr. Ward was allowed to speak on the telephone with two of his lawyers, Mr. Ward spent the next several hours in this cell before he was released.

**30**  Although there is no material dispute on the evidence regarding the events which occurred when Mr. Ward was at the Jail, there is a dispute as to whether a video camera was located in the room in which Mr. Ward was searched. Mr. Ward testified that there was a camera in the room but conceded on cross-examination that he may have been mistaken. Mr. Coulson, the Director of the Jail at the time, testified that there was no camera in the search room and a schematic drawing of the Jail did not show a camera located in the room. I find that there was no video camera in the search room.

Other Events

**31**  While Mr. Ward was at the Jail, his car was identified by the police, who caused it to be towed from its parking spot on Keefer Street to the police compound for the purpose of searching it once a search warrant had been obtained. The follow-up investigation was assigned to Detectives Brydon and Petit. They contacted Sergeant Huffsmith and ascertained that the source of his original radio broadcast had been a member of the Prime Minister's entourage who could not be contacted. The Detectives decided that they did not have grounds to obtain a search warrant in respect of Mr. Ward's car and that they should release Mr. Ward from jail because they would not have sufficient evidence to charge him within the 24 hour period following his arrest.

**32**  Detectives Brydon and Petit then went to the Jail to release Mr. Ward. They told him that he was being released pending further investigation. The Detectives drove Mr. Ward to the police compound and arranged for the release of his car. Mr. Ward was released from Jail approximately 4 1/2 hours after he was arrested and several hours after the Prime Minister had left the area following the ceremony.

**33**  On the evening of August 1, 2002, Global TV broadcast a two part story lasting approximately 5 minutes about the Prime Minister's visit to Vancouver. The first part of the story focused on the political situation of the Prime Minister remaining in office, and the second part of the story focused on the arrest of someone other than Mr. Ward in connection with a perceived attempt to throw a piece of cake at the Prime Minister. Scenes relating to the ceremony were shown during the first part of the broadcast, including approximately six seconds of footage of Mr. Ward being escorted in handcuffs by Sergeant Kelly and Constable Prasobsin. The broadcaster made reference to the fact that two arrests had been made at the ceremony.

**34**  Mr. Ward gave press and television interviews on the next day for the purpose of demanding an apology from the Vancouver Police Department. He subsequently lodged a complaint with the Police Complaint Commissioner, but it was dismissed and Mr. Ward's request for a public hearing was denied. Mr. Ward was never charged with the commission of an offence in connection with the events which occurred on August 1, 2002. He has not received an apology from the Vancouver Police Department.

ISSUES

**35**  The issues to be determined by me are follows:

1. was there a breach of Mr. Ward's rights under s. 7 of the *Charter*?
2. was there a breach of Mr. Ward's rights under s. 8 of the *Charter*?
3. was there a breach of Mr. Ward's rights under s. 9 of the *Charter*?
4. was the tort of assault committed?
5. was the tort of battery committed?
6. was the tort of false imprisonment committed?
7. were the City of Vancouver or the Provincial Government negligent?
8. are the police officers personally liable?
9. if a declaration of a *Charter* breach is granted, should damages for the breach also be granted?
10. if damages are to be granted, what is the appropriate amount?

**36**  In his written submissions, counsel for Mr. Ward submits that the Court should declare that Mr. Ward's rights under s. 10(a) and (b) of the *Charter* were also infringed. As the Statement of Claim only sought declarations in respect of ss. 7, 8 and 9 of the *Charter*, I will not deal with s. 10 of the *Charter* on the basis that it was not pleaded.

FINDINGS OF FACT

**37**  Before turning to the legal issues, it is necessary to make findings of fact with respect to the events which occurred on Taylor Street. In order to do so, I must make a finding of credibility with respect to the testimony of Mr. Ward and the police officers.

**38**  There was nothing in the demeanour of the witnesses or in the way in which they gave their testimony which would lead me to conclude that one witness was more credible than another witness. They were all equally credible in the manner in which they gave their testimony.

**39**  Counsel for Mr. Ward points to inconsistencies in the testimony of the police officers in submitting that I should prefer the testimony of Mr. Ward over their testimony. While I agree that there were some inconsistencies in their testimony, they were not of such a nature for me to conclude that the police officers were not credible in the main thrust of their testimony. It is understandable in view of the passage of time since August 1, 2002 that the memories of the police officers would not be perfect. Indeed, the fact that there were inconsistencies on some points of their testimony assists me in concluding that the police officers should not be disbelieved as a result of collusion between them.

**40**  In assessing the testimony of Mr. Ward and the police officers, I looked to evidence outside their testimony in order to determine whether it was more consistent with the testimony of Mr. Ward or the testimony of the police officers. I have concluded that Mr. Ward is mistaken in his recollection of the disputed events which occurred on Taylor Street. The evidence which has led me to prefer the testimony of the police officers on the major discrepancies in the evidence includes the following:

1. Mr. Ward testified that he was not running down Taylor Street, while Constable Cope testified that he was running. On the police radio broadcast, Constable Cope had reported that he thought he had the male referred to in the broadcast from the unidentified officer that a male matching the description was running southbound on Taylor. The operator then asked if Constable Cope had the guy that was threatening to throw the pie. Constable Cope responded that he didn't know if it was the guy, but "this is the guy that was *running* down Taylor Street and he kinda matches the description". Although prior consistent statements are generally inadmissible as evidence of the truth of the contents of the statements, Constable Cope's answer falls within the *res gestae* exception because it was made contemporaneously with little or no opportunity for fabrication: see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada,* 2nd ed. (Butterworths: Toronto and Vancouver, 1999) at p. 323.
2. Unless Constable Cope was yelling for Mr. Ward to stop, the R.C.M.P. officer at the Prime Minister's motorcade would not have known to stop Mr. Ward.
3. Constable Cope asked on the police radio broadcast for another unit to come to the scene. There would have been no need to call for a backup unit if Mr. Ward was not presenting difficulties for Constable Cope.
4. Mr. Ward would have had his hands cuffed behind his back (as Constable Prasobsin testified was the preferred practice) if he was not making it difficult for the police to handcuff him.
5. Unless Mr. Ward was yelling and creating a disturbance, it is unlikely that the attention of the Global TV camera crew would have been drawn to him. The beginning of the six second clip showing Mr. Ward filmed him and the police officers beside Constable Cope's motorcycle, the location where Constable Cope had his dealings with Mr. Ward. Mr. Ward testified that he did not raise his voice until he was moved down Taylor Street towards Keefer Street, but he must have been yelling or screaming at an earlier point in time (as the police officers testified) in order to have drawn the attention of the camera crew to him and for the crew to have gotten in a position to have started their camera while Mr. Ward was still beside Constable Cope's motorcycle.
6. The Global TV broadcast showed that Mr. Ward had a very agitated look on his face, that he appeared to be yelling for the benefit of the onlookers and that he was holding back as he was being escorted from Constable Cope's motorcycle down Taylor Street.

**41**  The evidence is relatively clear that the police arrested Mr. Ward on Taylor Street for breach of the peace pursuant to s. 31 of the *Criminal Code*, [*R.S.C. 1985, c. C-46*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-W9V1-JS0R-23WX-00000-00&context=), as amended. It is less clear whether the police arrested him on Taylor Street for assault or attempted assault. Both counsel for Mr. Ward and the City of Vancouver made their final submissions on the basis that he was arrested for assault or attempted assault on Taylor Street. I am not persuaded that he was.

**42**  Constable Cope did not testify about arresting Mr. Ward during his evidence. He testified that he told Mr. Ward that he was under investigation for assault. In his cross-examination, he testified that Mr. Ward was not under arrest at the time he was handcuffed.

**43**  Following is the evidence of Sergeant Kelly regarding Mr. Ward's arrest:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Was he under arrest at that point? |  |
|  | A | Yes. |  |
|  | Q | And what was he under arrest for? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Breach of the peace and we also had an investigation to conduct regarding assault. |  |
|  | Q |  | So are these two separate arrests or one arrest how does this work? |  |
|  | A |  | Well its the assault that the broadcast of the potential assault on the prime minister that led us to his original detention, us meaning the police in general, my lord, and then specifically our arrest involving that assault pending investigation, and for the breach of the peace. |  |

**44**  Constable Prasobsin testified as follows when describing the events when he arrived at the scene:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | He was yelling, "Am I under arrest? Am I under arrest? Am I under arrest?" Constable Cope advised him numerous times that he was under investigation ... During this time [the handcuffing of Mr. Ward], Mr. Ward continued to yell, "What am I under arrest for? What am I under arrest for?" And I stated to him, after my observations of the scene, his conduct, I stated to him, "breach of the peace". |  |

...

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Now, what was your understanding at that point when Mr. Ward was handcuffed? What was your understanding of what was happening? |  |
|  | A |  | I understood that he had been detained as a, as a person who possibly was attempting to pie the Prime Minister. I made observations of his demeanour at the time, trying to figure out -- I have dealt with a lot of people, my lord, in the six years I have been working the Downtown Eastside. It wasn't actually clear to me whether he was angry, plain angry at the police officers, whether he was a substance abuser, whether there were mental health issues. It didn't quite fit into any of those categories. |  |

As I am watching him, seeing him playing to the crowd, I made note that he was trying to cause a disturbance, more than anything else, and he wasn't trying to communicate to the police officers. Thus, I stated to him that he was under arrest for breach of the peace.

The following is the Constable's testimony about what he said to Mr. Ward when he was taken out of the back of the paddy wagon in the loading bay of the Jail:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Perhaps we should maybe complete this sort of history of events. So, the wagon left with Mr. Ward? |  |
|  | A |  | That is correct, my lord. Myself and Constable Crawford walked straight to the jail. I, unfortunately, I don't recall the path that we walked. |  |

Upon arrival at the jail, I removed Mr. Ward from -- we entered the jail, sorry, the wagon bay. I removed Mr. Ward from the wagon and I spoke to him outside the, the jail entrance next to the stairway.

At that time, I chartered Mr. Ward for breach of the peace and, and, and advised him that he was under investigation for assault.

I advised Mr. Ward at that time that breach of the peace was not a criminal charge and the circumstances around the investigation into the assault in that there were rumours of a male being heard speaking about pieing the Prime Minister, that he matched the description and that's what the reason he was there.

**45**  My conclusion from the testimony of Constable Prasobsin is that Mr. Ward was arrested for breach of the peace but was simply under investigation for assault. Sergeant Kelly said the same thing when he first answered his counsel's question and only revised his answer at the prompting of his counsel's follow-up question.

**46**  It is my finding that Mr. Ward was not arrested for assault or attempted assault on Taylor Street, but was being held pending investigation of an assault. I appreciate that words of arrest do not need to be used in order for a person to be arrested, and it can be sufficient if the person is physically detained. Here, it is clear that Mr. Ward was arrested but the arrest was for breach of the peace, and the evidence does not establish that he was arrested at the same time for assault or attempted assault.

DISCUSSION

**47**  Sections 7, 8 and 9 of the *Charter* read as follows:

1. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
2. Everyone has the right to be secure against unreasonable search or seizure.
3. Everyone has the right not to be arbitrarily detained or imprisoned.

Sections 8 through 14 of the *Charter* are illustrative of deprivations of the rights articulated in s. 7: see *Reference re Section 94(2) of the Motor Vehicle Act*, [*[1985] 2 S.C.R. 486*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-238F-00000-00&context=) at p. 502. A breach of any of ss. 8 through 14 will automatically constitute a breach of s. 7. The converse is not true because s. 7 provides residual protection for circumstances which do not fall within ss. 8 through 14: see *Thomson Newspapers Ltd. v. Canada (Director of Investigation & Research, Restrictive Trade Practices Commission*, [*[1990] 1 S.C.R. 425*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-653T-00000-00&context=).

**48**  An assault is the intentional creation of the apprehension of imminent harmful or offensive conduct: see Linden & Feldthusen, *Canadian Tort Law,* (8th ed) (Markham: LexisNexisButterworths) at p. 46. A battery is the intentional infliction of unlawful force on another person: see *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 [paragraph] 26. Consent and justification are defences to the torts of assault and battery. Section 25 of the *Criminal Code* provides justification to a peace officer if he or she acts on reasonable grounds, is doing what he or she is required or authorized to do and is using no more than the force necessary for that purpose.

**49**  False imprisonment is the intentional and total confinement of a person against his or her will without lawful justification: see Linden & Feldthusen, *Canadian Tort Law*, at p. 50. An imprisonment by a police officer is justified if the officer acts with legal authority. If the imprisonment follows an unlawful detention or arrest, the imprisonment will not be justified.

**50**  In order to succeed on the tort of ***negligence***, a plaintiff must prove that (i) the defendant owed a duty of care to the plaintiff, (ii) there was a breach of the duty of care through the failure of the defendant to exercise the standard of care required of a reasonable and careful person, and (iii) the plaintiff suffered damage as a result of the breach.

**51**  As the claims of *Charter* breaches and the tort claims overlap to a certain extent, I will deviate from the order of the issues listed above. I will first analyze the initial detention of Mr. Ward, his arrest, his imprisonment, the strip search and the seizure of his car. I will then deal with the remaining issues.

Initial Detention of Mr. Ward

**52**  The concept of detention was discussed by the Supreme Court of Canada in *R. v. Mann*, [*[2004] 3 S.C.R. 59*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B12C-00000-00&context=), [*2004 SCC 52*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B12C-00000-00&context=). It was described as follows at [paragraph]s 19 and 20:

19 "Detention" has been held to cover, in Canada, a broad range of encounters between police officers and members of the public. Even so, the police cannot be said to "detain", within the meaning of ss. 9 and 10 of the *Charter*, every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be "detained" in the sense of "delayed", or "kept waiting". But the constitutional rights recognized by ss. 9 and 10 of the *Charter* are not engaged by delays that involve no significant physical or psychological restraint. In this case, the trial judge concluded that the appellant was detained by the police when they searched him. We have not been urged to revisit that conclusion and, in the circumstances, I would decline to do so.

20 A detention for investigative purposes is, like any other detention, subject to *Charter* scrutiny. Section 9 of the *Charter*, for example, provides that everyone has the right "not to be arbitrarily detained". It is well recognized that a lawful detention is not "arbitrary" within the meaning of that provision. Consequently, an investigative detention that is carried out in accordance with the common law power recognized in this case will not infringe the detainee's rights under s. 9 of the *Charter*.

It is beyond question that Mr. Ward was not merely delayed or kept waiting. He was detained for investigative purposes and, thus, his detention is subject to *Charter* scrutiny.

**53**  Counsel for Mr. Ward submits that it was necessary for Constable Cope to have reasonable and probable grounds to detain Mr. Ward. I do not agree with this submission. The phrase "reasonable and probable grounds" is more properly associated with the prerequisite for an arrest by a peace officer without a warrant: see *R. v. Storrey*, [*[1990] 1 S.C.R. 241*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-653C-00000-00&context=). This is derived from s. 495 of the *Criminal Code*, which provides that a peace officer may arrest without warrant a person who, on reasonable grounds, the officer believes has committed or is about to commit an indictable offence.

**54**  The basis upon which police officers may detain persons for investigative purposes was discussed in *Mann*, at [paragraph] 45:

To summarize, as discussed above, police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary. In addition, where a police officer has reasonable grounds to believe that his or her safety or that of others is at risk, the officer may engage in a protective pat-down search of the detained individual. Both the detention and the pat-down search must be conducted in a reasonable manner. In this connection, I note that the investigative detention should be brief in duration and does not impose an obligation on the detained individual to answer questions posed by the police. The investigative detention and protective search power are to be distinguished from an arrest and the incidental power to search on arrest, which do not arise in this case.

This requirement has also been expressed as "articulable cause" and "reasonable grounds to detain": see also *Storrey* and *R. v. Simpson* [*(1993), 12 O.R. (3d) 182*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-JP9P-G46R-00000-00&context=) (C.A.). In *Mann* at [paragraph] 27, the Supreme Court of Canada referred to *Simpson* in specifically stating that the threshold for articulable cause is clearly lower than the reasonable and probable grounds required for lawful arrest.

**55**  In my view, the detention of Mr. Ward by Constable Cope was not arbitrary. Constable Cope had articulable cause to detail Mr. Ward for investigative purposes or, in other words, he had reasonable grounds to suspect that Mr. Ward was connected to a particular crime and to believe that his detention was necessary. Based on (i) the police radio broadcasts, (ii) the facts that Mr. Ward was running and appeared to be avoiding Constable Cope, and (iii) Mr. Ward's clothing more or less matched the clothing described in the first police radio broadcast, it is my opinion that Constable Cope had reasonable grounds for suspecting that Mr. Ward was connected to an assault or attempted assault of the Prime Minister.

**56**  I conclude that the initial detention of Mr. Ward by Constable Cope did not represent a breach of s. 9 of the *Charter*. I also conclude that Constable Cope and the other officers did not commit the torts of assault or battery when they handcuffed him because Constable Cope had reasonable grounds to believe that Mr. Ward may attempt to escape or assault him.

Arrest of Mr. Ward

**57**  Mr. Ward was arrested on Taylor Street for breach of the peace. His counsel submits that Mr. Ward's actions did not constitute a breach of the peace and relies on *R. v. Januska* [*(1996), 106 C.C.C. (3d) 183*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCY1-F528-G172-00000-00&context=) (Ont. Ct. of Jus. (Gen. Div.)), which was quoted with approval by the B.C. Court of Appeal in *R. v. Khatchadorian* [*(1998), 127 C.C.C. (3d) 565*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JGHR-M2V5-00000-00&context=). In *Januska*, the police approached a vehicle in which the accused was a passenger. As he was being questioned outside the vehicle, the accused became belligerent and loud. The Court held that it was not a breach of the peace for an individual to demand vociferously to be told what he is believed to have done wrong.

**58**  In the present case, Mr. Ward went further than loudly questioning whether he was under arrest and asking what offence for which he was arrested. He was yelling at the crowd, and drew the attention of a number of people, including the Global TV camera crew, away from the ceremony. He was creating a disturbance in a public place. The police were entitled to arrest him for breach of the peace.

**59**  As counsel made their closing submissions on the basis that Mr. Ward was arrested for assault or attempted assault, I will next consider whether the police were entitled to arrest him on Taylor Street for assault or attempted assault. The police would have been entitled to arrest him if they had reasonable and probable grounds to believe that he had committed or was about to commit an indictable offence and if there was an objective basis for that belief: see *Storrey*.

**60**  In my opinion, there was no objective basis for the police to believe that Mr. Ward was about to commit an indictable offence. Mr. Ward could not have assaulted the Prime Minister with a pie from his location on Taylor Street. He was too far away and was not in possession of a pie.

**61**  The police also lacked reasonable and probable grounds for concluding that Mr. Ward had committed an assault of the Prime Minister. Although Constable Cope was unsure whether the Prime Minister had been assaulted when he initially detained Mr. Ward, Sergeant Kelly and Constable Prasobsin were within sight of the ceremony when Constable Cope requested backup assistance, and they knew that the Prime Minister had not been assaulted. All of the officers conceded that if the Prime Minister had been assaulted, there would have been a police radio broadcast about it within a short period of time.

**62**  Counsel for the City of Vancouver and the police officers relies on s. 24(1) of the *Criminal Code*, which states that every one who, having an intent to commit an offence, does anything for the purpose of carrying out his intention is guilty of an attempt to commit the offence. The only evidence the police had was a report that a white male had been overheard planning to throw a pie at the Prime Minister. That does not constitute an attempt to commit assault. It would not even have been an offence of attempted conspiracy if the male had been overheard planning it with another person: see *R. v. Déry,* [*[2006] S.C.J. No. 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YH21-JPGX-S0DV-00000-00&context=), [*2006 SCC 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B17Y-00000-00&context=).

**63**  There was no evidence of a pie being found in the possession of Mr. Ward or nearby his location. While his clothing was fairly close to the description of the suspect, his height, hair colour and length, and age were all different from the suspect's description. Although the police officers testified that they believed that Mr. Ward was involved in a plan to pie the Prime Minister, they did not testify that they had reasonable grounds to believe that Mr. Ward had done anything for the purpose of carrying out an intention to assault the Prime Minister.

**64**  I conclude that an objective basis did not exist for the police officers to have reasonable and probable grounds to believe that Mr. Ward had done anything for the purpose of assaulting the Prime Minister. This is also the conclusion reached by Detectives Brydon and Petit when they decided that there were insufficient grounds to obtain a warrant to search Mr. Ward's vehicle.

**65**  It follows from my conclusion that the police were not entitled to arrest Mr. Ward without a warrant on Taylor Street for assault or attempted assault. However, even if Mr. Ward was unlawfully arrested for assault or attempted assault on Taylor Street, the police did not commit the torts of assault or battery or breach any of Mr. Ward's *Charter* rights in leading him down Taylor Street and into the paddy wagon because they were entitled to take him into custody in connection with the arrest for breach of the peace.

Imprisonment of Mr. Ward

**66**  Mr. Ward was imprisoned from the time he was put into the paddy wagon until he was released from the Jail at approximately 3:30 p.m. As a result of my conclusion that Mr. Ward was lawfully arrested for breach of the peace, the police were entitled to initially detain him in custody. Sergeant Kelly told the officer in charge at the Jail, Sergeant Gatto, that Mr. Ward should be held on the breach of the peace arrest until the Prime Minister had left the area.

**67**  The exact time the Prime Minister left the ceremony is not clear on the admissible evidence. Constable Cope testified that he expected the Prime Minister to be at the ceremony for approximately half an hour. As the Prime Minister's motorcade was located near Constable Cope's motorcycle, it is clear that the Prime Minister had not left the area before Mr. Ward was put in the paddy wagon and taken to the Jail. The Prime Minister probably departed shortly after Mr. Ward was taken from the paddy wagon into the Jail, but I cannot determine on the evidence whether the Prime Minister left the area before or after Mr. Ward was strip searched.

**68**  Once the Prime Minister did leave the area, the detention of Mr. Ward could not be justified on his arrest for breach of the peace. It is clear, however, that he was detained for several hours after the Prime Minister had left. The two potential justifications for his continued detention are that (a) he was being held on an investigative detention, and (b) he was under arrest for assault or attempted assault.

**69**  In *Mann*, the majority held that an investigative detention must be of brief duration ([paragraph] 22) and cannot become a *de facto* arrest ([paragraph] 35). The detention of Mr. Ward was not brief. It may be argued that it was reasonably necessary to have detained Mr. Ward until such time as his vehicle could be secured so that he did not have the opportunity to drive away with incriminating evidence. I need not decide if this was a legitimate justification for detaining Mr. Ward because he was detained for another 3 1/2 hours after his vehicle was secured.

**70**  As a result, if Mr. Ward was not arrested for assault or attempted assault on Taylor Street, his continued detention after the Prime Minister left the area became a *de facto* arrest. I have already held that an objective basis to believe that there were reasonable and probable grounds to arrest Mr. Ward on Taylor Street for assault or attempted assault did not exist. The only new information which came to light after Mr. Ward was put in the paddy wagon was the fact that Mr. Ward's vehicle was parked near the intersection of Taylor and Keefer Streets. There was nothing unusual about Mr. Ward's vehicle being parked near the ceremony. Thus, an objective basis to believe that there were reasonable and probable grounds to arrest Mr. Ward for assault or attempted assault similarly did not exist at the time the Prime Minister left the area.

**71**  I conclude that Mr. Ward was unlawfully imprisoned for a period of 3 1/2 to 4 hours after the Prime Minister left the ceremony. He was falsely imprisoned by the police during this period. His right under s. 9 of the *Charter* not to be arbitrarily imprisoned was infringed when he was kept in the Jail after the Prime Minister had left.

Strip Search of Mr. Ward

**72**  If Mr. Ward was not lawfully arrested and imprisoned at the time of the strip search, it would have been an unreasonable search, contrary to s. 8 of the *Charter*. However, as I indicated above, I cannot determine whether the strip search occurred before or after the Prime Minister had left the area of the ceremony. The result is that Mr. Ward has not discharged the burden on him in this regard, and I must consider whether the search was unreasonable on the basis that Mr. Ward was lawfully under arrest for breach of the peace at the time of the search.

**73**  The Supreme Court of Canada considered the topic of strip searches in *R. v. Golden*, [*[2001] 3 S.C.R. 679*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M49R-00000-00&context=), a case involving a search incident to arrest. The Court held that strip searches incident to arrest may be conducted where the police have reasonable and probable grounds for searching for the purpose of discovering weapons or evidence, but a strip search must be conducted in a manner that interferes with the privacy and dignity of the person as little as possible. The Court made a point of distinguishing such searches from searches conducted when a person enters a jail:

[paragraph] 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.).

The Court went on to give an example of the difference between prison searches and short term detention searches:

[paragraph] 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.

**74**  The B.C. Provincial Court had occasion to consider the issue of strip searches at the Jail in *R. v. Douglas*, [*[2003] B.C.J. No. 2832*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60Y9-00000-00&context=), [*2003 BCPC 392*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-JSRM-60Y9-00000-00&context=). In that case, the accused was stopped for speeding and was arrested for assaulting one of the police officers who had stopped her. She was taken to the Jail, where a strip search occurred in accordance with the same policy as was in effect when Mr. Ward was searched. Bruce, P.C.J. (as she then was) said the following when considering searches of persons detained pending bail in accordance with the principles described in *Golden*:

[paragraph] 80 In my view, once the detainee is mixed with the general prison population in circumstances where he or she is not directly supervised by a corrections officer, and in hand cuffs or other forms of restraint, a strip search will normally be justified given the security concerns present in the Vancouver jail environment. This will be the case regardless of whether the detainee presents any particular safety concerns. In this category are persons who have been lodged in cells and are awaiting a bail hearing upon a determination by the OIC that they are not suitable for release on a promise to appear.

[paragraph] 81 Excluded from this category of persons are those prisoners who are awaiting a determination by the OIC, even where they are in a holding cell with other new prisoners, and where they have some preliminary contact with corrections officers during the booking in process. Until it is determined that these persons will be detained in custody, and therefore must be lodged in cells, a proper balancing of their right to privacy with the institution's interests in securing a proper level of safety in the jail, precludes a blanket policy of strip searching.

[paragraph] 82 For those newly arrived prisoners a separate holding cell or cells can be arranged to ensure minimal contact with corrections staff and other personnel and to ensure they are not mixed with the general prison population prior to being lodged in cells. While Mr. Coulson testified that additional cell space is not available in the present configuration of the jail, I note that currently space is found for SIPP's and by law offenders. He also testified that where prisoners refuse to be strip searched they are put in a cell until they consent. Thus where there is a need for space, it can be found.

**75**  Bruce, P.C.J. concluded that the accused in that case fell within the category of prisoners properly searched as part of the blanket policy but that the manner of the search was unreasonable. The decision in *Douglas* has been referred to with approval in *R. v. Drury*, [*[2004] B.C.J. No. 1317*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X44G-00000-00&context=), [*2004 BCPC 188*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X44G-00000-00&context=) and *R. v. Wu*, (27 January 2006, Vancouver Docket No. 150911, B.C.P.C.).

**76**  Mr. Coulson, the Director of the Jail at the time of Mr. Ward's imprisonment, who also gave evidence in *Douglas*, testified that under the policy in effect at the time bylaw offenders and drunken persons were searched by way of a pat-frisk and a metal detector. He also testified that after the decision in *Douglas* was issued, the policy of the Jail was changed so that persons detained but not yet charged were no longer strip searched as a matter of course. Cells in the Jail were dedicated to this category of prisoner; new cells did not have to be constructed but it was necessary to hire additional staff.

**77**  Counsel for the Provincial Government says that, if it were not for the decision of the B.C. Court of Appeal in *Fieldhouse v. Kent Institution* [*(1995), 98 C.C.C. (3d) 207*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F60C-X19V-00000-00&context=) (B.C.C.A.) (which dealt with a program of random urinalysis in a penitentiary), the present case would be governed by the decision of the Supreme Court of Canada in *Conway v. Canada (Attorney General)*, [*[1993] 2 S.C.R. 872*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M38R-00000-00&context=). He states that, if this case goes to appeal, he will argue that *Conway* is the governing authority. Although I need not decide the point in view of the position of counsel for the Provincial Government that I am bound by *Fieldhouse*, I observe that *Conway* involved frisk searches of clothed male prisoners by female guards and did not deal with the reasonableness of strip searches.

**78**  Counsel for the Provincial Government urges me not to follow *Douglas* (which is not binding upon me) because Bruce, P.C.J. did not consider the effect of s. 19 of the *Correctional Centre Rules and Regulations*, [*B.C. Reg. 284/78*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F97-RC01-JSRM-61M3-00000-00&context=) (which was in effect until 2005). Section 19 read as follows:

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.
2. Once an inmate has been admitted to a correctional centre an officer shall only conduct such further searches where
3. the director so authorizes, or
4. 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.

**79**  In my opinion, s. 19 is not determinative of the issue. It simply states that all entrants to a correctional centre must be searched. It does not say that they must be *strip* searched. Counsel for Mr. Ward doesn't take issue with the right of the corrections staff to have searched Mr. Ward (as long as he had been lawfully under arrest). It is the manner of the search to which objection is taken. Counsel for Mr. Ward says that it was unreasonable for his client to have been strip searched and that a reasonable search in circumstances where Mr. Ward had not yet been charged would have been the pat-down or frisk search, coupled with the use of a metal detector, that was used for bylaw offenders and drunken persons.

**80**  Mr. Coulson testified that the policy in effect at the Jail at the time of the search of Mr. Ward was to strip search all new entrants into the Jail except bylaw offenders and drunken persons. I agree with the conclusion of Bruce, P.C.J. in *Douglas* that it is not reasonable to strip search as a matter of policy all new arrivals at the Jail in respect of whom no decision to charge them with an offence has yet been made. There was available space at the Jail to hold such persons, separate from the general prison population, until a decision is made to either release them or to charge them with an offence. Counsel for the Provincial Government says that if this is done, s. 19 of the *Correctional Centre Rules and Regulations* would prevent a further strip search when a decision is made to charge the person and place them with the general prison population. However, such searches could properly be authorized by the director of the correctional facility pursuant to clause 2(a) of s. 19. This provision did not require that the authorization be given on a case by case basis, and a general authorization could have been given.

**81**  There is another decision involving a strip search which was not cited to me by counsel; namely, *Ilnicki v. MacLeod,* [*[2006] 3 W.W.R. 627*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9371-JKPJ-G4JX-00000-00&context=) (Alta. C.A.). In that case, the plaintiff had been arrested on an outstanding warrant related to traffic violations. He was taken to the police station, where he was strip searched. In upholding the decision of the trial judge that the strip search violated the plaintiff's rights under s. 8 of the *Charter*, the Alberta Court of Appeal quoted from [paragraph]s 96 and 97 of *Golden* (which I have set out above) and continued as follows:

[paragraph] 13 The trial judge applied this law from *Golden* and concluded: "There is no doubt in my mind that this circumstance involved a short-term detention context especially in light of the position that Constable Ressler was taking - that he would not be opposing Mr. Ilnicki's being granted bail." We agree with this conclusion. The Supreme Court rejected a short term in a jail cell as automatically justifying a strip search, while still recognizing that such a search may be necessary even then, but must be analyzed on a case by case basis.

[paragraph] 14 Thus, we reject the appellants' argument that placing a detainee into a jail cell with one or more prisoners for a short term (here about ten minutes) is different than placing a detainee into a drunk tank. The court specifically dealt with that issue, as noted in the highlighted portion of the quote at para. 97.

**82**  I have held that there was no lawful arrest of Mr. Ward for assault or attempted assault. At the time he was strip searched, Mr. Ward was being detained for a short period of time pursuant to his arrest for breach of the peace. It is even more unreasonable to strip search a person being detained for breach of the peace than it is to strip search a person who has been arrested for a substantive offence and who may be charged with the offence and placed with the general prison population. Mr. Ward was in no different position than the drunken persons who are not strip searched.

**83**  *Douglas* was decided upon the basis of the policy in respect of which Mr. Coulson testified in that case and in this case was in effect at the time; namely, strip searches are conducted of all new prisoners except bylaw offenders and drunken persons. But that was not the written policy as contained in the Policy and Procedure Manual prepared by the Corrections Branch (in conjunction with the Vancouver City Police) for the Jail. I will repeat the written policy for ease of reference:

A strip search will be done for new prisoners; it is deemed necessary because of the following:

1. the seriousness of the offence
2. charges against the prisoner are associated with evidence hidden on the body
3. at the time of the arrest, weapons were involved
4. the accused is known to be violent and/or to carry weapons
5. there is possible danger to personnel and prisoners in the Jail

*A strip search will not usually be done on a Bylaw offender unless there is a threat to the safety and security of the Jail.*

In my view, the policy is ambiguous. It begins by stating that strip searches will be done for new prisoners, which one would assume, without reading more, meant *all* new prisoners. It then lists the reasons for the policy, but they are more in the nature of factors to be considered when deciding whether to strip search a new prisoner. The policy concludes by stating that strip searches will not usually be done on bylaw offenders, which suggests that the opening words of the policy did not mean that all new prisoners are to be strip searched. The policy does not mention drunken persons.

**84**  On reading the policy as a whole, it is my view that the "reasons" are actually factors to be considered in deciding whether a strip search should be conducted. However, it appears that Mr. Coulson or someone else decided that all new entrants to the Jail, other than bylaw offenders and drunken persons, represent a possible danger to personnel and prisoners in the Jail.

**85**  If the factors are applied to Mr. Ward, he would not fit the criteria for a strip search any more than bylaw offenders and drunken persons. He did not commit a serious offence, he was not charged with an offence associated with evidence being hidden on the body, no weapons were involved and Mr. Ward was not known to be violent or to carry weapons. Constable Prasobsin testified that Mr. Ward had calmed down by the time he reached the Jail, and there was no reason to believe that Mr. Ward represented a danger to the personnel and prisoners in the Jail. As there was no threat to the safety and security of the Jail, I conclude that the strip search of Mr. Ward was not in accordance with the Corrections Branch's written policy.

**86**  I conclude that Mr. Ward's *Charter* right under s. 8 to be secure against unreasonable search was infringed because his strip search was not in accordance with the Corrections Branch's written policy or, if it was conducted in accordance with it, the policy was unreasonable to permit strip searches of persons being held for a breach of the peace in the absence of any threat to the safety and security of the Jail.

Assault by Sergeant Gatto

**87**  Counsel for Mr. Ward submits that when Sergeant Gatto responded to Mr. Ward's request to speak with his lawyer by saying "we can do this the hard way or the easy way, you're not helping things", he was threatening to use force against Mr. Ward and thereby committed an assault. He also submits that Sergeant Gatto is liable for assault and battery because the strip search of Mr. Ward by the corrections staff was done at his direction. I do not agree with either of these submissions.

**88**  In order for words alone to constitute an assault, the words must create an apprehension of imminent harm: see Linden & Feldthusen, *Canadian Tort Law,* at p. 48. If Sergeant Gatto's words had been spoken in response to Mr. Ward refusing to disrobe at the time of the strip search, they may have been sufficient to create an apprehension of imminent harm. However, the words were spoken in response to Mr. Ward's request to speak to his lawyer, and there was no inference that Mr. Ward would be harmed if he continued to ask for his lawyer.

**89**  There is no evidence that anyone assaulted or battered Mr. Ward in connection with the strip search. He was asked to remove his clothes and he complied until all of his clothes other than his underwear were taken off. When he refused to take off his underwear, there was no threat of harm and, indeed, he was told that he did not have to take them off. He was never touched during the strip search. In addition, the strip search was done pursuant to the Corrections Branch's policy and was not done under Sergeant Gatto's direction. During his examination for discovery, Sergeant Gatto stated that he did not know if he had the authority to make the decision to stop the strip search. In his cross examination, Mr. Coulson disagreed that the officer in charge was in charge of the Jail and said that the persons in charge of the Jail were the corrections supervisor and the officer in charge.

**90**  Sergeant Gatto did not commit the torts of assault or battery.

Seizure of Mr. Ward's Vehicle

**91**  Mr. Ward's car was towed from its parking place near the intersection of Taylor and Keefer Streets to the police compound for the purpose of securing it until it could be searched. It was never searched because Detectives Brydon and Petit decided that there were insufficient grounds to obtain a search warrant.

**92**  If Mr. Ward had been lawfully arrested for assault or attempted assault on Taylor Street, it may be arguable that it was reasonable for the police to seize his vehicle in order to secure it so that evidence in the vehicle would not go missing. However, Mr. Ward was not lawfully arrested for assault or attempted assault, and the seizure of his car was not reasonable. The seizure of the car cannot be justified on the basis that Mr. Ward was under arrest for breach of peace.

**93**  I conclude that Mr. Ward's right under s. 8 of the *Charter* to be secure against unreasonable seizure of his belongings was infringed.

***Negligence***

**94**  In the Statement of Claim, Mr. Ward pleaded ***negligence*** against both of the City of Vancouver and the Provincial Government. The plea against the City of Vancouver was that the police officers were grossly negligent. This plea was probably directed at s. 21 of the *Police Act*, *R.S.B.C. 1996, c. 367*, which I will be discussing in the context of the personal liability of the police officers, but another portion of the Statement of Claim alleged that Mr. Ward suffered loss and damage as a result of the ***negligence*** of each of the Defendants. The plea against the Provincial Government is that it failed to adequately train, supervise and instruct the corrections staff at the Jail.

**95**  Counsel for Mr. Ward did not make any submissions with respect to the ***negligence*** claims and did not react when counsel for the City of Vancouver made the observation that it appeared that Mr. Ward was not pursuing the ***negligence*** claims. As the claims were not formally withdrawn, I will deal with them briefly.

**96**  The claims of ***negligence*** fail for two reasons. First, any duty owed by the City of Vancouver and the Provincial Government was a duty owed to the general public and was not a private law duty owed to Mr. Ward for the purposes of the tort of ***negligence***: see *Ribeiro v. Vancouver (City)*, [*[2005] B.C.J. No. 579*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M486-00000-00&context=), [*2005 BCSC 395*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M486-00000-00&context=). Second, there was no evidence on the applicable standard of care: see *Roy v. British Columbia (Attorney General)*, [*[2005] B.C.J. No. 293*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M3VD-00000-00&context=), [*2005 BCCA 88*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-DY89-M3VD-00000-00&context=).

Personal Liability of Police Officers

**97**  The City of Vancouver concedes that it is vicariously liable for any torts committed by the police officers by virtue of s. 20 of the *Police Act*. What is in dispute is whether any of the police officers are personally liable. Subsection 21(2) and (3) of the *Police Act* read as follows:

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.
2. Subsection (2) does not provide a defence if
3. the police officer or other person appointed under this Act has, in relation to the conduct that is the subject matter of action, been guilty of dishonesty, gross ***negligence*** or malicious or wilful misconduct, or
4. the cause of action is libel or slander.

**98**  The only wrongdoing I have found to have been committed by the police officers is false imprisonment as a result of the failure to release Mr. Ward for a period of 3 1/2 to 4 hours after the Prime Minister left the opening ceremony for the Millennium Gate. While Sergeant Gatto, as the officer in charge at the Jail, was charged with the responsibility of releasing Mr. Ward at the appropriate time, it was Sergeant Kelly who instructed Sergeant Gatto to continue holding Mr. Ward "pending investigation" after the Prime Minister had left the area.

**99**  The only decision referred to me on this point was *Walkey (Guardian ad litem of) v. Canada (Attorney General)*, [*[1997] B.C.J. No. 599*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F1H1-21RM-00000-00&context=) (S.C.). In that case, the police unlawfully arrested and imprisoned three girls in order to teach them a lesson. Vickers J. held that the police officers could not avail themselves of the protection afforded by s. 21 because the tort of false arrest and imprisonment by its very nature involved misconduct that is wilful.

**100**  In *Walkey,* the police officers knowingly arrested and imprisoned the plaintiffs when they knew that no charge would be laid. They knew that the arrest and imprisonment of the plaintiffs was wrong. Their actions clearly constitute wilful misconduct.

**101**  An oft cited passage in relation to the meaning of wilful misconduct is from the decision of *McCulloch v. Murray*, [*[1942] S.C.R. 141*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-FBV7-B55N-00000-00&context=), where Duff C.J.C. said the following at p. 145:

All these phrases, gross ***negligence***, wilful misconduct, wanton misconduct, imply conduct in which, if there is not a conscious wrong doing, there is a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves.

**102**  In my view, a clearer description of the meaning of wilful misconduct is contained in *R. v. Boulanger*, [*[2006] 2 S.C.R. 49*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B177-00000-00&context=), [*2006 SCC 32*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B177-00000-00&context=), a case dealing with the criminal offence of breach of trust by a public officer. The Supreme Court of Canada held that it is necessary to have reference to the common law authorities on misfeasance in public office in considering the offence. In this regard, the Court summarized parts of an English authority, *Attorney General's Reference (No. 3 of 2003)*, [2004] W.L.R. 451 (Eng. C.A), at [paragraph] 27:

Wilful misconduct was held to mean "deliberately doing something which is wrong knowing it to be wrong or with reckless indifference as to whether it was wrong or not" (para. 28), and recklessness to mean "an awareness of the duty to act or a subjective recklessness as to the existence of the duty" (para. 30). The recklessness test was said to apply to the determination of whether a duty arises in the circumstances, as well as to the conduct of the defendant if it does.

Although the Court did not specifically adopt or approve of these meanings, it did not express any disapproval of them.

**103**  In the present case, there is no evidence that either Sergeant Kelly or Sergeant Gatto decided not to release Mr. Ward when they knew that he should have been released. It is not sufficient to establish that their acts constituted the commission of an intentional tort. It must also be established that they committed the tort knowing it to be wrong or with reckless indifference as to whether it was wrong or not.

**104**  I find that the neither Sergeant Kelly nor Sergeant Gatto knew that it was wrong to continue imprisoning Mr. Ward after the Prime Minister left the area and that neither of them continued the imprisonment with reckless indifference in that regard. They were not guilty of wilful misconduct, with the result that neither of them is personally liable for the tort of false imprisonment.

Damages in Addition to Declaration of Charter Breach

**105**  Counsel for the Provincial Government argues that, if there was a breach of the *Charter* without the commission of a tort, no damages should be awarded. Counsel relies in this regard on the decision in *Wynberg v. Ontario* [*(2006), 269 D.L.R. (4th) 435*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FCK4-G1PG-00000-00&context=) (Ont. C.A.). In connection with the strip search of Mr. Ward and the seizure of his car, I have found a breach of s. 8 of the *Charter* but that none of the pleaded torts was committed.

**106**  Subsection 24(1) of the *Charter* provides that anyone whose rights have been infringed may apply to the court to obtain such remedy as the court considers appropriate and just in the circumstances.

**107**  In *Wynberg*, the plaintiffs were autistic children, aged six years of age and older, who were complaining that funded intensive behavioural intervention provided by the Ontario Ministry of Community and Social Services was limited to autistic children between the ages of two and five. The Ontario Court of Appeal held that there was no breach of s. 7 or 15 of the *Charter*, but went on to comment on the decision of the trial judge to award damages as well as granting a declaratory remedy.

**108**  The Court quoted at length at [paragraph] 192 from the decision in *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, [*[2002] 1 S.C.R. 405*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4BH-00000-00&context=), which held that damages should not normally be granted following a declaration that legislation is unconstitutional in the absence of ***negligence***, bad faith or abuse or power. The Court continued as follows at [paragraph] 193:

While the rule against combining damages with declaratory relief has been articulated in cases where the declaration of invalidity is sought against legislation, we see no principled basis on which to limit the application of this rule to cases where a statute, rather than some other government action, is declared unconstitutional. Support for this view can be found in the above quoted passage from *Mackin*, in which the Supreme Court refers to the "exercise of their powers" and "government action", rather than legislation *per se*. Moreover, the reasons underlying the general prohibition against damages where declaratory relief is granted apply with equal force whether the declarations are made as a result of a challenge to legislation under s. 52 of the *Constitution Act, 1982* or, as in this case, where the challenge is to some action taken under legislation that is said to infringe a *Charter* right and relief is sought pursuant to s. 24(1) of the *Charter*.

**109**  In the case at bar, I have not declared any legislative provision to be unconstitutional. I have held that the search of Mr. Ward by the corrections staff of the Provincial Government pursuant to s. 19 of the *Correctional Centre Rules and Regulations* and the seizure of Mr. Ward's car were unconstitutional because they violated s. 8 of the *Charter*.

**110**  In my opinion, the Ontario Court of Appeal was not extending the application of *Mackin* to all types of breaches of the *Charter*. Rather, it was extending the application of *Mackin* to policy decisions of the government which are held to be unconstitutional. The subject matter of *Wynberg* was the policy decision of the government to extend the intensive behaviour intervention program only to autistic children between the ages of two and five.

**111**  There have been a number of judgments which have granted damages for violations of the *Charter* without proof of malice, bad faith or ***negligence***: see, for example, *Morin v. Prince Edward Island Regional Administrative Unit No. 3 School Board* [*(2005), 254 D.L.R. (4th) 410*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7H-SCP1-F2TK-2110-00000-00&context=) (P.E.I.S.C.A.D.), *Hawley v. Bapoo* [*(2005), 76 O.R. (3d) 649*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJX1-FD4T-B34J-00000-00&context=) (Ont. Sup. Ct.) and *Bevis v. Burns* [*(2006), 269 D.L.R. (4th) 696*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-XPY1-JBDT-B07X-00000-00&context=) (N.S.C.A.). With specific reference to strip searches where no tort has been committed, the Federal Court held in *Blouin v. R.* (*sub. nom. Blouin v. Canada)* [*(1991), 51 F.T.R. 194*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8W-M421-FJM6-63CS-00000-00&context=) (T.D.) at [paragraph] 24 that a person who was unreasonably strip searched was entitled to damages in addition to a declaration. If the Ontario Court of Appeal had intended in *Wynberg* to disapprove of these and other decisions, one would have expected more than a single paragraph of *obiter dicta* making no reference to any of the contrary decisions.

**112**  Counsel for the City of Vancouver makes a similar submission. Relying on *Stenner v. British Columbia (Securities Commission)* [*(1993), 23 Admin. L.R. (2d) 247*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-FG12-61PH-00000-00&context=) (B.C.S.C.), counsel says that an award of damages is not appropriate under s. 24(1) where the breach of the *Charter* was a result of good faith action. However, that decision is not comparable to the present case. It involved a statutory authority applying valid legislation in good faith. It is more akin to the *Wynberg* situation, where it was alleged that unconstitutional policy decisions were made pursuant to constitutional legislation.

**113**  I conclude that Mr. Ward is entitled to awards of damages with respect to the strip search and the seizure of his vehicle in addition to a declaration that his rights under s. 8 of the *Charter* were infringed.

Quantum of Damages

**114**  The final matter is the determination of the amount of damages to which Mr. Ward is entitled in respect of his false imprisonment, the strip search of his person and the seizure of his vehicle.

**115**  In *Hanisch v. Canada*, [*[2004] B.C.J. No. 2159*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FCSB-S367-00000-00&context=), [*2004 BCCA 539*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FCSB-S367-00000-00&context=), the B.C. Court of Appeal discussed the function of non-pecuniary damages in a case involving false arrest and false imprisonment:

[paragraph] 60 Non-pecuniary damages are intended to compensate for the deprivation of liberty, public humiliation and loss of reputation and mental anguish. As such they reflect the nature of the events, the character of the person wronged and the community where the events occurred.

The Court of Appeal upheld the trial judge's award of $25,000 for non-pecuniary damages, but set aside the trial judge's award of $35,000 for punitive damages. In the latter regard, the Court of Appeal quoted the following passage from *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=):

[paragraph] 196 Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

The Court of Appeal held that the police officer's conduct did not warrant punitive damages because his actions reflected immature judgment, inadequate training and inexperience.

**116**  In addition to *Hanisch*, counsel for Mr. Ward relied upon the decisions of *Phillips v. Nagy*, [*[2006] A.J. No. 1020*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9381-JJSF-22JB-00000-00&context=), [*2006 ABCA 227*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9381-JJSF-22JB-00000-00&context=), the *Hill* case, *St. Pierre v. Pacific Newspaper Group Ltd.*, [*[2006] B.C.J. No. 259*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1XC-00000-00&context=), [*2006 BCSC 241*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1XC-00000-00&context=) and *Dix v. Canada (Attorney General)*, [*[2003] 1 W.W.R. 436*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9361-F4GK-M39K-00000-00&context=) (Alta. Q.B.). In *Phillips v. Nagy,* the Alberta Court of Appeal upheld an award of $150,000 for general damages and $50,000 for punitive damages in a situation involving false imprisonment and an unlawful strip search.

**117**  *Hill* was a defamation case heard by a jury. The Supreme Court of Canada upheld the jury's awards of $300,000 for general damages, $500,000 for aggravated damages and $800,000 for punitive damages. In addition to making the above comment regarding punitive damages, the Court made the following comments about aggravated damages:

[paragraph] 188 Aggravated damages may be awarded in circumstances where the defendants' conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety arising from the libellous statement ...

[paragraph] 189 These damages take into account the additional harm caused to the plaintiff's feelings by the defendant's outrageous and malicious conduct. Like general or special damages, they are compensatory in nature.

**118**  In *St. Pierre*, another defamation case, the plaintiff was a lawyer and his picture was accidentally placed with a newspaper article about the terrorist group, Hezbollah. This Court awarded him $35,000 in damages.

**119**  *Dix* was a malicious prosecution case, where Mr. Dix spent 23 months in jail following a misguided investigation by the police. Counsel for Mr. Ward relies on this case for the fact that $300,000 in punitive damages were awarded. The sum of $100,000 of the punitive damages was awarded on the basis that the police had treated Mr. Dix in a high-handed manner which would offend and shock the sensibilities of most citizens. The remaining $200,000 in punitive damages was awarded against a Crown prosecutor who knowingly relied on a false letter at two bail hearings.

**120**  Counsel for the City of Vancouver relies on decisions with more modest awards: *Hewer v. Paquette*, [*[1990] B.C.J. No. 1549*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JK4W-M175-00000-00&context=) (S.C.), *Forster v. MacDonald* [*(1993), 108 D.L.R. (4th) 690*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9331-FBN1-243B-00000-00&context=) (Alta. Q.B.), *Nolan v. Toronto (Metropolitan) Police Force,* [*[1996] O.J. No. 1764*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCY1-F57G-S03H-00000-00&context=) (Ont. Ct. of Jus. (Gen. Div.)) and *King v. Ontario (Ministry of Attorney General)*, [*[2002] O.J. No. 4766*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SDH1-JCJ5-2424-00000-00&context=) (Ont. Sup. Ct. of Jus.). The judgments in these cases awarded general damages for wrongful imprisonment in the amounts of $1,000, $8,000, $5,000 and $2,500, respectively.

**121**  Counsel for Mr. Ward submits that in assessing the damages, I should take into account that his client was a lawyer who was shown on a television broadcast being bustled away in handcuffs by the police. He also argues that I should award aggravated, exemplary and/or punitive damages as a result of the undignified way Mr. Ward was treated in front of the news media, which filmed him in handcuffs and broadcast the footage on television.

**122**  I have held that the police were justified in arresting Mr. Ward for breach of the peace. Mr. Ward caused the breach of the peace, which brought the attention of the TV crew to him. I would add that very few people probably recognized Mr. Ward from the Global TV broadcast and that the amount of publicity devoted to the event was largely generated by Mr. Ward's subsequent interviews with the press and television media.

**123**  The police were entitled to imprison Mr. Ward when he was arrested for breach of the peace. The commission of the tort of wrongful imprisonment arose from the failure of the police to release him within a reasonable time after the Prime Minister had left the area of the ceremony. In assessing damages for wrongful imprisonment, therefore, I am not assessing damages for the imprisonment itself, but for the length of the imprisonment. In all of the circumstances, I award Mr. Ward the sum of $5,000 as general damages for the wrongful imprisonment.

**124**  I do not regard the police's conduct as being malicious, high-handed or oppressive. Their actions would not shock the sensibilities of reasonable observers, and the Court's sense of decency is not offended. There is no evidence to support the suggestion that the police targeted Mr. Ward as a result of the fact that he had acted for other persons having complaints against the police. All three of Constable Cope, Sergeant Kelly and Constable Prasobsin testified that they believed at the time, and still believe, that Mr. Ward was involved in a plan to throw a pie at the Prime Minister, and I find that they are sincere in their belief (which is not to say that I share their belief). A proper basis to award aggravated, exemplary or punitive damages does not exist.

**125**  I turn next to the matter of damages for the strip search. *Phillips v. Nagy*, where $150,000 in general damages were awarded, involved egregious circumstances. The plaintiff suffered the indignity of body cavity searches, three enemas and induced vomiting. She suffered psychological injuries, and became a dependent adult who was unlikely to experience a full recovery. This is a far cry from the manner and effect of the strip search of Mr. Ward.

**126**  In addition to the authorities relied upon by counsel, I have considered the amounts of the damages awarded in *Blouin* and *Ilnicki*. In *Blouin,* the Federal Court granted general damages in the amount of $5,000 for a strip search conducted of a penitentiary guard by his superiors. The plaintiff had been required to take off all of his clothes and do a full turn in front of two superiors. In *Illnicki*, the plaintiff had refused to co-operate with the strip search, and the police used force in taking off all of his clothes, including his underwear. As a result of the force used by the police, the plaintiff sustained injuries to his arm and shoulder. The Alberta Queen's Bench (whose decision is cited as [*[2003] A.J. No. 605*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9361-FG68-G4T9-00000-00&context=), [*2003 ABQB 465*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9361-FG68-G4T9-00000-00&context=)) awarded the plaintiff $5,000 damages for the breach of his s. 8 rights and $6,000 damages for pain and suffering. The quantum of the damages was not cross-appealed when the police appealed the finding of their liability to the Alberta Court of Appeal.

**127**  In the present case, the strip search of Mr. Ward did not involve the removal of his underwear and exposure of his genitals. While the Supreme Court of Canada commented at [paragraph] 90 of *Golden* that strip searches are inherently humiliating and degrading for detainees, a strip search which does not involve the removal of the detainee's underwear is less humiliating and degrading than searches involving the removal of all clothing such as the strip searches conducted in *Blouin* and *Ilnicki.* Although Mr. Ward testified that the whole experience shook his core beliefs about the rule of law, he did not suffer any physical or psychological injury as a result of the strip search. In view of all of the circumstances in relation to the strip search, I award Mr. Ward the sum of $5,000 against the Provincial Government for the infringement of his right under s. 8 of the *Charter* to be secure against unreasonable search.

**128**  The actions of the corrections staff in conducting the strip search of Mr. Ward were not malicious, high-handed or oppressive. Mr. Coulson testified that the Corrections Branch received legal advice after the decision in *Golden* was made that it did not have to change its policy regarding strip searches. I make no order for aggravated, exemplary or punitive damages.

**129**  The final issue with respect to damages relates to the unreasonable seizure of Mr. Ward's car. He did not suffer any substantive damage as a result of the seizure. I award him nominal damages of $100.

CONCLUSION

**130**  I make the following declarations and awards of damages:

1. I declare that Mr. Ward's rights under ss. 7 and 9 of the *Charter* were infringed as a result of his wrongful imprisonment;
2. I declare that Mr. Ward's rights under ss. 7 and 8 of the *Charter* were infringed as a result of his strip search and the unreasonable seizure of his vehicle;
3. I award damages to Mr. Ward against the City of Vancouver for his wrongful imprisonment and the unreasonable seizure of his vehicle in the amount of $5,100; and
4. I award damages to Mr. Ward against the Provincial Government in respect of his strip search in the amount of $5,000.

**131**  Counsel asked to reserve their right to make submissions on the topic of costs until following the release of my judgment on the merits of the action. If all counsel agree, these submissions may be made in writing. If any of the counsel wishes to make oral submissions, arrangements for a hearing can be made through Trial Division.

TYSOE J.

**End of Document**

[***Chapeskie v. Canadian Imperial Bank of Commerce, [2003] B.C.J. No. 1046***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F4NT-X331-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Groberman J. (In Chambers)

Oral judgment: April 28, 2003.

Vancouver Registry No. S020130

**[2003] B.C.J. No. 1046** | 2003 BCSC 708 | 33 B.L.R. (3d) 153 | 122 A.C.W.S. (3d) 856

Between Brenda Chapeskie and Moonbeams Coffee Café Inc., plaintiffs, and Canadian Imperial Bank of Commerce and 580482 BC Ltd. (now known as Davie Grind Café Inc.), defendants, and 580482 BC Ltd. (now known as Davie Grind Café Inc.), third party

(58 paras.)

**Case Summary**

**Contracts — Remedies for breach — Damages — Fraud and misrepresentation.**

|  |
| --- |
| Action by Moonbeams Coffee Cafe to recover an unpaid balance of an asset purchase agreement. The plaintiff Chapeskie operated a coffee shop known as Moonbeams Cafe. Evans, who incorporated the defendant 580482 B.C. Ltd., later known as Davie Grind, offered to purchase the cafe. Chapeskie decided to sell the cafe and concentrate on her coffee roasting business. She agreed to supply coffee beans to Evans at a substantial discount from market rates, and she agreed not to compete in the cafe business in the local area. Evans and Chapeskie attended at Chapeskie's branch of the defendant Canadian Imperial Bank of Commerce. It was proposed that Evans obtain financing to take over three outstanding business loans totalling $145,000, and that he raise the balance of $40,000 on his own. Evans paid a deposit of $10,000, and Chapeskie handed over the keys to the premises and the business assets. She claimed not to be aware that Evans was experiencing delays in obtaining financing. After closing she spoke to an employee of the Bank, who told her that the three business loans would be paid out and that an additional $15,000 would be paid to her line of credit. There were disagreements over the amounts that Moonbeams was allowed to charge for coffee beans, resulting in Davie Grind withholding the balance of the purchase price in the amount of $15,718.41. Davie Grind conceded that it was liable for the unpaid balance, subject to a claim for set-off resulting from the coffee pricing dispute and for a claim for breach of the non-competition clause. Chapeskie claimed against the Bank for misrepresentation, and the bank claimed a set-off.  HELD: Action allowed in part.  The bank had paid out $718.41 less than it should have, and so was liable for that amount to Moonbeams. There was a loss of $15,000 arising from the Bank's misstatements as to the amounts that would be transferred. However, Chapeskie was 50 per cent responsible for that loss for failing to demand payment in a timely manner. Therefore, the Bank was liable jointly and severally with Davie Grind to Moonbeams in the amount of $8,218.41. The Bank was not entitled to any set-off arising from the dispute over the coffee bean prices or the breach of the non-competition agreement. Losses to Davie Grind over the breach of the non-competition agreement were de minimis. Moonbeams recovered from Davie Grind the balance of the purchase price of $15,718.41, less $7,000 for breach of the coffee pricing agreement, plus $810.41 for unpaid invoices for beans. |

**Counsel**

K. Ducey, for plaintiffs. G. Mayovsky, for C.I.B.C. D. Evans, appeared in person, for 580482 BC Ltd.

[Editor's note: A corrigendum was released by the Court April 5, 2004; the correction has been made to the text and the corrigendum is appended to this document.]

|  |
| --- |
| **GROBERMAN J. (orally)** |

OVERVIEW

**1**  This action concerns the sale of a coffee shop located at 1262 Davie Street from Moonbeams Coffee Café Inc. to 580482 B.C. Ltd. I will refer to the numbered company as Davie Grind, a name that it later assumed.

**2**  The sale, which was to complete on March 31st, 2001 was by way of an asset purchase agreement. Davie Grind's financing was not in place in time for the closing. Nonetheless, Moonbeams handed over the assets of the business to Davie Grind on the closing date on the understanding that funds would be forthcoming. Soon thereafter, the business relationship between Moonbeams and Davie Grind deteriorated and the latter failed to pay the full purchase price. Davie Grind has since become insolvent.

**3**  In this action, Moonbeams seeks to recover the unpaid balance of the purchase price from Davie Grind, together with an amount for unpaid invoices for coffee beans. Moonbeams also seeks to recover the unpaid balance of the purchase price from the Canadian Imperial Bank of Commerce on the basis that the bank made negligent statements to Ms. Chapeskie, the principal of Moonbeams, which induced Moonbeams to forbear payment from Davie Grind at a time when it could have collected funds from it.

**4**  Finally, I have before me setoff claims by Davie Grind against Moonbeams and Chapeskie based on alleged breaches of the asset purchase agreement by the vendor.

**5**  CIBC alleges that it, too, can take advantage of these claims as set offs against any amount that is it would otherwise be liable to pay Moonbeams in damages for negligent misstatement.

Events Leading up to the Claims

**6**  With that overview I will now turn to the detailed background of the claims and counterclaims. From July 1998 to March 2001, Brenda Chapeskie operated a coffee shop known as Moonbeams Café at 1262 Davie Street in the West End of Vancouver. Initially, the café was owned by three partners but after some sort of falling out Ms. Chapeskie continued to operate the business as the sole principal of Moonbeams Coffee Café Inc. Ms. Chapeskie also roasted coffee beans both for use at and retail sale from the café, and for wholesale sales to other small enterprises.

**7**  Don Evans frequented Moonbeams Café. Sometime in 2000 he asked Ms. Chapeskie whether she was interested in selling it to him. She was not interested in selling at that time as she had recently settled with her former partners and wanted to try to make a go of the business on her own.

**8**  Six months later, however, she was finding the business exhausting and decided that she was ready to sell the café and continue only the coffee roasting business. She approached Mr. Evans at that time and they commenced negotiations for the purchase of the café by Mr. Evans.

**9**  Ms. Chapeskie was not prepared to take less than $185,000 for the café. She felt that if she received that amount, she would be able to pay off amounts that she owed for business debts. Mr. Evans did not have a great deal of capital and was not initially prepared to pay $185,000. Although the evidence of Mr. Evans and Ms. Chapeskie differs on this point, I am satisfied that Ms. Chapeskie induced Mr. Evans to increase the amount of his offer in exchange for a promise that she would supply him coffee beans at a substantial discount from market rates. I will deal with the details of that agreement later in this judgment.

**10**  Aside from the issue of the price for the business, there was also an issue as to whether Mr. Evans would be entitled to use the name "Moonbeams" for the café. Ms. Chapeskie considered that the name was of some value and wished to use it as a brand name for her coffee beans. Ultimately a deal was worked out whereby Ms. Chapeskie would call her beans "Moonbeams" and Mr. Evans would be entitled to call the café "Moonbeams" as long as he used and sold Ms. Chapeskie's beans.

**11**  Ms. Chapeskie and Moonbeams Coffee Café Inc. agreed not to compete with the existing Moonbeams Café in the café business in the downtown and West End Vancouver areas.

**12**  The mechanics of the sale then took shape. Mr. Evans elected to incorporate the company eventually named "Davie Grind" to purchase the café. The asset purchase agreement was reduced to writing drafted by Ms. Chapeskie's solicitor. Ms. Chapeskie, who had dealt with a branch of the Canadian Imperial Bank of Commerce for many years, took Mr. Evans to see Jack Picken at the bank. Mr. Picken specialized in providing services to small business clients. After some discussion among Mr. Picken, Mr. Evans and Ms. Chapeskie, it was determined that Mr. Evans might qualify to obtain financing to take over three outstanding business loans totalling approximately $145,000. Mr. Evans would have to raise the balance of the purchase price from his own resources.

**13**  I use the term "take-over" in relation to the business loans advisedly. Some of the bank documents suggest that Mr. Evans was to "assume" the loans. This was not, strictly speaking, correct. Rather, Mr. Evans was to obtain new government guaranteed financing and pay out the existing three business loans from the proceeds of the new loans.

**14**  Even before the closing date, difficulties began to occur. First, Mr. Evans's financing was delayed due to problems in the proper completion of the loan application forms. Second, for one reason or another, Mr. Evans did not attend at the café to be trained in its operations by Ms. Chapeskie. Third, the arrangements for the handing over of the premises were changed so rather than the closing occurring during the day, it was to occur late in the evening on a Saturday.

**15**  A deposit of $10,000 was paid by Mr. Evans, but other than that no money had changed hands by the time of closing on March 31st, 2001. Ms. Chapeskie nonetheless handed over the keys to the premises and the business assets on the understanding that the balance of the purchase price would be forthcoming.

**16**  Ms. Chapeskie claims that she was not aware at the time of the closing that Mr. Evans' financing was delayed. She says that she attended at the bank on the Monday following the closing and spoke to Clarissa Johnston, a bank employee, about what amounts would be paid out directly by bank transfer from Mr. Evans' business account to hers.

**17**  She says that she was advised that three business loans would be paid out and that an additional $15,000 would be paid to her line of credit, which had a maximum overdraft of $15,000. Ms. Chapeskie says that Ms. Johnston worked out the balance of the purchase price due to her and that it was $15,373.35. She says that she then went to the café and obtained a cheque from Mr. Evans in that amount.

**18**  Needless to say, this is a most unusual way for a business sale to occur. Although Ms. Chapeskie had a lawyer and although there was a formal written agreement setting out the manner of closing, no statement of adjustments was ever done and no trust arrangements were, in fact, relied upon to ensure that the full sale price was forthcoming before the assets were handed over.

**19**  There is a dispute among the parties as to whether Ms. Johnston advised Ms. Chapeskie on April 2nd that the amount due to her was $15,373.35. Ms. Chapeskie is adamant that this happened. Ms. Johnston says that she does not specifically recall meeting with Ms. Chapeskie on April 2nd although she does not deny that she may have done so. She has only a vague and unsure recollection of discussions during which she calculated the amounts that would be paid out directly through inter-account transfers at the bank. She says that if these discussions did occur, she would have included a $15,000 payment to the line of credit in her calculations.

**20**  The bank takes the position that the alleged discussions of April 2nd, 2001 did not occur at all. It says that it was not privy to the detailed arrangements between the parties and could not have known exactly how much was due under those arrangements. I reject that contention.

**21**  I am unable to determine exactly what passed between Ms. Chapeskie and Ms. Johnston on April 2nd, 2001. I am satisfied, however, that the two did have discussions on that day as to what amounts would be paid directly by bank transfer. Whether Ms. Johnston specifically advised Ms. Chapeskie as to what amounts would be owing to her after the transfers is of no moment. What is important is that she represented to Ms. Chapeskie that in addition to paying out the business loans of Moonbeams, the bank would also be transferring $15,000 into that company's line of credit.

**22**  Aside from Ms. Chapeskie's testimony on this matter, there is undisputed evidence that after speaking to Ms. Johnston, Ms. Chapeskie went to Mr. Evans and requested a cheque in the amount of $15,373.35. This odd amount appears to be very close to (within 5 dollars of) what would, in fact, have been owed by Mr. Evans on the asset purchase agreement had the bank paid out the business loans and paid an additional $15,000 into the line of credit account. The exact amount due had to be calculated manually in order to incorporate per diem interest from April 1 to 2; under the circumstances, I consider any discrepancy between the two amounts to be of no moment.

**23**  There is no plausible explanation for the $15,373.35 amount other than that Ms. Chapeskie believed that that was the amount that would be owing after the bank completed inter-account transfers. There is also no plausible explanation for Ms. Chapeskie calculating this amount other than a bank official advised her of the amounts that the bank would be paying out. It is highly unlikely that anyone without detailed knowledge of the bank's policies would have assumed that $15,000 would be paid into the line of credit when only a much smaller amount was, in fact, due as of April 2nd, 2001. Ms. Johnston says, however, that for the bank's purposes the payout amount on the line of credit would have been the full amount of the authorized overdraft rather than the amount of the overdraft actually drawn at that time.

**24**  I accept Mr. Evans' evidence that when Ms. Chapeskie attended at the café on April 2nd, she stated that she needed the cheque to "pay her bills." I cannot, however, accept the bank's interpretation of this statement as meaning that Ms. Chapeskie calculated the amount by adding up particular bills that she was going to pay rather than relying on the bank's representations of what was owed to her. Although the bank has had access to (and indeed was responsible for keeping) statements of deposits to and withdrawals from Moonbeam's accounts, no attempt has been made to show the bills in an amount similar to the $15,737.35 amount were paid by Moonbeams around April 2nd, 2001. It would be an extraordinary coincidence if pressing bills came to the same amount as the amount remaining due to Moonbeams assuming that all its credit facilities were directly paid by bank transfer.

**25**  As well as accepting that the bank gave Ms. Chapeskie advice on April 2nd as to how much was going to be paid directly into Moonbeam's accounts, I also accept that Ms. Chapeskie reasonably relied on these statements and that the bank should reasonably have foreseen that she would do so. The bank argues that Ms. Chapeskie ought to have relied on her lawyer or produced a statement of adjustments in order to determine the amount owing by Mr. Evans' company. While that may be true, the fact remains that any statement of adjustments would have had to rely on the bank's representations as to how much money was being transferred into the various Moonbeam's accounts in order to calculate the difference remaining payable by Mr. Evans' company.

**26**  The bank also suggests that Ms. Chapeskie knew from discussions concerning Mr. Evan's financing that the financing would not be paying out her line of credit. While this would appear to be true, I do not think that this would clothe her with knowledge that the line of credit was not to be paid by direct transfer of funds from Mr. Evans' company's account to Moonbeam's accounts without the need for a cheque.

**27**  Ms. Chapeskie says that when she was at the bank on April 2nd she was not advised that financing was delayed and that she anticipated that the transfers into Moonbeam's accounts would take place without delay. She claims that she was not aware of the delay until after she received her April bank statement in May and noticed that she was still being charged for payments on the business loans.

**28**  I do not accept Ms. Chapeskie's evidence in this regard. Mr. Picken and Mr. Evans both say that they made Ms. Chapeskie aware of the anticipated delays. Ms. Johnston was also keenly aware of the delays and while neither she nor the others realized on April 2nd that the funding of the loans was still over three weeks away, they were well aware that funding was not imminent. It is scarcely conceivable that this information was kept from Ms. Chapeskie.

**29**  The loans were not, in fact, advanced until April 27th and even then the bank did not proceed with the inter-account transfers. Rather, the money was simply deposited to Mr. Evans' company's account. No payments to Moonbeam's account took place until May 7th. I accept without hesitation Ms. Johnston's clear recollection that the payments on that date and again on May 8th happened as a result of Ms. Chapeskie coming into the bank and complaining that loan payments continued to be deducted from her accounts.

**30**  When the inter-account transfers were made, Ms. Johnston transferred amounts from Mr. Evans' company's accounts to pay off not only the three Moonbeam's business loans but also to pay the $15,000 into Moonbeam's line of credit. This was consistent with her understanding of what was to occur and also consistent with her representations to Ms. Chapeskie on April 2nd, 2001.

**31**  Within days, however, Mr. Evans complained that the bank did not have instructions to pay out more than $145,000 from Davie Grind's account to Moonbeam's accounts and he demanded that the payment be reversed. The bank complied with this request. Thereafter there was some confusion in the bank's treatment of the situation but it ultimately resolved the situation in July of 2001 by confirming that no amounts over $145,000 would be transferred.

**32**  I find that the bank had no explicit instructions from Mr. Evans as to how much money was to be transferred from his company's accounts to Moonbeam's accounts. It did, however, have implicit instructions to pay off the three business loans, including accrued interest that were to be "assumed" by Davie Grind with the new financing. The bank therefore ought to have paid over $145,718.41, not the $145,000 it ultimately paid. It is liable to Moonbeams for the difference of $718.41, which was properly transferred over to the Moonbeams account and later improperly transferred back to the Davie Grind account.

**33**  By the time the payments were processed in May, Moonbeams and Davie Grind were involved in two disputes over the asset purchase agreement. First, Moonbeams failed to pay rent during its last two months in the café premises, relying on its deposit with the landlord of two months rent. Davie Grind rightly claimed that under the agreement the two months rent deposit was an asset that should have been transferred to it under the asset purchase agreement. Ultimately this issue was settled between the parties.

**34**  Second, the parties had serious disagreements over the amounts that Moonbeams was allowed to charge Davie Grind for coffee beans. As a result of these disputes, Davie Grind withheld the balance of the purchase price, some $15,718.41, which the plaintiff has never collected.

Claims for the Unpaid Purchase Price

**35**  It is conceded by Davie Grind that, apart from a setoff resulting from the coffee pricing dispute and for a claim for breach of the non-competition clause in the asset purchase agreement, Davie Grind is liable to the plaintiff for the unpaid balance of the purchase price.

**36**  The question remains as to whether the bank is also liable for this amount as a result of its misrepresentations of April 2nd, 2001 as to the amounts that would be transferred.

**37**  I have already stated that Ms. Chapeskie reasonably relied on the misstatements made by the bank and that the bank ought to have foreseen that she would do so. Equally, I find that the misstatements were causative of the loss in that if they had not been made, Ms. Chapeskie would have requested and received a cheque for the full balance of the purchase price over and above the outstanding business loans on April 2nd, 2001. Thus the elements of negligent misstatement are made out.

**38**  I find, however, that this is an unusual case in which, while the plaintiff's reliance on the bank was reasonable and causative of her loss, there is separate contributory ***negligence*** on her own part causing loss. Ms. Chapeskie knew that the amount of Davie Grind's new financing was approximately equal to Moonbeam's three existing business loans. Any amounts owed in excess of these loans (including the line of credit) were to come from Davie Grind's own resources. It did not make sense for Ms. Chapeskie to wait weeks for Davie Grind's business loans to be funded before demanding that the company pay the amounts that was coming from other sources.

**39**  Had Ms. Chapeskie demanded payment from Davie Grind in a timely manner, it is likely (though not certain) that the payments would have been forthcoming. I find that Ms. Chapeskie should have made a request for a cheque from Davie Grind when it became apparent that more than a fleeting delay in the funding of the loans was occurring.

**40**  This is a case in which the ***negligence*** of the two parties should be found to be equally contributory to the loss. That loss should be calculated as $15,000 from May 7th, 2001. The bank will, as I have already indicated, be liable for an additional $718.41 from that date on the basis that I have already described.

**41**  The bank will be liable for one half of the $15,000 amount. Its liability on both the amounts that I have described will be joint and several with the defendant Davie Grind.

The Bank's Claim for Set-off

**42**  In my view, the bank is not entitled to any setoff resulting from the dispute over coffee bean prices or over any breach by the plaintiff of the non-competition clause. To the extent the Davie Grind is entitled to these setoffs, they arose later than the bank's liability and in relation to entirely separate matters. To the extent that they benefit Davie Grind, they should not benefit the bank in preference to its other creditors.

Breach of the Coffee Pricing Agreement

**43**  Given Davie Grind's insolvency, the setoff claims would appear to be of only academic concern. Nevertheless, as a formal (if probably worthless) judgment will go against the company, I will briefly indicate my decision with respect to those claims.

**44**  The claims arise in this manner: the asset purchase agreement provided that Moonbeams was to provide coffee beans to Davie Grind for "cost plus 50 percent COD" for a period of at least 30 months. The parties disagree as to what should be included in determining the "cost" of the roasted coffee beans. When the agreement was entered into Ms. Chapeskie advised Mr. Evans that he could expect to save about $15,000 over 30 months under this arrangement. She further told him that the wholesale price of coffee beans is typically one half of the retail price and the cost is typically one half of the wholesale price.

**45**  When Moonbeams started to supply beans to Mr. Evans' Company, he found that its prices, far from saving him money, were higher than those he could obtain from another wholesaler of comparable beans. Discussions ensued and I find that compromises were reached and then unilaterally broken by the plaintiffs.

**46**  The major dispute is over whether the plaintiff was entitled to impute into the cost of beans a labour component for her roasting. I find that the phrase "cost plus 50 percent" does not contemplate the addition of such a labour component. First, I interpret "cost plus 50 percent" to refer to the cost of the materials rather than of labour and materials. Moonbeams was entitled to include in that cost the cost of the green beans that went into a pound of roasted coffee (I note that it is acknowledged that this will include an amount to cover bean loss since it takes more than a pound green beans to make a pound of roasted coffee). It was also entitled to include the transportation charges, customs fees, duties and taxes that it was required to pay on the green beans. It was not entitled to impute an amount for labour for roasting the beans nor for such things as electrical consumption by the roaster. If those sorts of expenses had been intended to be included, the contract should have referred to the beans being sold at a 50 percent profit rather than 50 percent over cost.

**47**  I am fortified in this view by the representations that the plaintiff made as to relationship of cost to retail price and as to the savings that Davie Grind would realize over the course of 30 months.

**48**  In the result, I am prepared to allow Davie Grind to set off its claim for breach of the bean sales portion of the agreement against its liability to Moonbeams. It is not possible to precisely quantify the loss to Davie Grind, but I believe that a reasonable approximation can be achieved by using the promised $15,000 saving over 30 months as a starting point.

**49**  I am satisfied that the contract would not have subsisted over the full period of 30 months, as the defendant would have become insolvent even with lower coffee bean prices. I would estimate the defendants' loss at $7,000, or somewhat less than half of the anticipated savings of $15,000.

**50**  In reaching this estimate, I take into consideration that Moonbeams did supply coffee beans to Davie Grind for a short period at a slight discount from market rates.

Breach of the Non-Competition Agreement

**51**  Following the dispute over the coffee pricing agreement, the parties appear to have grown further apart. Under the asset purchase agreement, the defendant was not entitled to use the name "Moonbeams Café" once it ceased to use Moonbeams coffee. It did cease to use the name in late 2001. Thereafter, in clear breach of the asset purchase agreement, the plaintiff operated a café within seven blocks of the defendant's café. She used the name "Moonbeams" and targeted the same customers as the defendant catered to.

**52**  I have no doubt that the new Moonbeams Café drew some customers from the defendants' premises on occasion, but no evidence of falling revenues for the defendant or of the plaintiffs' revenues at the new location has been put before the Court. The plaintiff says that the new location made no profit and I do not doubt the veracity of that evidence. In the end, it is my view that any loss resulting from the breach of the non-competition clause is de minimus and I am not prepared to award any amount in respect of that breach.

Unpaid Coffee Invoices

**53**  Finally, Moonbeams advances a claim for $810.41 for unpaid invoices for roasted beans. This claim is not in dispute and the plaintiffs will be entitled to judgment against Davie Grind for this amount.

Summary of Awards

**54**  In the result, I find that Moonbeams is entitled to judgment against the bank for $8,218.41 plus prejudgment interest. The bank's liability for that amount is joint and several with Davie Grind and the bank is entitled to be indemnified for any amount it is called upon to pay under this judgment by Davie Grind. Moonbeams is entitled to judgment against Davie Grind for $9,528.82.

**55**  Are there submissions as to costs? I note that the amount recovered is within the jurisdiction of the Provincial Court.

(Submissions)

**56**  THE COURT: Well, in my view this matter was an appropriate case to be brought in small claims court. It did not need to be brought before this Court, particularly over the length of time that was utilized for it, and I am not prepared to award costs on the claim.

(Submissions)

**57**  I am prepared to allow disbursements at the rates that would be allowed for a small claims action. In terms of filing fees and hearing fees, it will be at the rate that would have been allowed in a small claims action.

(Submissions)

**58**  I am not prepared to allow anything for discovery. That would not normally be available under small claims procedure.

GROBERMAN J.

\* \* \* \* \*

CORRIGENDUM

Released: April 5, 2004

Corrigendum to the Reasons for Judgment issued by Mr. Justice H. Groberman advising that the style of cause on the first page of the Reasons incorrectly lists one of the Defendants as "Canadian Imperial Bank of Canada". The correct name should be listed as "Canadian Imperial Bank of Commerce".

**End of Document**

[***Paterson v. Hindle, [2017] B.C.J. No. 1271***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5NYG-2N01-F2F4-G4KG-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

L.B. Gerow J.

Heard: April 11-13, 18-20, 2017.

Judgment: June 29, 2017.

Docket: M160876

Registry: Victoria

**[2017] B.C.J. No. 1271** | [*2017 BCSC 1104*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5R56-8V41-F22N-X3N4-00000-00&context=)

Between Louise Paterson, Plaintiff, and Dion James Hindle and Jake's Roofing Ltd., Defendants

(122 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Neck — Soft tissue — Head injuries — Brain damage — Concussion — Fibromyalgia or chronic pain — Psychological injuries — Cognitive impairment — Depression — Third party claims — Persons entitled to claim — Child — Recoverable losses — Cost of personal care — Action by 82-year-old plaintiff for damages for personal injuries suffered in motor vehicle accident in 2014 allowed — Liability for rear-end collision was admitted — Plaintiff suffered head injury and concussion or mild traumatic brain injury, soft tissue injuries to her neck, shoulders and upper and lower back, and injuries to her pelvis and legs — After accident, plaintiff gave up many outdoor pursuits and could not farm — Plaintiff awarded $125,000 for non-pecuniary damages, $10,000 for loss of housekeeping capacity, $205,635 for cost of future care, $5,731 for special damages, and $20,000 for her in trust claim.**

**Damages — Types of damages — General damages — For personal injuries — Cost of future care — Loss of housekeeping ability — Special damages — Expenses and expenditures — Non-pecuniary loss — Action by 82-year-old plaintiff for damages for personal injuries suffered in motor vehicle accident in 2014 allowed — Liability for rear-end collision was admitted — Plaintiff suffered head injury and concussion or mild traumatic brain injury, soft tissue injuries to her neck, shoulders and upper and lower back, and injuries to her pelvis and legs — After accident, plaintiff gave up many outdoor pursuits and could not farm — Plaintiff awarded $125,000 for non-pecuniary damages, $10,000 for loss of housekeeping capacity, $205,635 for cost of future care, $5,731 for special damages, and $20,000 for her in trust claim.**

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| Action by the 82-year-old plaintiff for damages for personal injuries suffered in a motor vehicle accident in 2014. Liability for the rear-end collision was admitted. The plaintiff's vehicle was written off. Prior to the accident, the plaintiff was very active in many outdoor activities and managed her 20-acre farm. The plaintiff suffered a head injury and a concussion or mild traumatic brain injury, soft tissue injuries to her neck, shoulders and upper and lower back, and injuries to her pelvis and legs. After the accident, the plaintiff gave up many of her outdoor pursuits and could not farm. Two of her children took time off work to assist the plaintiff with farm maintenance, take her to appointments and shop for her.  HELD: Action allowed.  The plaintiff's injuries had resulted in chronic pain and ongoing cognitive and psychological issues. The injuries had impacted every aspect of the plaintiff's life. The plaintiff was awarded non-pecuniary damages of $125,000. There was some duplication in the claims advanced by the plaintiff for loss of housekeeping capacity and future care costs. The plaintiff had suffered a diminished capacity in her ability to care for her farm. She was awarded $10,000 for her loss of housekeeping capacity. She was awarded $205,635 for cost of future care, including $12,476 for physiotherapy and acupuncture, $2,500 for psychological counselling, $600 for a driver assessment, $100,000 for home support, $42,321 for housecleaning, $40,000 for yard and home maintenance, $881 for bathroom and safety aids, $857 for mobility aids, $1,000 for medication, and $5,000 for transportation. There was no evidence that suggested a live-in caregiver was medically necessary. The plaintiff's special damages were assessed at $5,731. An in trust award of $20,000 was awarded for the services provided by the plaintiff's children. |

**Counsel**

Counsel for the Plaintiff: D. MacIsaac.

Counsel for the Defendants: M. Henderson.

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| **L.B. GEROW J.** |

**Introduction**

**1**  The plaintiff, Louise Paterson was injured in a motor vehicle accident that occurred on the Alberni Highway near Coombs, B.C., on August 21, 2014, when she was rear ended by a vehicle driven by the defendant, Dion James Hindle. Ms. Paterson commenced this action against the defendants, Jake's Roofing Ltd., the owner of the vehicle, and Mr. Hindle, seeking damages for the injuries she alleges she sustained in the accident. The defendants have admitted liability for the accident.

**2**  The defendants concede Ms. Paterson was injured in the accident. However, the defendants disagree about the nature, extent and seriousness of her injuries caused by the accident.

**3**  The defendants pleaded contributory ***negligence*** and failure to mitigate but conceded during submissions that neither had been made out on the evidence.

**Issues**

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

1. What are the nature, extent and duration of the injuries Ms. Paterson suffered in the accident?
2. What is the appropriate award for general damages for pain and suffering?
3. What is the appropriate award for the cost of future care?
4. What is the appropriate award for the "in trust" claim?
5. What amount should be awarded for special damages?

**Background**

**5**  Ms. Paterson was 79 years old at the time of the accident. Ms. Paterson lives on a 20 acre farm in Beecher Bay, Sooke, B.C. She has six adult children, two of whom live on the property at Beecher Bay. Ms. Paterson graduated from high school and worked at various jobs during her working life, including in a restaurant, as courier, selling wood, in the log salvage business, and in a rest home.

**6**  Prior to the accident Ms. Paterson was very active, engaging in hiking, camping, farming, and other outdoor activities. She was also a prolific writer and very involved in her community.

**7**  Ms. Paterson was returning to her farm in Beecher Bay from Port Alberni when the accident occurred. Ms. Paterson has a home in Port Alberni as well as the farm in Sooke, B.C. Just prior to the accident, Ms. Paterson had been hiking and camping with her family for two weeks in the Bamfield area. Ms. Paterson testified that she had been carrying a 50 pound pack when camping. Ms. Paterson was planning to return to Sooke and then travel to Prince George, B.C. to go moose hunting with her youngest daughter.

**8**  The accident occurred at approximately 2 p.m. in front of the Coombs market. Ms. Paterson had stopped because some children and dogs had stepped out in front of her vehicle, when the large pickup truck driven by Mr. Hindle hit her vehicle from behind. Ms. Paterson was wearing a seatbelt with a shoulder harness. The headrest behind the driver's seat had been removed and bars installed to keep her dog in the back of the car. Ms. Paterson's vehicle was not driveable after the accident. It was eventually written off.

**9**  Ms. Paterson testified that she heard a loud noise and it felt like a bomb went off in her head when the accident occurred. She hit her head on the bars behind the driver's seat. Ms. Paterson had a loss of bladder control during the accident which she found disgusting. Ms. Paterson was able to get out of the car after the accident, and someone helped her to a chair and got ice for her head. She was in a state of shock after the accident. The ambulance attended at the scene, but Ms. Paterson did not want to go to the hospital. Her daughter, June Graham, was called. Ms. Graham followed the tow truck to Erington, and then drove her mother to the farm at Beecher Bay. Ms. Paterson has no recollection of the 2 1/2 hour drive from Coombs to her residence at Beecher Bay.

**10**  The next day, Ms. Paterson went to a medical clinic in Langford, B.C. At the time, Ms. Paterson was complaining of pain in the back of her head, neck, shoulders, back and pelvis. For the two to three weeks following the accident, Ms. Paterson was bedridden and one of her daughters, Robin Graham, looked after her.

**11**  On August 25, 2014, Ms. Paterson went to her family doctor, Dr. Lintern. Dr. Lintern recommended physiotherapy and sent her to a gynecologist as Ms. Paterson was experiencing vaginal bleeding. Her preoccupation in the early days after the accident centered on her gynecological problems. On August 27, 2014, she attended the Emergency Department at the Victoria General Hospital as a result of the bleeding. On October 31, 2014, Ms. Paterson had a hysterectomy. Testing determined that Ms. Paterson was suffering from endometrial cancer.

**12**  Ms. Paterson sought treatment for her injuries. Ms. Paterson has attended physiotherapy, and acupuncture appointments for her soft tissue injuries. She also noticed that she was having memory and mood problems. In May 2015, Dr. Lintern referred Ms. Paterson to a neurologist as a result of her complaints of mood changes, and forgetfulness. He administered the Montreal Cognitive Assessment test, which is a screening test for cognitive problems, Ms. Paterson had scored 21 out of 30 in September 2014, and 28 out of 30 in May 2015. While the 2015 score indicated improvement, Ms. Paterson continued to show signs of cognitive impairment.

**13**  Ms. Paterson has also attended for psychological counselling to deal with her depression and anxiety.

**14**  Despite the numerous treatments she has undergone, Ms. Paterson continues to complain of ongoing physical symptoms, particularly in her neck and shoulder area, and ongoing mood and memory problems. She says the ongoing symptoms restrict her household, community and physical activities, and have prevented her from farming and writing.

**What are the nature and extent of the injuries suffered in the accident?**

**Plaintiff's Position**

**15**  As a result of the accident, Ms. Paterson suffered a concussion or mild traumatic brain injury ("MTBI"), soft tissue injuries to her neck and back, bruising to her legs, and pelvic trauma triggering post-menopausal bleeding.

**16**  Ms. Paterson says that since the accident she has continued to suffer ongoing symptoms, including cognitive impairment, depression and anxiety, headaches and musculoskeletal pain. Her primary and persisting injuries are the cognitive problems and the pain in the left side of her neck.

**17**  Ms. Paterson submits her ongoing symptoms from the injuries she sustained in the accident affect every aspect of her life. Since the accident she has been unable to look after her farm as she did before the accident. Ms. Paterson says she has been unable to write and no longer participates in the community in the same manner she did prior to the accident. As well, Ms. Paterson has had to give up many of her physical and social activities. Ms. Paterson complains that she has changed from a vital, active person to someone who can barely look after herself, and is no longer able to farm, walk or drive the way she could before the accident.

**Defendant's Position**

**18**  As noted earlier, the defendants concede that Ms. Paterson sustained soft tissue injuries to her head, neck, shoulder and back as a result of the motor vehicle accident. The defendants agree that Ms. Paterson still has ongoing left sided neck pain. The defendants say the evidence is that Ms. Paterson's back and shoulder pain have resolved. The defendants agree that Ms. Paterson suffered a head injury in the accident, but say it is not clear she suffered a concussion.

**19**  The defendants take the position that Ms. Paterson's complaints of cognitive impairment are not clearly attributable to the accident. The defendants say there is evidence of numerous contributing factors including longstanding anxiety and possible undiagnosed depression dating back many years before the accident. The defendants point to the fact that Ms. Paterson's recent psychological counselling indicates that Ms. Paterson is dealing with many life stressors and her concerns do not relate solely to the accident or injuries she sustained in it. As well, the defendants say that Ms. Paterson's inability to do many of the activities she previously did is the result of age related issues, and not as a result of the injuries she sustained in the motor vehicle accident.

**20**  The defendants point to the fact that Ms. Paterson presented as an engaged participant who was mentally active while giving testimony in court and showed very little anxiety and hardly any problems with short and long term memory. Ms. Paterson was able to understand the questions and provide reasoned responses even though she was in an anxiety provoking situation. She testified that she conducted her own banking and made her own meals. The defendants submit that speaks to the mildness of Ms. Paterson's current psychological issues.

**21**  As well, the defendants submit that despite her injuries, Ms. Paterson has displayed a good deal of functionality since the accident.

**Relevant Law**

**22**  In order to establish causation Ms. Paterson must prove on a balance of probabilities that but for the accident she would not have suffered the injury she complains of.

**23**  The Supreme Court of Canada considered causation in *Clements v. Clements*, [*2012 SCC 32*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X20M-00000-00&context=). The Court confirmed that the basic test for determining causation remains the "but for" test articulated in *Snell v. Farrell*, [*[1990] 2 S.C.R. 311*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-655K-00000-00&context=) and *Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=). The plaintiff bears the burden of proving that but for the negligent act or omission of the defendant the injury would not have occurred.

**24**  The plaintiff is not required to establish that the defendant's ***negligence*** was the sole cause of his or her injuries. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is liable even if other causal factors, for which the defendant is not responsible, result in the victim's losses being more severe than they would be for the average person. At the same time, the tortfeasor need not put the victim in a better position than the victim would have been in, and need not compensate the victim for the effects of a pre-existing condition that the victim would have experienced in any event: *Snell*; *Athey*.

**Application of the Law to the Facts**

**25**  All of the doctors who examined Ms. Paterson agree she was injured in the accident and that her ongoing complaints are a result of the injuries she sustained.

**26**  Dr. Lynne MacKean, a specialist in physical medicine and rehabilitation provided an expert report and testified at the trial. Dr. MacKean began treating Ms. Paterson on September 10, 2014, as a result of a referral from her family doctor, Dr. Lintern. At the initial appointment, Dr. MacKean diagnosed Ms. Paterson with a grade 2 whiplash associated disorder involving the cervical spine and upper back, and musculoligamentous injuries involving the lumbosacral spine and sacroiliac joint regions. Dr. MacKean recommended physiotherapy and acupuncture. Dr. McKean saw Ms. Paterson again on October 7, 2014, at which time Ms. Paterson reported some gradual improvement. Dr. MacKean recommended Ms. Paterson continue with physiotherapy and acupuncture treatment.

**27**  Dr. MacKean saw Ms. Paterson next on January 28, 2015. On January 14, 2015, x-rays of the cervical spine had been done which showed some degenerative changes in Ms. Paterson's neck. As well, there was some degeneration in her lumbar spine. Ms. Paterson complained of lower back pain and neck pain on both sides. Dr. MacKean advised Ms. Paterson to continue with physiotherapy and acupuncture treatment twice a week.

**28**  Dr. MacKean saw Ms. Paterson again for a medical legal assessment on December 19, 2016. Ms. Paterson described ongoing pain involving the left side of her neck. The right side of her neck and back were no longer bothering her. At the time, Dr. MacKean diagnosed Ms. Paterson with grade 2 whiplash associated disorder with persistent left sided pain. The pain involving other areas, including the right side of her neck, upper back and lower back, had resolved. In Dr. MacKean's opinion the ongoing problems with left sided neck pain is due to injuries she sustained in the motor vehicle accident. While there is some degenerative change in Ms. Paterson's cervical spine, it was asymptomatic prior to the accident, and may have become symptomatic following it.

**29**  In Dr. MacKean's opinion, Ms. Paterson is close to the point of maximal medical improvement as her symptoms have persisted for over two years. Dr. MacKean recommends ongoing physiotherapy and acupuncture twice a month for management of Ms. Paterson's neck pain. Dr. MacKean's opinion is that Ms. Paterson is limited in the amount of work she can do around her property as she is not able to do the moderate to heavy physical work and that will be an ongoing limitation for her. In Dr. MacKean's opinion, Ms. Paterson will require help for home and property maintenance and heavier cleaning activities on an ongoing basis.

**30**  Dr. Peter Hobza, an expert in family medicine, prepared a report and testified at the trial. Dr. Hobza has been Ms. Paterson's family doctor since May 2016, when Dr. Lintern retired. Based on his record review, he is of the opinion that Ms. Paterson suffered a concussion, grade 2 whiplash, a musculoligamentous injury to her lumbosacral spine and sacroiliac joints, and trauma triggering vaginal bleeding (the underlying cause of which was cancer) in the accident. Dr. Hobza's opinion is that the injuries resulting from the accident caused Ms. Paterson's symptoms of musculoskeletal pain in the neck, shoulders and back, headaches, depression, anxiety and cognitive impairment. Dr. Hobza recommends that Ms. Paterson continue with analgesia, physiotherapy, acupuncture and massage on an as needed basis for her symptoms relating to the musculoskeletal injuries.

**31**  As well, Dr. Hobza's opinion is that Ms. Paterson would benefit from counselling and continued medical therapy to help treat and manage her symptoms relating to anxiety and depression. Dr. Hobza's prognosis is guarded with regards to her musculoskeletal injuries. He is of the view, that while there may be some improvement of her physical symptoms, Ms. Paterson will likely not achieve full recovery. Dr. Hobza's prognosis for recovery from her cognitive impairment is more guarded and less optimistic. Further counselling and medication may help to control her symptoms of depression and anxiety, but will be unlikely to return her to her pre-accident level of function.

**32**  In Dr. Hobza's opinion the symptoms from the injuries will continue to impact Ms. Paterson's ability to take care of herself and it is likely she will require home care support or a care aid in the future to assist her. The activities required of her to run her house and farm have been, and will continue to be, impaired by the injuries Ms. Paterson sustained in the accident.

**33**  In cross-examination, Dr. Hobza testified the fact that Ms. Paterson had been taking diazepam for years prior to the accident to deal with situational depression and anxiety did not change his opinion that the accident caused her current depression and anxiety. Ms. Paterson was functioning at a high level prior to the accident. In his opinion, there was a significant change in her level of anxiety following the accident. In cross examination, Dr. Hobza was also asked if Ms. Paterson's pre-accident chronic obstructive pulmonary disease ("COPD") could have an impact on her cognitive ability. His evidence was that COPD does not entail any cognitive impairment.

**34**  Dr. Ingrid Friesen, an expert in the area of neuro-psychology prepared a report and testified at the trial. Dr. Friesen met with Ms. Paterson on December 13, 14 and 20, 2016, for a neuropsychological assessment. The purpose of the assessment was to identify Ms. Paterson's current neuropsychological status and changes, if any, in her cognitive abilities that may have arisen as a consequence of the motor vehicle accident.

**35**  Ms. Paterson complained to Dr. Friesen about a number of symptoms she had experienced since the accident, including feeling out of shape, having pain in her neck that disturbs her sleep, sensitivity to sounds, decreased balance, stress and anxiety, lack of energy, a decline in her thinking abilities, gaps in her memory, losing of her train of thought, word finding difficulties, lacking motivation and procrastinating on tasks. Dr. Friesen also interviewed Ms. Paterson's daughter, who noted significant changes in her mother's physical stamina, and mental state since the accident.

**36**  Based on a review of the medical evidence, and the interviews with Ms. Paterson and her daughter, June Graham, Dr. Friesen concluded there was no evidence to suggest Ms. Paterson had cognitive issues prior to the accident. Following the motor vehicle accident, Ms. Paterson's physician diagnosed her with a concussion or MTBI. Dr. Friesen noted the terms are interchangeable.

**37**  Dr. Friesen's opinion is that it is probable that the motor vehicle accident is the cause of Ms. Paterson's cognitive problems because of the dramatic change reported in pre and post-accident functioning. Dr. Friesen's evidence is that even if Ms. Paterson had been suffering from depression and anxiety prior to the accident, all reports were that she was actively engaged. After the motor vehicle accident there was a sudden change according to Ms. Paterson and her daughter, which in Dr. Friesen's opinion is indicative of a MTBI.

**38**  Dr. Friesen notes that Ms. Paterson did not recall events for several seconds after the motor vehicle accident and that medical documents indicate she was experiencing physical, cognitive and emotional symptoms of a MTBI. In Dr. Friesen's opinion, Ms. Paterson neuropsychological test results and her symptom presentation are consistent with the residual effects of a MTBI. As a result of her interview with Ms. Paterson and her daughter, her review of the medical records, and the psychological testing she performed, Dr. Friesen diagnosed Ms. Paterson with a major neurological disorder and personality change due to MTBI. Dr. Friesen was of the opinion that some of the changes Ms. Paterson reports and others have observed may also be due to personality changes from frontal lobe dysfunction.

**39**  Dr. Friesen's opinion is that the cognitive symptoms Ms. Paterson is experiencing are not associated with normal aging. The impacts of age were accounted for in the test procedures which compared Ms. Paterson's performance to that of a normative group of the same age. As well, Ms. Paterson's scores on the psychological tests were inconsistent with Alzheimer disease or dementia.

**40**  Dr. Friesen's opinion is that the prognosis for future neurological improvement is low given the amount of time that has elapsed since the accident, and Ms. Paterson's age. As a result, Ms. Paterson is likely to experience limitations on her ability to cook, drive, and write. As well, due to her cognitive problems she will likely continue to have problems expressing herself to others and problem solving. In Dr. Friesen's opinion it is likely that Ms. Paterson will require significantly more care in the near future.

**41**  Dr. Claire Sira, an expert in neuropsychology, provided a report and testified at the request of the defendants. Dr. Sira did not meet with Ms. Paterson but performed a records review, and critique of Dr. Friesen's report, testing and methodology. Dr. Sira, in critiquing Dr. Friesen's methodology, noted that many of Ms. Paterson's scores on cognitive tests fell within normal limits and did not represent a decline in functioning. Dr. Sira's opinion is that where the scores fell below expectations there may be explanations other than MTBI. Dr. Sira's opinion is that Dr. Friesen's conclusions are questionable for several reasons, which are outlined in her report.

**42**  However, in my opinion, not much weight can be given to Dr. Sira's opinions. As noted earlier, she did not meet Ms. Paterson or conduct any psychological testing of her or interview any collateral witnesses. As well, despite including in her report a certification that she had a duty to assist the court and not to be an advocate for any parties, I found Dr. Sira argumentative during cross-examination and was acting very much as an advocate for the defendants.

**43**  As a result, I prefer Dr. Friesen's opinion. It is consistent with both the medical evidence and the evidence from the lay witnesses regarding the changes they observed in Ms. Paterson's personality and behaviour following the accident. The evidence is that Ms. Paterson suffered from many of the symptoms of concussion following the accident, including headaches, confusion, memory problems, problems concentrating, sleeping more than usual, and a lack of energy.

**44**  I note that Dr. Sira agreed in cross-examination that a person not remembering a two and a half hour drive subsequent to an accident was consistent with post traumatic amnesia and could be consistent with a concussion or MTBI. Ms. Paterson testified that she could not remember the drive back to Beecher Bay after the accident, which took approximately two and a half hours.

**45**  Based on my review of the medical evidence, I find that Ms. Paterson suffered a head injury and a concussion or MTBI, soft tissue injuries to her neck, shoulders and upper and lower back, as well as injuries to her pelvis and legs. While she has recovered from a number of the injuries, the injuries she sustained in the accident have resulted in the chronic pain she experiences in her neck and ongoing cognitive and psychological symptoms.

**46**  There is no evidence that Ms. Paterson was suffering pain as a result of her degenerative spine condition prior to the accident. As noted by Dr. MacKean, many people have degenerative conditions in their spine and are asymptomatic. Given the lack of symptoms prior to the accident, it is likely the accident either activated or aggravated Ms. Paterson's pre-existing degenerative condition.

**47**  While Ms. Paterson had some earlier problems with situational depression and anxiety and had been taking diazepam for many years prior to the accident, she had by all reports been active both physically and socially prior to the accident. All reports are that Ms. Paterson was active in the community and a prolific writer prior the accident. The lay witnesses are consistent in their evidence that there was a marked change in Ms. Paterson following the accident. Ms. Paterson's evidence is that despite her attempts, she has not been able to return to many of her pre-accident activities and interests.

**48**  None of the experts suggest Ms. Paterson's symptoms will completely resolve regardless of the treatments she receives, or steps she takes. In my view, the medical evidence supports a finding that Ms. Paterson will likely experience some improvement over time with further physical and psychological treatment, but will not have a resolution of her symptoms or a return to her pre-accident condition.

**49**  Accordingly, I find on a balance of probabilities that as a result of the accident Ms. Paterson will continue to suffer from chronic neck pain, cognitive impairment, depression and anxiety.

**What is the appropriate award of general damages for pain and suffering?**

**50**  Ms. Paterson seeks an award of $175,000 to $200,000 for general damages. The defendants submit an appropriate award for general damages is $85,000 to $100,000.

**Applicable Law**

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

**52**  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 paras. 45 and 46, the court noted that a non-pecuniary award will vary to meet the specific circumstances of each case, and set out the factors to be considered in making such an award:

[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=)).

**53**  Ms. Paterson relies on *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=); *O'Connell (Litigation Guardian of) v. Yung*, [*2010 BCSC 1764*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JNY7-X4M0-00000-00&context=); *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=); *Burdett v. Eidse*, [*2010 BCSC 219*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JSJC-X0XV-00000-00&context=); *Adamson v. Charity*, [*2007 BCSC 671*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-DXWW-24HS-00000-00&context=); *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=); *Wong (Litigation Guardian of) v. Towns*, [*2015 BCSC 1333*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GN8-FRT1-FC6N-X1Y8-00000-00&context=); *Sundin v. Turnbull*, [*2017 BCSC 15*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5MKR-T2S1-F27X-60XP-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=); and *Ha v. Frizke*, [*1999 BCCA 667*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F2TK-22P5-00000-00&context=), to support the argument that the appropriate award for general damages is $175,000 to $200,000. I find that in many of these cases, the plaintiffs suffered more significant injuries than those suffered by Ms. Paterson.

**54**  The defendants rely on *Nahal v. Ram*, [*2016 BCSC 39*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5HXW-S171-JX8W-M07X-00000-00&context=); *Drodge v. Kozak*, [*2011 BCSC 1316*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-DYMS-62B6-00000-00&context=); and *Rothenbusch v. Van Boeyen*, [*2010 BCSC 1518*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-JX3N-B32B-00000-00&context=) to support the argument that the appropriate award for general damages is $$85,000 to $100,000. In my view, *Rothenbusch* has no application as it was found the plaintiff had not suffered a concussion.

**55**  While the cases cited are helpful, as noted in *Stapley* at para. 45:

Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from *Lindal v. Lindal, supra*, at 637 is a helpful reminder:

Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (*Thornton* at p. 284 of S.C.R.).

[Emphasis in original]

**Application of the Law to the Facts**

**56**  As stated earlier, Ms. Paterson suffered soft tissue injuries and a concussion or MTBI in the accident. Most of her soft tissue injuries have resolved, but she is still suffering from chronic neck pain. As well, she is suffering from ongoing cognitive and psychological problems, including memory problems, depression and anxiety.

**57**  The evidence is that the symptoms arising from the injuries have impacted every aspect of Ms. Paterson's life. She can no longer hike and camp the way she used to. She is not as social and does not participate in the community functions the way she did before the accident. Ms. Paterson expresses one of her biggest losses as the loss of her inclination to write.

**58**  Although the defendants assert there has been a lack of evidence concerning the change in Ms. Paterson's life since the accident, the lay witnesses who testified, including family members, friends and members of the community, all testified regarding the changes they observed following the accident.

**59**  June Graham and Robin Graham, two of Ms. Paterson's daughters, testified that there had been profound changes in their mother's energy level and personality following the accident.

**60**  June Graham testified that prior to the accident Ms. Paterson was very active for an older woman despite having COPD. They did a lot of hikes and camping together. She described her mother as very creative, doing lots of writing, and as being very involved in her community. Prior to the accident, Ms. Paterson was able to do chores on the property, including repairing roofs, fences and the bird coops. Since the accident, she has observed that Ms. Paterson is no longer able to do any of those activities. Ms. Paterson no longer hikes and camps, and is not able to do the chores around the farm or look after the animals and birds.

**61**  June Graham testified that she has seen a change in her mother's personality since the accident. Ms. Paterson has lost her sense of humour and is no longer as talkative. She testified that she has noticed that Ms. Paterson's memory has changed since the accident. Ms. Paterson no longer remembers things as well, and repeats herself frequently. June Graham's evidence is that since the accident, her mother's ability to care for herself has become a concern. She is no longer able to cook and bath herself as she did prior to the accident. Although housekeeping has never been a priority for her mother, June Graham has noticed a decline in the housekeeping. As well, she has noticed that Ms. Paterson's appetite has changed since the accident and she no longer writes.

**62**  Robin Graham described her mother as the "matriarch of the family" prior to the accident, and testified that her family depended on her. Since the accident, she describes her mother as less confident, and almost afraid. She no longer drives herself places but relies on Robin to drive her and do her shopping. Robin Graham testified that it has been a great shock to see how vulnerable and needy her mother is. Prior to the accident, Ms. Paterson could handle the stressors that came her way, but since the accident she has been unable to recover and is dependent on her family. Robin Graham testified that since the accident, Ms. Paterson seems to have lost her joy for living. As well, Robin Graham noted that Ms. Paterson has given up many of her hobbies. Ms. Paterson used to love camping, beach combing and photography. She no longer does any of those activities. While Ms. Paterson was aging prior to the accident and was experiencing some shortness of breath due to her COPD, since the accident her aging has accelerated and her condition has deteriorated dramatically.

**63**  Dr. Jodie Graham, another family member, testified that she has observed changes in Ms. Paterson since the accident. Prior to the accident, Ms. Paterson was very active and independent. Dr. Graham described Ms. Paterson as a very chatty lady and having a big appetite. After the accident, Dr. Graham observed that Ms. Paterson was much more subdued and her appetite and energy levels have changed. Ms. Paterson requires more assistance and is not as chatty or engaged as she was prior to the accident.

**64**  Wendy-Ann Miller, an employee of the Capital Regional District, met Ms. Paterson in 2000 through the Advisory Planning Committee which Ms. Paterson chaired. Ms. Miller described Ms. Paterson as very outdoorsy and adventurous, as well as very engaged and passionate about the environment prior to the motor vehicle accident. Since the accident, Ms. Miller has noticed that Ms. Paterson's energy has declined and she is unwilling or unable to go on site visits into the wilderness with Ms. Miller as she did prior to the accident. Ms. Miller has also observed that rather than driving herself to meetings as she did prior to the accident, Ms. Paterson now relies on family members to drive her.

**65**  Alda Peers a long-time friend of Ms. Paterson testified regarding the changes she has observed in her. Ms. Peers is 85 years old and is active in the community, including being the historian for the Sooke museum. She testified that prior the accident, Ms. Paterson was garrulous, vivacious and very outgoing. Ms. Paterson would assist Ms. Peers on history projects and they would go hiking together. Ms. Peers used to receive long emails from Ms. Paterson about various subjects and would see Ms. Paterson out and about. After the accident, Ms. Paterson is no longer able to help her on projects, and does not send her emails. Ms. Peers has only seen Ms. Paterson twice since the accident as Ms. Paterson no longer gets out. Ms. Peers noted that when she saw Ms. Paterson she observed she was moving slowly.

**66**  Cara White another friend of Ms. Paterson's testified regarding the changes she observed in Ms. Paterson. Ms. White testified she met Ms. Paterson through their mutual interest in maintaining a community park. Ms. White described Ms. Paterson as very energetic and a dynamo prior to the accident. She was an outgoing person with a good sense of history and an enormous interest in local history. Since the accident, Ms. White has seen Ms. Paterson on a number of occasions, but Ms. Paterson does not come to the community park meetings anymore. Ms. White testified that Ms. Paterson doesn't seem to want to talk as much anymore, and she has been shocked to see how frail and thin she has become. Ms. White's evidence is that Ms. Paterson's voice has changed since the accident in that she speaks more slowly and her voice seems weak. She does not seem to have the same sense of humour.

**67**  The evidence from the lay witnesses is consistent with Ms. Paterson's evidence that, although she had taken diazepam prior to the accident and had significant stressors in her life, she had been able to cope with the stress and been active both physically and in the community prior to the accident. It is also consistent with her evidence about the changes since the accident. Ms. Paterson's evidence is that since the accident she has become an introvert. She testified that she hates it when the phone rings and feels guilty. Prior to the accident, she was a self-employed farmer and landlord. She would carry out repairs on her farm and look after her birds. Ms. Paterson testified that since the accident she has been unable to do chores around the farm or feed and care for the birds. As a result, many of the birds have died. As well, Ms. Paterson testified that since the accident she has been unable to return to hiking, driving and camping. She has lost interest in writing and no longer writes. As well, Ms. Paterson says she is more socially isolated since the accident, and has not been as engaged in her community.

**68**  Dr. Stetson, a psychologist who has been treating Ms. Paterson since November 18, 2016 testified. Ms. Paterson told him she had been in a car accident and had a number of ongoing symptoms. Dr. Stetson testified that Ms. Paterson presented as depressed, with stooped posture, poor eye contact and mumbled speech. Dr. Stetson described Ms. Paterson's conversation as a bit circuitous, and that she had a hard time staying on topic. Some days he could redirect her, and others he could not. Dr. Stetson also noticed that Ms. Paterson showed signs of confusion.

**69**  As noted earlier, although Ms. Paterson suffered from some depression and anxiety prior to the accident and had taken diazepam for many years, the evidence is that prior to the accident she was a very engaged and active senior. The accident caused a significant change in her personality and activity level. Since the accident she has been unable to return to many of the activities she enjoyed prior to the accident, including hiking, camping, driving, travelling, photography and writing. It is apparent from the evidence that Ms. Paterson has lost much of her independence since the accident, and has had a personality change, in that she is no longer as social and has lost her sense of humour.

**70**  I have reviewed the various cases regarding the appropriate range for general damages. The cases relied on by the defendants are premised to some extent on the argument that Ms. Paterson's current cognitive and psychological problems are not caused by the accident. However, as stated earlier, I have found that Ms. Paterson's cognitive and psychological problems were caused by the accident.

**71**  In the cases relied on by Ms. Paterson, the plaintiffs injuries were more severe than those suffered by Ms. Paterson.

**72**  As noted in *Stapley*, the assessment of non-pecuniary damages depends on the particular circumstances of the plaintiff in each case. Having considered Ms. Patterson's age, the nature of her injuries, her symptoms and the fact they have been ongoing for three years with little improvement, the cognitive and psychological problems, and the guarded prognosis for full recovery, as well as the authorities, I am of the view that the appropriate award for non-pecuniary damages is $125,000.

**Loss of Income or Income Earning Capacity**

**73**  Ms. Paterson is not advancing any claim for past or future loss of income or income earning capacity.

**Loss of Housekeeping Capacity**

**74**  Ms. Patterson is advancing a claim for future loss of housekeeping in the amount of $121,173 to $282,737. The defendants take the position that this claim is subsumed under Ms. Paterson's claim for the costs of future care for home support services, house cleaning and home and farm maintenance.

**Applicable Law**

**75**  The Court of Appeal in *O'Connell (Litigation Guardian of) v. Yung*, [*2012 BCCA 57*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JCRC-B1SF-00000-00&context=), reiterated that loss of housekeeping capacity is distinct from future care costs, stating:

[67] As noted by Madam Justice Huddart in *McTavish*, at para. 16, the case was concerned with the development of principled restraints on claims for loss of housekeeping capacity. One of the principles approved in *Kroeker* came from *Fobel v. Dean* [*(1991), 83 D.L.R. (4th) 385*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K6X1-JS5Y-B294-00000-00&context=) at 407, [*[1991] 6 W.W.R. 408*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K6X1-JS5Y-B294-00000-00&context=) (Sask.C.A.), in which it was said that it is not necessary for a plaintiff to prove that someone will be employed to do the work in the future to be entitled to an award for loss of housekeeping capacity. As I understand the principle, it is the loss of a capacity - an asset - that is compensated. Accordingly, because the award reflects the loss of a personal capacity, it is not dependent upon whether replacement housekeeping costs are actually incurred. Damages for the cost of future care serve a different purpose from awards for loss of housekeeping capacity. Unlike loss of housekeeping capacity awards, damages for the cost of future care are directly related to the expenses that may reasonably be expected to be required (*Krangle* at para. 22). ...

**76**  The Court of Appeal in *Westbroek v. Brizuela*, [*2014 BCCA 48*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JSJC-X1GW-00000-00&context=), discussed the difference between a loss of homemaking and cost of future care at para. 74:

I agree that the trial judge miscategorised the homemaking award under the head of future cost of care damages. In *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. 59?68, this Court clarified that homemaking costs, properly considered, are awarded for loss of capacity and are distinct from possible future cost of care claims. An award ordered for homemaking is for the value of the work that would have been done by the plaintiff but which he or she is incapable of performing because of the injuries at issue. The plaintiff has lost an asset: his or her ability to perform household tasks that would have been of value to him or herself as well as others in the family unit but for the accident. This is different from future care costs where what is being compensated is the value of services that are reasonably expected to be rendered to the plaintiff rather than by the plaintiff.

[Emphasis in original]

**77**  The Court went on to adopt, at para. 77, the cautionary approach for awards under this head of damage as suggested in *Kroeker v. Jansen*, [*[1995] 6 W.W.R. 5*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F60C-X11W-00000-00&context=) (B.C.C.A.).

**Application of the Law to the Facts**

**78**  In this case, Ms. Paterson points to the fact that her daughter Robin Graham has been working "her butt off", but could not keep up with the work of looking after Ms. Paterson's farm and home. Ms. Paterson testified she has difficulty keeping her files organized and is unable to do housework or cook anything more than one pot meals. As well, since the accident Robin Graham has to do her shopping and errands. Ms. Paterson testified that the injuries from the accident have impacted her self-care.

**79**  The damage award Ms. Paterson is seeking under this head is based on the recommendations for home support services for home care set out in the report prepared by Sharyle Jewett, an expert in occupational therapy and cost of future care, and the report of Robert Wickson, an economist, which outlines the present value of future costs for these recommendations.

**80**  However, it is clear from the case law that loss of housekeeping or homemaking capacity is a loss of capacity claim and not a claim for future care. It is to reflect the diminished capacity of a plaintiff to take care of her household, not the cost of provision of services by others.

**81**  In this case, Ms. Paterson is advancing claims under cost of future care for housecleaning, house, yard and farm maintenance, and home support services. As well, she is advancing an in trust claim to compensate her adult children, June and Robin Graham, for assisting her as a result of her injuries.

**82**  While it is apparent that Ms. Paterson has a diminished capacity to take care of her household and herself, a conservative approach should be taken in making any such award. I am also mindful that there appears to be some duplication in the claims being advanced by Ms. Paterson for loss of housekeeping capacity and future care costs.

**83**  Having considered the evidence, it is apparent Ms. Paterson has suffered diminished capacity in her ability to care for her house and farm. Accordingly, I have concluded it is appropriate to make some award under this head of damages. In my view, an award of $10,000 is appropriate under this head to compensate Ms. Paterson for her loss of capacity.

**Cost of Future Care**

**84**  Ms. Paterson is advancing a claim for cost of future care in the amount $500,000 for other costs of future care. As noted, the loss of housekeeping capacity overlaps with the claim for the cost of future house cleaning and home support services. Ms. Paterson is relying on the report of Ms. Jewett on cost of future care and the report of Mr. Wickson for the present value of the future care costs.

**85**  The defendants submit that many of the items Ms. Paterson is claiming are neither medically justified nor reasonable. The defendants take the position that the appropriate award for cost of future care is $100,000.

**Applicable Law**

**86**  Cost of future care is established if there is a medical justification for the claim, and the claim is reasonable: *Aberdeen v. Zanatta*, [*2008 BCCA 420*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3RY-00000-00&context=) at para. 42.

**87**  In *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=), the Court of Appeal discussed cost of future care:

[55] The law is settled as to the appropriate approach to be taken in assessing future care costs. 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 paras. 21-22, [*[2002] 1 S.C.R. 205*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4BC-00000-00&context=), referred to by the trial judge, the Court articulated the test:

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.

22 The resulting award may be said to reflect the reasonable or normal expectations of what the injured person will require. Jane Stapleton, "The Normal Expectancies Measure in Tort Damages" (1997), 113 *L.Q.R*. 257, thus suggests, at pp. 257-58, that the tort measure of compensatory damages may be described as the "'normal expectancies' measure", a term which "more clearly describes the aim of awards of compensatory damages in tort: namely, to re-position the plaintiff to the destination he would normally have reached ... had it not been for the tort". The measure is objective, based on the evidence. This method produces a result fair to both the claimant and the defendant. The claimant receives damages for future losses, as best they can be ascertained. The defendant is required to compensate for those losses. To award less than what may reasonably be expected to be required is to give the plaintiff too little and unfairly advantage the defendant. To award more is to give the plaintiff a windfall and require the defendant to pay more than is fair.

[Emphasis in original]

**88**  Services that a plaintiff is unlikely to avail themselves of should not be awarded. The assessment of future losses entails a consideration of what will reasonably be required: *O'Connell*, at para. 68.

**89**  As noted in *Harrington v. Sangha*, [*2011 BCSC 1035*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22SH-00000-00&context=) at para. 153:

Measures that provide some solace but are not likely to result in medical improvement ought to be compensated for under the head of general damages rather than an expense that is compensable as a cost of future care.

**90**  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=) at para. 13, the court noted that common sense should inform awards of costs of future care, quoting the following from *Travis v. Kwon*, [*2009 BCSC 63*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JCRC-B110-00000-00&context=):

[109] Claims for damages for cost of future care have grown exponentially following the decisions of the Supreme Court of Canada in the trilogy of decisions usually cited under *Andrews v. Grand & Toy, Alberta Ltd.*, [*[1978] 2 S.C.R. 229*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250W-00000-00&context=), [*[1978] 1 W.W.R. 577*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JT99-250W-00000-00&context=).

[110] While such claims are no longer confined to catastrophic injury cases, it is useful from time to time to remind oneself that damages for future care grew out of catastrophic injuries and were intended to ensure, so far as possible, that a catastrophically injured plaintiff could live as complete and independent a life as was reasonably attainable through an award of damages.

[111] This is worth mentioning because the passage of time has led to claims for items such as, in this case, the present value of the future cost of a long-handed duster, long-handed scrubber, and replacement heads for the scrubber, in cases where injuries are nowhere near catastrophic in nature of result.

**Analysis**

**91**  The defendants concede that the cost of future physiotherapy and acupuncture are likely attributable to the accident injuries. Ms. Paterson is claiming the amount of $12,476 for the cost of physiotherapy and acupuncture. In my view, an award in that amount is appropriate.

**92**  The defendants also agree that some portion of psychological counselling and homecare are attributable to the accident. Ms. Paterson is claiming $3,677 for the cost of future psychological counselling. However, they note that Ms. Paterson has psychological issues before the accident, and much of what Dr. Garret Stetson, her treating psychologist, and Ms. Paterson are dealing with are not issues arising from the accident, but rather issues from Ms. Paterson's past.

**93**  Dr. Stetson began treating Ms. Paterson in November 2016. Dr. Stetson recommends ongoing treatment for depression and anxiety. Dr. Stetson testified that Ms. Paterson has a number of complaints apart from the effects of the accident, including her family situation, and difficulties with one of her children. The evidence is that Ms. Paterson had a number of difficult issues arise in her life. In the past she has been able to push through them, but now concedes she needs to help dealing with issues apart from the effects of the motor vehicle accident. Having considered the evidence, and the fact that Ms. Paterson concedes that a number of the issues she is dealing with are not a result of the accident, it is my view is the amount of $2500 is an appropriate award for future psychological counselling.

**94**  Ms. Paterson is claiming the amount of $600 for a driver assessment. Given that she has been having trouble driving since the accident, and had no concerns before, it is my view, this is an appropriate award.

**95**  Ms. Jewett testified and provided a report. Ms. Jewett visited Ms. Paterson on a number of occasions following the accident from September 30, 2014 until November 20, 2016. On December 27, 2016, Ms. Jewett completed an occupational assessment of Ms. Paterson at her home. Ms. Jewett notes that prior to the accident Ms. Paterson was able to care for herself in her home. Ms. Jewett's opinion, based on her review of the medical reports and her assessment of Ms. Paterson in her home, is that Ms. Paterson is continuing to experience residual physical, cognitive and emotional symptoms from the accident which have impacted her ability to fully participate in her life at home, her recreational pursuits and in her community. Ms. Paterson has become dependent on others and feels she is depressed and anxious. Ms. Paterson continues to live on her rural property but is likely to require increased supports in order to continue to do so in the future.

**96**  Ms. Jewett provided a number of recommendations in her report for home support services and assistance with housing and maintenance of Ms. Paterson's property and buildings. As well, she made recommendations for various medical equipment, including bathroom safety aids, positional aids, pain management aids and mobility aids. She also made recommendations for future care, such as live in caregivers and a long term care facility. As well, she recommends an amount for medications and a taxi account as Ms. Paterson is no longer able to drive herself the way she could before the accident.

**97**  Ms. Shannon Smith, an expert in occupational therapy and cost of future care, provided a response to Ms. Jewett's report, and testified. Ms. Smith did not assess Ms. Paterson's care needs but reviewed the medical records, and Ms. Jewett's report.

**98**  Ms. Jewett recommends two hours of home support services a day to assist Ms. Paterson with personal care, meal preparations, managing her wood stove, and go on supervised walks to the beach. Ms. Paterson is claiming $121,173 - $282,737 for home support services from 3 to 5 days per week. However, the medical evidence of Dr. Hobza and Dr. MacKean is that Ms. Paterson is independent in activities of daily living. This is consistent with Ms. Paterson's evidence. As noted by Dr. MacKean, Ms. Paterson is able to look after herself and prepare uncomplicated meals. The evidence is that Ms. Paterson has had trouble getting in and out of the bath. Ms. Jewett is also recommending bath aids that will assist Ms. Paterson with getting in and out of the bath tub. Ms. Paterson's evidence is that she is able to walk to the beach. In my view, the medical necessity for home care presently has not been made out. While Ms. Paterson may need some assistance with home care in the future, the evidence, including the medical evidence, does not support the recommendations for home care made by Ms. Jewett. In my view, given the recommendation from Dr. Hobza that Ms. Paterson is likely to need homecare in the future, the appropriate award for cost of future home support is $100,000.

**99**  Ms. Jewett recommends two hours of housecleaning weekly, plus one hour travel time, and seasonal housecleaning. Although Ms. Smith raises some issue regarding whether two hours is necessary dependent on the size of the house, she agrees that some housecleaning support is necessary. Both Dr. Hobza and Dr. MacKean recommend Ms. Paterson have assistance with house and yard maintenance. Accordingly, I am of the view, that the award Ms. Paterson is seeking of $42,321 for the cost of future housecleaning is appropriate.

**100**  Ms. Jewett recommends $2,000 per year for house maintenance and $7,280 per year for yard and farm maintenance. Ms. Paterson is claiming the amount of $74,356 for the future cost of house and farm maintenance. Although Ms. Paterson did the maintenance on her farm and home, the evidence is that the farm and home were in disrepair at the time of the accident. As well, Ms. Paterson spent a great deal of time away from the farm at her house in Port Alberni and relied on her tenants to do much of the care of the farm and the animals. Having considered the evidence, including Ms. Paterson's age and the fact she did the repairs and maintenance prior to the accident, it is my view that $40,000 is an appropriate award for future costs of yard and home maintenance.

**101**  Ms. Paterson is claiming the amount of $881 for the costs of bathroom and safety aids. The evidence is that Ms. Paterson has problems getting in and out of the bath. In my view, an award in the amount of $881 for the future cost of bathroom and safety aids is appropriate.

**102**  Ms. Patterson is claiming the amount of $857 for positional aids and mobility aids. Ms. Smith agrees that this amount is appropriate based on Ms. Paterson's history of having fallen and the fact she lives in a rural areas. Accordingly, I am making an award for that amount.

**103**  Ms. Jewett includes an amount for live-in caregivers and a long term care facility. However, there is no medical necessity given for that recommendation. Although Dr. Friesen suggests in her report that Ms. Paterson may require more care in the near future, that is not supported by the evidence of Ms. Paterson or Dr. Hobza. As noted earlier, Ms. Paterson is able to care for herself at home. In Ms. Smith's report she states that if a decline in function is anticipated as a result of her injuries, the decline will likely be gradual so Ms. Paterson's need for homecare assistance may also gradually increase, for example starting at 2 - 3 days per week, potentially increasing. There is no evidence that Ms. Paterson will require a live in care facility in the future. As noted by Dr. Hobza, given Ms. Paterson's age and physical and cognitive limitations, she will likely require some homecare assistance in the future, but I have already dealt with the requirement with an award for future home care.

**104**  Ms. Paterson is claiming $1,907 for the cost of medications that may be required in the future based on $500 per year. In my view, it is not possible to estimate with any certainty the amount or cost of future medications. However, I agree some amount should be awarded based on Dr. Hobza's recommendations. Doing the best I can with the limited evidence, I find that $1,000 is appropriate under this head of damages.

**105**  Ms. Paterson is claiming the amount of $21,981 to $24,729 for the future cost of transportation based on $4,160 to $4,680 per year. As noted by Ms. Smith, the amount for transportation is appropriate if Ms. Paterson is deemed unsafe to drive. The evidence is that she gets pain in the left side of her neck now when she drives, and is unable to drive as much as she could before the accident. However, I agree with Ms. Smith that the differential costs associated with owning and operating a vehicle should be offset. Ms. Smith sets out a cost of $3,958 per year based on estimates from the Canadian Automobile Association for owning and operating the 1989 Honda Accord Ms. Paterson was driving at the time of the accident. Having considered the evidence, and offsetting the cost of owning and operating a vehicle, I am of the view that $5,000 is appropriate for the cost of future transportation.

**106**  In summary, I am awarding the following for cost of future care:

1. Physiotherapy and acupuncture: $12,476.00
2. Psychological counselling: $2,500.00
3. Driver assessment: $600.00
4. Home support services: $100,000.00
5. Housecleaning: $42,321.00
6. House and farm maintenance: $40,000.00
7. Bathroom and safety aids: $881.00
8. Positional and mobility aids: $857.00
9. Medications: $1,000.00
10. Transportation costs: $5,000.00
11. Total future care costs: $205,635.00

**Special Damages**

**107**  The agreed upon amount of special damages is $6,162.35, but the defendants submit the entire cost of counselling is not attributable to the accident. As noted earlier, Ms. Paterson has discussed a number of issues that are non-accident related with the psychologist, Dr. Stetson. In my view, there should be some reduction of the counselling costs. Ms. Paterson is claiming $1,330. For the cost of counselling. Having considered the evidence, I am reducing that amount approximately 1/3 for an amount of $900.

**108**  Accordingly, the award of special damages is $5,731.55.

**In Trust Claim**

**109**  Ms. Paterson is claiming $30,000 as an in-trust claim. The defendants take the position that Ms. Paterson and/or her family have failed to mitigate the damages associated with an in-trust claim. There is no clear indication that it is more beneficial for Ms. Paterson to reside at her Beecher Bay home than in her home in Port Alberni.

**Applicable Law**

**110**  In-trust claims were discussed in *Frankson v. Myre*, [*2008 BCSC 795*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-JFSV-G30P-00000-00&context=) at paras. 50 and 51 as follows:

[50] The law of "in trust" claims is governed by the principles set out by the British Columbia Supreme Court in *Bystedt (Guardian ad litem of) v. Bagdan* [*2001 BCSC 1735*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-JSC5-M4GD-00000-00&context=) at para. 180, aff'd [*2004 BCCA 124*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F7VM-S3NW-00000-00&context=).

[51] The six relevant factors are:

1. the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
2. if the services are rendered by a family member, they must be over and above what would be expected from the family relationship;
3. the maximum value of such services is the cost of obtaining the services outside the family;
4. where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
5. quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services;
6. the family members providing the services need not forego other income and there need not be payment for the services rendered.

**111**  In *Dykeman v. Porohowski*, [*2010 BCCA 36*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DXWW-2018-00000-00&context=), the Court made the following comments at para. 29:

The majority in *Kroeker* was alive to the possibility that awards for gratuitous services by family members of plaintiffs could "unleash a flood of excessive claims" (*supra*, at para. 29) and for that reason, urged courts to be cautious in making such awards. In the words of Gibbs, J.A.:

... as the law has developed it would not be appropriate to deny to plaintiffs in this province a common law remedy available to plaintiffs in other provinces and in other common law jurisdictions. It will be the duty of trial judges and this Court to restrain awards for this type of claim to an amount of compensation commensurate with the loss. With respect to other heads of loss which are predicated upon the uncertain happening of future events measures have been devised to prevent the awards from being excessive. It would be reasonable to expect that a similar regime of reasonableness will develop in respect of the kind of claim at issue in this case. [At para. 19; emphasis added.]

I do not read *Kroeker* or *Ellis*, however, as establishing a threshold of "grievousness" in terms of the injuries which may necessitate such services. A plaintiff who has a broken arm, for example - presumably not a "grievous" injury - and who is obliged to seek assistance in performing various household tasks should not be foreclosed from recovery on this basis. This was recognized in *Ellis* in the quotation reproduced above. Thus I disagree with the trial judge's reference to grievous injury as a threshold that the plaintiff was required to surmount if her claim was to go to the jury. Instead, claims for gratuitous services must be carefully scrutinized, both with respect to the nature of the services - were they simply part of the usual 'give and take' between family members, or did they go 'above and beyond' that level? - and with respect to causation - were the services necessitated by the plaintiff's injuries or would they have been provided in any event? Finally, if these questions - which I would have thought are appropriate for determination by a jury - are answered affirmatively, the amount of compensation must be commensurate with the plaintiff's loss. The assessment of such loss has been the subject of several considered judgments in this province, most notably *McTavish* and *Bystedt*, both *supra*.

[Emphasis in original]

**112**  Ms. Paterson has provided a number of cases dealing with awards of in-trust claims for services provided by family members, including adult children, namely: *Wong (Litigation Guardian of)*; *McAllister v. Sotelo*, [*[1999] B.C.J. No. 2132*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F361-M1GM-00000-00&context=); *Ha v. Fritzke*, [*1999 BCCA 667*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F2TK-22P5-00000-00&context=); and *Iwanik v. Hayes*, [*2011 BCSC 812*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-229W-00000-00&context=).

**Analysis**

**113**  The evidence is that Ms. Paterson's adult children have provided services to her that were required as a result of the injuries she sustained in the accident. Some of these services were over and above what would be expected from the family relationship.

**114**  June Graham testified that that she had to take time off work and drive from Port Alberni to Beecher Bay to assist her mother with farm maintenance, taking her to appointments and helping her in the house. June Graham is also dealing with the tenants on Ms. Paterson's property, which was a task her mother did prior to the accident. June Graham presented an estimate of expenses she has incurred as a result of having to take time off work and drive to Beecher Bay to assist her mother in the amount of $15,632.40, excluding meals and buying groceries for her mother.

**115**  Robin Graham testified that she looked after her mother for the first two weeks after the accident because her mother was unable to look after herself. As well, she cared for her when she was released from hospital after the hysterectomy. During that time she cooked for her mother, and looked after her mother's dog. Robin Graham's evidence is that, since the accident, she drives her mother to and from appointments, does her shopping for her, and assists her with the farm.

**116**  Ms. Paterson testified that both Robin and June have helped her since the accident by driving her, taking care of her, shopping and helping around the farm.

**117**  Although the defendants suggest that Ms. Paterson's needs would have been less if she moved to Port Alberni, there is no evidence to support that proposition. June Graham testified that her mother could not move to Port Alberni because she would be unable to get a doctor there. June Graham's evidence is that people who arrive in Port Alberni have to go out of town to find a doctor.

**118**  In this case, I am satisfied that Robin Graham provided care for Ms. Patterson after the accident for approximately two weeks. As well, she had to provide complete care for Ms. Patterson when she was released from hospital following the hysterectomy. However, the hysterectomy was a result of Ms. Patterson having cancer, and was not a result of the accident.

**119**  Some of the appointments June Graham refers to, such as driving her mother to hospital for surgery, also relate to the hysterectomy, and not the accident.

**120**  After considering the evidence and the authorities, it is my view that an "in trust" award in the amount of $20,000 is appropriate.

**Conclusion**

**121**  In summary, I am awarding the following amounts:

1. Non-pecuniary damages: $125,000.00
2. Loss of housekeeping capacity: $10,000.00
3. Cost of future care: $205,635.00
4. Special damages: $5,731.55
5. In trust claim: $20,000.00
6. Total: $366,366.55

**122**  Ms. Paterson is entitled to pre-judgment interest on the special damages. Ms. Paterson is also entitled to her costs of this action at Scale B, subject to submissions.

L.B. GEROW J.

**End of Document**

[***Yip v. Saran, [2014] B.C.J. No. 1453***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JBDT-B15W-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

E.J. Adair J.

Heard: March 18-21 and May 20, 2014.

Judgment: July 11, 2014.

Docket: M125109

Registry: Vancouver

**[2014] B.C.J. No. 1453** | 2014 BCSC 1283

Between Veronica Yip, Plaintiff, and Tanya Sherrie Saran, Defendant

(96 paras.)

**Case Summary**

**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Back and spine — Neck — Soft tissue — Head injuries — Concussion — Headaches — Arm injuries — Hand — Leg injuries — Knee — Psychological injuries — Emotional and mental distress — Depression — Phobias — Considerations impacting on award — Degree of impairment — Mitigation — Action by Yip for damages from motor vehicle accident allowed — Liability admitted — Plaintiff retired at time of accident and focused on caring for family — Accident caused mild to moderate soft tissue injuries to neck, shoulder, back, leg, knee, sensation loss in hands, concussion, headaches and driving-related anxiety, depression and hopelessness — Plaintiff awarded $55,000 non-pecuniary damages for pain and suffering, $10,000 for loss of housekeeping capacity, $7,215 plus mileage in special damages — Termination of therapy not contrary to medical advice and not constitute failure to take all reasonable steps to mitigate damages.**

**Damages — Types of damages — General damages — For personal injuries — Calculation — Considerations — Duration of loss — Extent of incapacity — Loss of housekeeping ability — Special damages — Expenses and expenditures — Transportation — Non-pecuniary loss — Pain and suffering — Action by Yip for damages from motor vehicle accident allowed — Liability admitted — Plaintiff retired at time of accident and focused on caring for family — Accident caused mild to moderate soft tissue injuries to neck, shoulder, back, leg, knee, sensation loss in hands, concussion, headaches and driving-related anxiety, depression and hopelessness — Plaintiff awarded $55,000 non-pecuniary damages for pain and suffering, $10,000 for loss of housekeeping capacity, $7,215 plus mileage in special damages — Termination of therapy not contrary to medical advice and not constitute failure to take all reasonable steps to mitigate damages.**

**Damages — Assessment of damages — Measure of damages — Limiting factors — Duty to mitigate — All reasonable steps — Action by Yip for damages from motor vehicle accident allowed — Liability admitted — Plaintiff retired at time of accident and focused on caring for family — Accident caused mild to moderate soft tissue injuries to neck, shoulder, back, leg, knee, sensation loss in hands, concussion, headaches and driving-related anxiety, depression and hopelessness — Plaintiff awarded $55,000 non-pecuniary damages for pain and suffering, $10,000 for loss of housekeeping capacity, $7,215 plus mileage in special damages — Termination of therapy not contrary to medical advice and not constitute failure to take all reasonable steps to mitigate damages.**

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| Action by Yip for damages from a motor vehicle accident. The plaintiff was retired at the time of the accident and focused her efforts on caring for her family. Liability was admitted, but the defendant argued that the plaintiff's physical injury claim was exaggerated and that there was a failure to prove that her psychological condition was caused by the accident. The defendant also argued that the plaintiff's decision to terminate therapy constituted a failure to mitigate her damages. The plaintiff argued that she performed all of the housekeeping for her family of four prior to the accident which justified a significant loss of housekeeping capacity award.  HELD: The action was allowed.  The accident caused mild to moderate soft tissue injuries to the plaintiff's neck, shoulder area, back, right leg and knee. It also caused a loss of sensation in her hands, a concussion and headaches. While the plaintiff had been an anxious person prior to the accident, the accident caused a driving-related anxiety, depression and hopelessness. The plaintiff was awarded $55,000 in non-pecuniary damages for pain and suffering. The plaintiff's claim for loss of housekeeping capacity was exaggerated because it presumed none of the other family members, all of whom were adults, would contribute at all to housekeeping. It was also premised on the plaintiff's choices, such as hand washing dishes when the family owned a dishwasher, which were personal preferences and did not impact the loss of housekeeping capacity award. The plaintiff was awarded $10,000 for loss of housekeeping capacity. She was also awarded $7,215 plus mileage in special damages. Termination of therapy was not contrary to medical advice and therefore did not constitute a failure to mitigate her damages. |

**Statutes, Regulations and Rules Cited:**

Court Order Interest Act, *RSBC 1996, CHAPTER 79*,

Supreme Court Civil Rules, Rule 15-1

**Counsel**

Counsel for the Plaintiff: Richard J. Chang.

Counsel for the Defendant: Jacqueline Barnes and Jonathan Wittig.

**Reasons for Judgment**

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| **E.J. ADAIR J.** |

**Introduction**

**1**  On January 25, 2011, the plaintiff, Veronica Yip, was involved in a motor vehicle accident at the intersection of Lougheed Highway and Pinetree Way in Coquitlam, B.C. Ms. Yip was turning left onto Pinetree Way, on an advanced green left-turn signal, when her vehicle was hit by a vehicle driven by the defendant, who drove through the intersection. Ms. Yip claims that, as a result of the collision, she has suffered a variety of physical and psychological injuries. In addition to non-pecuniary damages, Ms. Yip seeks compensation for past loss of housekeeping capacity and special damages. A claim for damages for loss of earning capacity and an in-trust claim were not pursued at trial.

**2**  The defendant admits that her ***negligence*** caused the collision. She does not dispute that Ms. Yip sustained some injuries as a result of the collision. However, the defendant says that, at most, Ms. Yip sustained mild to moderate soft-tissue injuries, that any injuries are mostly resolved and that Ms. Yip has been functioning at pre-accident levels for over two years. The defendant says further that the accident was not the cause of Ms. Yip's psychological complaints. Finally, the defendant says that Ms. Yip failed to take reasonable steps to mitigate her damages because she refused to follow medical advice concerning treatment.

**Background**

**3**  Ms. Yip was born in August 1951. She is married to Mr. Tommy Yip. They have two adult children, a son (now 33) and a daughter (now 28).

**4**  Ms. Yip came to Canada from Hong Kong in 1968 and graduated from high school here. Between 1971 and 1974, she worked at various jobs, including as a clerk at an insurance company and a bank teller. In 1974, Ms. Yip began working full time for what became Canada Post. Mr. Yip joined Canada Post in March 1977. Ms. Yip and Mr. Yip were married in 1978.

**5**  After 32 years, Ms. Yip retired from Canada Post at the end of 2006, at age 55. Ms. Yip explained that she wanted to enjoy life, travel and take care of her family. Mr. Yip continued to work full time at Canada Post until September 2012, when he also retired.

**6**  According to Ms. Yip, one of her favourite activities was doing volunteer work. She explained that it allowed her both to help others and to learn new things. Moreover, unlike full-time employment, it left time for Ms. Yip to care for her family and to travel. She did some volunteer work at a community centre and with several other organizations. However, I would say that Ms. Yip's commitment to volunteer work was not very strong.

**7**  Rather, Ms. Yip's primary focus, particularly after she retired, was on taking care of her family. That was how she preferred to spend her time, and it was something she took great pleasure in doing. According to Ms. Yip, once she retired she looked after everything, from basic housework and cleaning, meal preparation and laundry for all the family members and washing the family's cars, to driving her daughter to and from school and work. The family was organized based on Ms. Yip providing all of these services, although Mr. Yip would help with some of the chores on his days off.

**8**  According to Ms. Yip, other favourite activities prior to the accident were travel and ballroom dancing, an activity she shared with Mr. Yip. However, I did not hear about dancing from Mr. Yip.

**9**  In 2010, the Yips sold their single family house (where the family had lived since shortly after Ms. Yip and Mr. Yip were married) in Burnaby. The family moved to two adjacent townhouses that Ms. Yip and her husband purchased in south Burnaby. As Ms. Yip and Mr. Yip both explained, the idea was that each of their children would be given his and her own home. After the move, Mr. Yip and the couple's daughter lived in one of the townhouses, and Ms. Yip and their son lived in the other. However, according to both Ms. Yip and Mr. Yip, the family members all came together for activities such as meals.

**10**  After the move to the Burnaby townhouses, Ms. Yip continued to concentrate on looking after the needs of her family, and she attended to virtually everything involved in running both households. Moreover, even though her daughter had a driver's licence and her own car, Ms. Yip continued to spend considerable time driving her to school and also to her part-time job. Ms. Yip explained that she did this because she was concerned about her daughter getting enough sleep, given that she was going to school and studying hard, and because parking was expensive. According to Ms. Yip, she went so far as to forbid her daughter from driving herself.

**11**  By late 2010, Ms. Yip and her husband had concluded that the two south Burnaby townhouses were not going to be suitable long-term. Their children did not care for them. One of the townhouses had been sold, and the family members were living together in the second townhouse. A decision was made to move to Coquitlam, and, again, Ms. Yip and her husband were purchasing two separate homes, one for each of their children. This time, the units (each about 2,000 square feet) were back-to-back, instead of adjacent. The first unit, "No. 49," was ready for occupancy in February 2011. However, the second unit, "No. 106," was not going to be ready until July or August 2011. The plan was that the family members would move from Burnaby into No. 49, and live there together until No. 106 was completed. Then, Mr. Yip and the couple's daughter would move to No. 106, while Ms. Yip and the couple's son would remain in No. 49.

**The Accident**

**12**  The accident occurred in the evening on January 25, 2011. Ms. Yip was driving her daughter's blue Honda Civic and was in the process of moving some belongings from the townhouse in Burnaby to No. 49 in Coquitlam, in anticipation of the full move in early February.

**13**  Ms. Yip was travelling eastbound and had stopped in one of the turning lanes, in order to turn left onto Pinetree Way northbound. Ms. Yip was behind one other car. When the green left-turn arrow appeared, Ms. Yip began to make her turn. As she recalled, she was approaching the area of the crosswalk on Pinetree Way when her car was hit on the right side by the defendant's car. Ms. Yip recalled that there was a loud bang, the car spun and she hit the left side of her head on something. She recalled that the car's airbags deployed. She then remembers feeling pain on the whole right side of her body. She recalled that both of her hands lost sensation. After the impact, and once her car came to a stop, Ms. Yip recalled feeling very frightened and nauseated, and as if she was unable to breathe. Someone yelled at her to open the car door, and she recalled hearing someone offering help.

**14**  As Ms. Yip recalled, when she got out of the car, someone helped her into an ambulance. She recalled being unable to answer when she was asked her name. She recalled that her head, neck and the right side of her body felt very painful. Ms. Yip was taken to Eagle Ridge Hospital where she was examined. She remembers feeling very scared, and feeling that she did not know whether or not she was going to die.

**15**  Photographs of the blue Civic show the impact of the defendant's car on the right side of the Civic, and also the deployment of the car's airbags.

**After the Accident**

**16**  According to Ms. Yip, after the accident, she was a different person entirely.

**17**  Ms. Yip recalled that, immediately after the accident, the right side of her body hurt the most, in particular her hip, lower back, knee and the back of her neck. The left side of her head also hurt. She recalled that both shoulders hurt, the right shoulder especially. She said that she did not have any sensation in her hands. According to Ms. Yip, pain radiated all down her lower back, and for the first six months after the accident, she had problems sitting and could not walk for more than 15 minutes at a time. Ms. Yip recalled experiencing what she described as "serious dizziness." She said that, for example, when she lay on her bed, she would feel as if the room was spinning.

**18**  According to Ms. Yip, she was also experiencing significant emotional symptoms. She had problems sleeping. She had no appetite to speak of and was feeling depressed. She had disturbing dreams about the accident.

**19**  In the first few weeks after the accident, Ms. Yip recalled that she had severe headaches. Her neck was causing her significant discomfort, and her shoulder symptoms made it painful to perform simple tasks such as changing her clothes. Her family doctor prescribed some medication for the pain. For two to three months after the accident, Ms. Yip continued to feel pain in the area of her right hip and lower back, and could not sit for very long. According to Ms. Yip, she also experienced painful symptoms radiating down her right leg to her knee, and it was painful to stand or walk for more than 15 minutes.

**20**  Because of the accident, the job of packing up the Burnaby townhouse and moving to No. 49 fell primarily to Mr. Yip, although normally Ms. Yip would have looked after it. After the family moved into No. 49, and before Mr. Yip and their daughter moved into No. 106, Mr. Yip did all of the household chores. Mr. Yip recalled that in the first few weeks after the accident, Ms. Yip looked terrible and was taking painkillers, but she showed gradual improvement as time went by. According to Ms. Yip, about three to four months after the accident, she again tried to do household chores. However, it was a struggle. She needed help from Mr. Yip and from her son.

**21**  Ms. Yip's family doctor referred her to physiotherapy and massage therapy. Gradually, things improved. Ms. Yip attended physiotherapy regularly from February to December 2011, and massage therapy from May to August 2011. She also had a series of acupuncture treatments in January and February 2012. According to Ms. Yip, a year after the accident, she continued to have physical symptoms, which seemed to coincide in particular with changes in the weather. However, her condition had improved. Ms. Yip terminated physiotherapy and massage therapy, and she preferred not to take medication for pain. She decided to rely on herself to get better. Rather than medication, Ms. Yip found using Tiger Balm quite helpful to manage her pain.

**22**  According to Ms. Yip, she continued after the accident to have symptoms of numbness or loss of sensation in her hands. Ms. Yip says that she is no longer able to enjoy pastimes such as knitting or reading newspapers and flyers as a result of the symptoms in her hands. According to Ms. Yip, after the accident, using a full-sized vacuum cleaner also caused numbness and pain in her hands.

**23**  With respect to her emotional symptoms, Ms. Yip described continuing to have disturbing dreams. She said that, for the first two to three weeks after the accident, she had nightmares at least two to three times a week, and she also had flashbacks to the accident. During her testimony, she became quite emotional when describing how she felt at the sight of a blue car. Ms. Yip explained that, after the accident, if she saw a blue car, like the blue Civic she had been driving, she became anxious and scared, and had bad dreams. Continuing into 2012, seeing a blue car would result in Ms. Yip having anxious feelings. Ms. Yip would have to take active steps to calm herself down. At trial, she became tearful and upset when she was asked to look at photographs of her daughter's blue Civic, showing damage from the accident. She explained in her testimony the following day that, after being shown the photographs, she had problems sleeping. According to Ms. Yip, for months after the accident, she was afraid to be in a car.

**24**  Ms. Yip's family doctor recommended that Ms. Yip have treatment for the emotional and psychological problems she was experiencing following the accident. Beginning in September 2011 and until December 2011, Ms. Yip regularly saw a psychologist, Dr. Macy Lai, for counselling. As Ms. Yip recalled, she talked to Dr. Lai about her nightmares, her fear of blue cars and other problems. According to Ms. Yip, Dr. Lai worked with her and taught her strategies to deal with her fearful and anxious feelings and the bad dreams. In December 2011, when Ms. Yip felt about 75% recovered, she decided that she preferred to rely on herself to get better and move forward. Ms. Yip terminated treatment with Dr. Lai.

**25**  However, according to Ms. Yip, her fearfulness and anxiety, and the nightmares, came back sometime in 2012 and in 2013. She was also depressed and irritable. A vacation to Hawaii that she took with Mr. Yip was not an enjoyable experience for either of them. As Ms. Yip recalled, she realized that she again needed the help of a professional.

**26**  Ms. Yip's realization in the fall of 2013 that she could benefit from further counselling was very likely spurred by the independent medical assessments arranged by her lawyer in connection with this case. In July 2013, Ms. Yip was assessed by Dr. Jacqueline Purtzki, a specialist in physical medicine and rehabilitation. In October 2013, Ms. Yip was assessed by Dr. Hiram Mok, a psychiatrist. As I note below, both doctors recommended counselling for Ms. Yip.

**27**  In December 2013, Ms. Yip again contacted Dr. Lai. She saw Dr. Lai for six sessions, beginning in late December 2013. Again, Dr. Lai coached Ms. Yip and gave her strategies to help address her feelings, including her fear of driving. As a result of the sessions with Dr. Lai, and with the assistance of medications prescribed by Ms. Yip's family doctor, Ms. Yip was able to sleep better, was feeling less pain and could again drive a motor vehicle. At the beginning of February 2014, Ms. Yip concluded that she no longer required treatment from Dr. Lai and terminated the sessions.

**28**  As of trial, Ms. Yip still experiences some physical symptoms, for example, in her neck and back. These seem to her to be very much dependent on the weather. She continues to use Tiger Balm to manage pain symptoms.

**Expert Evidence**

**29**  I had the benefit of opinion evidence from two medical doctors: Dr. Purtzki and Dr. Mok. Both Dr. Purtzki and Dr. Mok prepared reports and gave oral evidence.

**30**  The defendant did not tender any opinion evidence.

**31**  Dr. Purtzki carried out her assessment of Ms. Yip on July 4, 2013.

**32**  In her report, Dr. Purtzki noted "Pertinent Examination Findings" from her interview and physical examination of Ms. Yip, which included the following:

1. during Dr. Purtzki's interview with Ms. Yip, Ms. Yip was "extremely anxious and, at times, tearful admitting to feeling quite hopeless and depressed due to the pain and ongoing disability";
2. Ms. Yip had significant "allodynia," i.e., feeling a non-painful stimulus as painful and "hyperalgesia," i.e., feeling mildly uncomfortable stimulus as very painful; and
3. certain tests and examinations could not be performed because Ms. Yip was both apprehensive of Dr. Purtzki moving parts of her body and also reported pain.

**33**  In Dr. Purtzki's oral evidence, she described Ms. Yip as "probably one of the most anxious patients," and reported that, despite using techniques designed to distract a patient during examination and make the patient feel comfortable, she had real difficulty getting Ms. Yip to be relaxed. Dr. Purtzki indicated that it was quite difficult to make objective findings for Ms. Yip (for example, concerning restrictions in range of motion) because Ms. Yip resisted Dr. Purtzki's passive movement of parts of Ms. Yip's body, fearing pain.

**34**  In Dr. Purtzki's opinion, Ms. Yip "now has severe depression and severe anxiety with even latent suicidal thoughts. . . . She appears to be completely paralyzed by fear of ongoing pain and hopelessness." Dr. Purtzki's recommendation in this regard was that Ms. Yip required an urgent assessment by a psychiatrist and the initiation of medications, and she said that "this is one of the very important interventions that need to be done first before we can address her physical disabilities effectively." Dr. Purtzki also recommended counselling by a psychologist in addition to medication.

**35**  Dr. Purtzki concluded that Ms. Yip may have suffered a concussion at the time of the impact in the accident. She noted that Ms. Yip's description of the symptoms of vertigo, a spinning feeling and nausea, especially initially, is very characteristic of a vestibular concussion, which can be part of a concussion. However, she also noted that these symptoms seemed mainly to have resolved.

**36**  In Dr. Purtzki's opinion Ms. Yip "has a very severe chronic persistent pain disorder with significant hyperalgesia and allodynia." Dr. Purtzki noted that "In fact, a good physical examination was not possible because of her guarding and pain sensitivity." Dr. Purtzki commented that the "pain itself is now one of the primary disabilities quite separate from any additional physical disabilities."

**37**  Dr. Purtzki concluded that, physically, Ms. Yip suffered a right sacroiliac joint strain with ongoing sacroiliac joint dysfunction. Dr. Purtzki believed that, because of the sacroiliac joint injury, Ms. Yip had a painful abnormal gait, and that weakness in muscles on the right side of the body was leading to adjustments that were causing Ms. Yip further pain. In Dr. Purtzki's opinion, Ms. Yip's neck pain was likely the result of a soft tissue injury, and she described Ms. Yip's headaches as "likely cervicogenic in nature, meaning that they are triggered by a painful area in the upper neck."

**38**  In terms of general treatment recommendations, Dr. Purtzki said that Ms. Yip's mood symptoms and the generalized central pain should be addressed first, including with ongoing psychological counselling and support. With respect to the prognosis, Dr. Purtzki said:

Prognosis for resolution of pain after this duration is quite poor, certainly less than 50%. Given Ms. Yip's track record of being quite enduring and likely having quite a bit of personal strength, I am hoping that she will be able to commit to a therapy program and experience some benefit, which would then motivate her to carry on in that direction. . . .

**39**  Dr. Mok examined Ms. Yip on October 16, 2013. The documents he reviewed in preparing his report included Dr. Purtzki's expert report. Dr. Mok diagnosed Ms. Yip as having "Chronic Pain Disorder" (associated with psychological factors and a general medical condition), post-traumatic stress disorder, major depressive disorder and post-MVA driving-related anxiety. He expressed the opinion that these were a "direct result" of the accident, noting that there were "no pre-existing emotional difficulties." He deferred to other medical experts with respect to Ms. Yip's physical prognosis. Dr. Mok recommended that Ms. Yip be referred to a Cantonese-speaking clinical psychologist for individual psychotherapy, and he believed that she would require at least another ten sessions.

**40**  In fact, as I noted above, Ms. Yip accepted the recommendations that she receive further counselling, and attended another series of sessions with Dr. Lai.

**Findings and Conclusions concerning Ms. Yip's Injuries**

**41**  The defendant does not dispute that Ms. Yip suffered mild to moderate soft tissue injuries as a result of the accident. The defendant says however that Ms. Yip's injuries are mostly resolved and she has been functioning at her pre-accident levels for about two years. With respect to Ms. Yip's psychological complaints, including her anxiety and depression, the defendant says Ms. Yip has failed to show that these were caused by the accident, and argues that Ms. Yip would have had these problems even if the accident had not occurred.

**42**  At this point, I am going to comment briefly on the witnesses, especially Ms. Yip.

**43**  I heard from four witnesses: Ms. Yip, her husband, Mr. Yip, and the two experts.

**44**  Ms. Yip's credibility and reliability are, of course, important, since her case involves subjective complaints of pain. Indeed, as a result of Ms. Yip's subjective complaints of pain, Dr. Purtzki was unable to do a complete physical examination.

**45**  Although Ms. Yip was pressed on some points in cross-examination, in closing submissions, Ms. Barnes (counsel for the defendant) did not seriously challenge Ms. Yip's credibility, although her reliability in some areas (for example, estimating hours spent doing housework) was challenged.

**46**  On cross-examination, Ms. Yip had a tendency to resist agreeing with what seemed to be obvious propositions (for example, that she missed and was worried about her son, who was in the Canadian military and serving in Afghanistan for a period of time). At times during her cross-examination, Ms. Yip was argumentative, evasive and defensive, especially if she perceived an answer might hurt her case (for example, when she was testifying about an accident with a Ford truck). She demonstrated a poor memory for dates of trips. Documents generally did not refresh her memory, which was somewhat unusual. Her evidence that there was nothing better than having the whole family together seemed at odds with the living arrangements the family adopted (with Ms. Yip and her husband living in separate places) after the sale of the single-family home in Burnaby.

**47**  On the other hand, Ms. Yip had little difficulty agreeing with Ms. Barnes about her reasons for terminating physiotherapy and terminating her counselling sessions with Dr. Lai, even though this was not necessarily favourable to her case.

**48**  As is apparent from Dr. Purtzki's evidence, she was unable to perform a full physical examination of Ms. Yip because of Ms. Yip's subjective complaints, and fear, of pain. Therefore Dr. Purtzki was unable to say what, objectively, Ms. Yip's physical condition and limitations, related to the accident, might be.

**49**  Based on my own observations of Ms. Yip during her time in the witness stand, I would say that when she was asked to focus on her physical symptoms and emotional problems following the accident, she probably reported accurately both the symptoms of pain, and the emotional and psychological difficulties, that she experienced following the accident. Ms. Yip became quite emotional and tearful when relating events concerning the accident and its aftermath, indicating to me that she is still affected by those events.

**50**  However, when Ms. Yip's attention and concentration were directed elsewhere, she appeared quite different. I noticed this especially during Ms. Yip's cross-examination, when she was quite animated, including physically animated. I observed that Ms. Yip often gestured with her arms and hands to make her points and to describe events (such as what Ms. Yip clearly considered to be a very minor collision with the Ford Truck).

**51**  Although (as Dr. Purtzki described) Ms. Yip's reaction to both non-painful and mildly uncomfortable stimuli was exaggerated and not normal, there is an explanation, namely, that Ms. Yip developed a chronic pain disorder as a result of injuries suffered in the accident. In my opinion, this explanation is consistent with Ms. Yip's presentation and her evidence at trial.

**52**  Ms. Yip's testimony and that of Mr. Yip are, generally, consistent with one another. Mr. Yip's credibility was also not seriously challenged. On the whole, I accept that Ms. Yip was being truthful in relating how the accident has affected her, and how her life is different now as compared with before the accident.

**53**  Next, because, based on Ms. Barnes' submissions, causation is an important aspect of the case from the defendant's perspective, I will set out some basic principles as context for my findings and conclusions.

**54**  For a plaintiff to recover damages in tort, 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***. See ***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 and 13, and ***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 para. 23.

**55**  However, it is not necessary for the plaintiff to establish that the defendant's ***negligence*** was the sole cause of the injury. As long as a defendant is part of the cause of the injury, the defendant is liable, even though the defendant's act alone was not enough to create the injury. 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 paras. 13-17. The plaintiff is to be placed in the same position she would have been in, if not for the defendant's ***negligence***.

**56**  The corollary of this principle is that the defendant need not compensate the plaintiff for any loss not caused by the defendant's ***negligence*** or for "debilitating effects of [a] pre-existing condition which the plaintiff would have experienced anyway": see ***Athey***, at para. 35, and ***Yoshikawa v. Yu*** [*(1996), 21 B.C.L.R. (3d) 318*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G2J5-00000-00&context=), [*1996 CanLII 3104*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G2J5-00000-00&context=) (C.A.), at paras. 14-16 (regarding causation of psychological injury).

**57**  Moreover, one must be cautious when being asked to infer a causal connection between negligent conduct and damage based primarily on a temporal relationship: see ***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. 62 (citing ***White v. Stonestreet***, [*2006 BCSC 801*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1CF-00000-00&context=), at paras. 74-75).

**58**  The plaintiff must establish causation for both injury and loss. "Injury" refers to the initial physical or mental impairment suffered by the plaintiff as a result of the defendant's act. "Loss" refers to the pecuniary or non-pecuniary consequences of that impairment. See, for example, ***Blackwater v. Plint***, [*2001 BCSC 997*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F06F-23N7-00000-00&context=), at para. 364. If a defendant did not cause an injury, he or she is not liable for losses flowing from that injury. Even if a defendant did cause an injury, he or she is not liable for any losses or damages that were not caused by that injury.

**59**  I find that, as a result of the accident, Ms. Yip sustained mild to moderate soft tissue injuries to her neck and shoulder area (primarily, but not exclusively, on the right), her back (especially her low back and in the area of the sacroiliac joint), and her right leg and knee. She also had symptoms of loss of sensation in her hands. I find that, when the defendant's vehicle hit Ms. Yip's car, the impact caused Ms. Yip to hit the left side of her head, and based on the symptoms of dizziness and the spinning feeling that Ms. Yip described, I think it likely that, as a result, she suffered a vestibular concussion (as described by Dr. Purtzki in her report) and headaches. Moreover, I find that, as a result of the collision, Ms. Yip was very deeply frightened and feared for her life.

**60**  I find that, immediately following the accident, and for a period of some months thereafter, Ms. Yip experienced considerable pain from her soft tissue injuries, and dizziness and discomfort from the effects of her concussion. However, the concussion-related symptoms eventually resolved. Emotionally, the accident left Ms. Yip feeling unusually anxious, and she also experienced nightmares and disturbed sleep as a result of the accident. Her anxiety extended to driving and travelling as a passenger in a car. For a period of time, she was unable to drive as a result.

**61**  Moreover, I find that Ms. Yip's home and family life was affected as a result of the accident. Ms. Yip was unable to care for family members and look after the Yips' household in the way that she had done prior to the accident. She required help performing household chores such as cooking, washing dishes and dusting. She was unable, as a result of her physical injuries, to do heavier chores such as vacuuming. I find that, as a result, Ms. Yip became depressed and anxious about her circumstances.

**62**  As a result of her physical injuries and related symptoms, Ms. Yip was referred by her family doctor for, and attended, physiotherapy, massage therapy and acupuncture. To address Ms. Yip's psychological and emotional symptoms (including her nightmares, post-traumatic stress, fear of driving and depression), she was referred for and attended counselling with Dr. Lai. Ms. Yip also took medication prescribed for her.

**63**  Then, in the first part of 2012 (about a year after the accident), Ms. Yip terminated her treatments and decided she preferred to go forward on her own and rely on her own resources. Indeed, by her own estimate, Ms. Yip was 75% recovered. I see this as an indication of some stoicism on Ms. Yip's part. I find that, by this time, Ms. Yip had substantially recovered from the physical injuries suffered in the accident. However, I find that she was still experiencing some pain symptoms and some limitations in her pre-accident ability to care for her family.

**64**  I find further that, as a result of Ms. Yip's efforts to cope on her own and rely on herself, some of her symptoms and, in particular, her pain and her emotional and psychological symptoms, worsened, rather than continuing to improve, and Ms. Yip developed a chronic pain disorder. I find that this was the state of affairs when Ms. Yip was examined by Dr. Purtzki in July 2013 and by Dr. Mok in October 2013. As of the fall of 2013, Ms. Yip was continuing to have pain symptoms, although the extent of her actual physical limitations could not be determined because of Ms. Yip's fear of exacerbating her pain. This was an aspect of her pain disorder.

**65**  However, as recommended by both Dr. Purtzki and Dr. Mok, Ms. Yip followed up with further treatment with Dr. Lai and took the medications prescribed for her by her family doctor. By the time the sessions with Dr. Lai ended in February 2014, Ms. Yip was able to sleep better and no longer had nightmares, was feeling less pain and was able again to drive.

**66**  I find that as of trial, Ms. Yip was continuing to experience some pain and limitations in her activities, including activities around her household. However, Ms. Yip determined for herself that she was able to manage on her own, without the need for further treatment or medication, apart from using Tiger Balm occasionally to relieve pain.

**67**  With respect to Ms. Yip's emotional and psychological issues, I think it is fair for Ms. Barnes to point out that, before the accident, Ms. Yip was an anxious person, in support of her argument that Ms. Yip's problems after the accident were not caused by the defendant's ***negligence***, but are problems Ms. Yip would likely have had in any event. It is also fair for Ms. Barnes to point out that, after the accident, there were other things -- for example, the Yips' unusual living arrangements, and concern about her children -- that could or might account for Ms. Yip's depression and other psychological symptoms.

**68**  However, Ms. Barnes did not put these alternative theories for Ms. Yip's problems to Dr. Mok, as explanations (other than the accident) for his diagnoses. Dr. Mok was not asked, for example, whether, if he had known about Ms. Yip's family situation, it would have affected his diagnosis or his opinion on causation.

**69**  I think it can be said that, even before the accident, Ms. Yip exhibited signs (e.g., forbidding her daughter to drive, and driving her everywhere herself) of being an overly anxious person. Feelings of anxiety are a normal part of life, and an individual cannot expect to be compensated for feelings she would have felt in any event, even if the accident had not occurred.

**70**  However, in my opinion, Ms. Yip's driving-related anxiety, and her depression and hopeless feelings after the accident, would not have occurred but for the accident. Her depression, for example, was a consequence of the circumstances in which she found herself after the accident: in pain and unable to care for her family. Therefore, I do not agree with Ms. Barnes' submissions that Ms. Yip has failed to prove, on a balance of probabilities, that her psychological and emotional problems after the accident were a result of the accident. In my opinion, Ms. Yip has proved this.

**Non-pecuniary Damages**

**71**  The purpose of non-pecuniary damages is to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The amount of the award does not depend alone on the seriousness of the injury but upon the award's ability to ameliorate the condition of the injured person, considering his or her particular situation: 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 para. 45. 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***, at para. 46.

**72**  On behalf of Ms. Yip, Mr. Chang submits that the appropriate range of non-pecuniary damages is between $50,000 and $70,000.

**73**  In support of his position, Mr. Chang cites the following cases: ***Pisani v. Pearce***, [*2012 BCSC 1118*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-F57G-S24K-00000-00&context=) (20-year old plaintiff suffered soft tissue injuries to her neck, shoulder, back and hip; the hip problem prevented her from enjoying activities, there were continued flare-ups and no evidence that the problem would resolve; non-pecuniary damages of $80,000 awarded); ***Macdonald v. Hazel***, [*2012 BCSC 2079*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-202J-00000-00&context=) (the plaintiff was injured in a broadside collision, and suffered headaches, left-sided neck pain, low back pain, pain in hip and sacroiliac area; there was some improvement but her hip symptoms continued; non-pecuniary damages of $80,000 awarded); ***Kim v. Morier***, [*2013 BCSC 673*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-204T-00000-00&context=) (the plaintiff was injured in two accidents and left with ongoing pain in her hip and low back, as well as mild ongoing disability; non-pecuniary damages of $55,000 awarded); and ***DeGuzman v. Ge***, [*2013 BCSC 1450*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JCRC-B28C-00000-00&context=) (the plaintiff suffered soft tissue injuries; pain symptoms were reduced by trial, but she continued to have symptoms affecting activities and work; non-pecuniary damages of $50,000 awarded).

**74**  On behalf of the defendant, Ms. Barnes submits that the appropriate range of non-pecuniary damages is between $35,000 and $40,000. The cases cited by Ms. Barnes included ***Bern v. Jung***, [*2010 BCSC 730*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-220N-00000-00&context=) (plaintiff was involved in two accidents; in the first he suffered rib fracture and fracture of one of the bones in his hand, facial trauma that required dental surgery, and also experienced some psychological and emotional problems; he suffered soft tissue injuries in the second accident and aggravated problems he was having as a result of the first accident, adding to his depression and anxiety; plaintiff was continuing to have physiotherapy as of the trial; non-pecuniary damages of $50,000 awarded); ***Bissonnette v. Horn***, [*2012 BCSC 518*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JFSV-G39J-00000-00&context=) (plaintiff, 36 at the time of the accident, suffered soft tissue injuries, including neck, back and hip pain, headaches, a dental injury and emotional problems (especially anxiety); as of trial, she continued to suffer left hip pain, headaches and some numbness in one hand; she was taking medication daily; prognosis was guarded; non-pecuniary damages of $50,000 awarded); and ***Brown v. Raffan***, [*2013 BCSC 114*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JGHR-M361-00000-00&context=) (plaintiff, 44 years old when the accident occurred, suffered significant soft tissue injuries to her face, spine, right shoulder and both knees, a dental injury and a concussion; court was not satisfied that the plaintiff had proved she suffered any significant psychological injury as a result of the accident; as of trial, plaintiff continued to suffer from headaches, anxiety, knee pain and also had some scarring on her right elbow and knee; non-pecuniary damages of $35,000 awarded).

**75**  As a result of the accident, Ms. Yip sustained mild to moderate soft tissue injuries and a concussion (with related, disturbing symptoms, as well as headaches). Moreover, the accident was a terrifying experience for Ms. Yip. She developed psychological and emotional problems as a result. However, she accepted treatment, with positive results. Things that were very important to Ms. Yip and that gave her life meaning -- her family and her ability to take care of them -- were very much affected as a result of the accident. In addition, activities such as travel, which she had looked forward to doing once she retired, were and are no longer enjoyable for her. Her stoicism, and her desire to try and manage on her own, is not something that should count against her.

**76**  In my opinion, a fair award for non-pecuniary damages is $55,000.

**Loss of Housekeeping Capacity**

**77**  Ms. Yip seeks an award of between $20,000 and $25,000 for lost housekeeping capacity.

**78**  On behalf of Ms. Yip, Mr. Chang submits that, on the evidence, after Ms. Yip retired in 2006, she planned on doing the bulk of the housekeeping tasks for the family. When the family members moved from the single family house to the Burnaby townhouses, the plan was that Ms. Yip would provide all the housekeeping (including meals and laundry) for both households, with Mr. Yip helping out on his days off. Based on Ms. Yip's and Mr. Yip's evidence, this was the arrangement in place at the time of the accident. When the accident occurred, the family members were in the process of moving to Coquitlam, and the plan in that regard was that, as Ms. Yip had done in Burnaby, she would provide all of the housekeeping for both households, with Mr. Yip again helping out.

**79**  Mr. Chang submits that, on the evidence, Ms. Yip spent over 57 hours per month doing housework at the Burnaby residences prior to the accident. He says that, as a result of Ms. Yip's injuries, she lost the ability to perform work of economic value and the other family members had to take on the housekeeping tasks that Ms. Yip otherwise would have done. Mr. Chang submits that Ms. Yip's time should be valued at $15 per hour. Thus, from the date of the accident, until Mr. Yip's retirement at the end of September 2012 (when he was able to take on more of the housekeeping), the value of Ms. Yip's time is $17,250 (57.5 hours per month multiplied by 20 months at $15 per hour). Mr. Chang submits that after September 2012, Ms. Yip would only have been responsible for housekeeping in No. 49 (since Mr. Yip would have been in a position to look after Unit 106 himself after his retirement). Therefore (in his submission), Ms. Yip's loss of housekeeping capacity from October 2012 to trial is $8,193 (28.75 hours per month multiplied by 19 months at $15 per hour).

**80**  On behalf of the defendant, Ms. Barnes submits that no award should be made for loss of housekeeping capacity. She argues that Ms. Yip is not a reliable witness in terms of estimating the number of hours she was spending on various tasks, and that there is no evidence of the dollar value of what Ms. Yip was doing. Ms. Barnes submits in addition that Ms. Yip had taken on work that was not her responsibility in the first place, and the defendant should not be required to compensate Ms. Yip for loss of capacity to do such work.

**81**  Awards for loss of housekeeping capacity may be made for either past or future losses, or both: see ***Kroeker v. Jansen*** [*(1995), 123 D.L.R. (4th) 652*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F60C-X11W-00000-00&context=), [*1995 CanLII 761*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F60C-X11W-00000-00&context=) (B.C.C.A.), at para. 25. (Here, Ms. Yip seeks an award for past losses only.) Such claims are different from a future cost of care claim in that they reflect a loss of a personal capacity and are not dependent on whether replacement housekeeping costs are actually incurred: see ***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. 67. An award ordered for loss of housekeeping capacity is for the value of the work that would have been done by the plaintiff but which he or she is incapable of performing because of the injuries at issue. A claim in respect of loss of housekeeping capacity is also distinct from a claim for non-pecuniary damages. Even though the claim is not dependent on whether replacement housekeeping costs are actually incurred, it is frequently valued using a replacement cost approach.

**82**  However, any award should be approached conservatively: see ***Kroeker***, at para. 29.

**83**  Ms. Yip's personal satisfaction in being able to look after her family is separate from her claim for loss of housekeeping capacity. To the extent that injuries suffered in the accident affected her ability to engage in an activity that Ms. Yip enjoyed and gave her personal satisfaction, the compensation is by way of non-pecuniary damages.

**84**  I do not agree with Ms. Barnes' general submission that there is no basis for an award of damages for loss of housekeeping capacity. I find that, as a result of the injuries Ms. Yip suffered in the accident, she suffered a loss of housekeeping capacity. There were chores -- vacuuming, for example -- that were hard for Ms. Yip to manage physically. Even performing more simple tasks such as cooking a meal and washing dishes resulted in symptoms for Ms. Yip. Mr. Yip (both before and after he retired) and their son took up some of the slack while Ms. Yip was recovering.

**85**  However, in my view, the level of housekeeping services Ms. Yip was providing gratuitously to the other family members before the accident does not provide a reasonable basis to assess Ms. Yip's claim for damages for loss of housekeeping capacity. I say this for several reasons.

**86**  The Yip family had never been a traditional family in the sense that Ms. Yip (as wife and mother) took on the role of homemaker and Mr. Yip (as husband and father) took on the role of breadwinner. Rather, both Ms. Yip and Mr. Yip worked full-time throughout their marriage. This background would be part of the usual "give and take" among family members, against which Ms. Yip's claim for loss of housekeeping capacity should be assessed. As of January 2011, when the accident occurred (and for some time before that), all of the family members were adults. They were capable of looking after themselves and contributing to the running of the household, also as part of the usual "give and take" between family members. There was no demonstrated need for Ms. Yip to undertake all of the housework she was doing before the accident. For example, the residences (including both No. 49 and No. 106) came equipped with dishwashers. However, Ms. Yip preferred that dishes be washed by hand for environmental reasons, even though that required extra time and effort. Washing dishes by hand is a personal preference, not a factor in support of a claim for damages for loss of housekeeping capacity.

**87**  In that light, the time Ms. Yip was spending on housekeeping and chores after she retired, even accepting her estimates as reasonably accurate, is inflated well beyond what is reasonable. Her estimates assume that, but for the accident, other adults living in the household would not contribute any time or effort to making sure necessary chores (laundry, washing dishes, cooking, vacuuming, mopping floors, washing the family cars and so on) were done. Ms. Yip has been living in No. 49 with her son, who is in his early 30s and gainfully employed in a responsible job. I do not consider it reasonable to assume that, but for the accident and living in a home purchased for him by his parents, Ms. Yip's son would treat his mother as an unpaid housekeeper, and do nothing around the house himself. However, that is the basis on which I am being urged to assess Ms. Yip's damages.

**88**  In the circumstances in which Ms. Yip was living, I believe that between 20 to 25 hours of housework a month would be reasonable. This is in the range of what Mr. Chang says was being spent on housekeeping after Mr. Yip retired. I accept Mr. Chang's rate of $15 per hour. Assuming 20 hours per month for 39 months at $15 per hour, the compensation would be $11,700. Assuming 25 hours per month over the same period, the amount would be $14,625. Moreover, although Ms. Yip had some loss of housekeeping capacity, she was still able to do some household chores.

**89**  In my opinion, a fair award for Ms. Yip's loss of housekeeping capacity, consistent with the principles described above, is $10,000.

**Special Damages**

**90**  Special damages are agreed as presented in Ex. 1, except for the chiropractic treatments in 2013. There was insufficient evidence to support the conclusion that these expenses were incurred as a result of the accident. Ms. Yip is also entitled to compensation for mileage, however the mileage for the chiropractic treatments should be deleted. I will leave counsel to do the final calculation of the mileage expenses. I therefore award Ms. Yip special damages in the sum of $7,215.32 plus the appropriate mileage expenses.

**Mitigation**

**91**  Ms. Barnes submits that Ms. Yip's damage award should be reduced by 30% on the basis that she failed to mitigate her damages. Ms. Barnes argues that Ms. Yip terminated treatment in early 2012, but then suffered for almost another two years, before she went back to see Dr. Lai at the end of December 2013. The renewed treatment with Dr. Lai yielded good results. What this shows, in Ms. Barnes' submission, is that if Ms. Yip had continued treatment in 2012, instead of terminating it, she could have recovered much sooner.

**92**  The test for a failure to mitigate by refusing to undergo medical treatment is summarized in ***Fox v. Danis***, [*2005 BCSC 102*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JN6B-S119-00000-00&context=), aff'd [*2006 BCCA 324*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1T2-00000-00&context=), as follows (at paras. 35 and 37):

[35] There is no dispute that every plaintiff has a duty to mitigate his/her damages, and that the burden of proving a failure to fulfil that duty rests with the defendant, the standard of proof being the balance of probabilities: ***Janiak v. Ippolito***, [*[1985] 1 S.C.R. 146*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-2361-00000-00&context=).

. . .

[37] To succeed . . ., the Defendants must establish, on the balance of probabilities, that the Plaintiff failed to undertake this recommended treatment; that by following that recommended treatment she could have overcome or could in the future overcome the problems; and that her refusal to take that treatment was unreasonable: ***Janiak v. Ippolito***, *supra* and ***Maslen v. Rubenstein*** [*(1993), 83 B.C.L.R. (2d) 131*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-FD4T-B0MF-00000-00&context=) (C.A.).

**93**  However, in this case, there was no evidence that a medical doctor recommended a particular treatment and that Ms. Yip failed, unreasonably, to follow it. Rather, in my view, the evidence is consistent with Ms. Yip following medical advice. That is what she did in 2011; that is what she did in 2013, when more recommendations were made. Moreover, the evidence does not support the conclusion that when, in early 2012, Ms. Yip decided to see how she could do on her own, she was acting either unreasonably or contrary to medical advice she had received. Perhaps Ms. Yip might have been better off, for example, to continue therapy with Dr. Lai into 2012. But whether she probably would have been better off is speculation.

**94**  In my opinion, the defendant has failed to show that Ms. Yip failed to mitigate her damages.

**Summary**

**95**  In summary, I award Ms. Yip:

1. non-pecuniary damages of $55,000;
2. damages of $10,000 for loss of housekeeping capacity; and
3. special damages of $7,215.32 plus the appropriate mileage expenses, in accordance with these reasons.

Ms. Yip is also entitled to interest pursuant the ***Court Order Interest Act***, *R.S.B.C. 1996, c. 79*.

**96**  Subject to any submissions the parties may wish to make, Ms. Yip is also entitled to her costs, taking into account that this action is subject to Rule 15-1. If the parties wish to make submissions on costs, they are at liberty to do so within 30 days of these reasons. Submissions may be made in writing or orally, as the parties prefer.

E.J. ADAIR J.

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[***Fajardo v. Horianopoulos, [2006] B.C.J. No. 172***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1S7-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Terrace, British Columbia

Ross J.

Heard: December 12, 2005.

Judgment: January 27, 2006.

Terrace Registry No. 14562

**[2006] B.C.J. No. 172** | 2006 BCSC 147 | 29 M.V.R. (5th) 54 | 146 A.C.W.S. (3d) 578 | 2006 CarswellBC 188

Between Reynaldo Pacheco Fajardo, plaintiff, and Sam Horianopoulos, defendant

(40 paras.)

**Case Summary**

**Tort law — *Negligence* — Causation — Duty of care — Motor vehicles — Liability of driver — Action by Fajardo against Horianopoulos for damages resulting from personal injuries sustained in a motor vehicle accident dismissed — Despite being found negligent, Fajardo would still have collided with the carcass if the vehicle was moved, as it was stretched over the whole of the lane.**

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| Action by Fajardo against Horianopoulos for damages resulting from personal injuries sustained in a motor vehicle accident -- Horianopoulos was driving northbound on a highway when his motor vehicle collided with a moose -- The collision caused his vehicle to come to a halt and threw the moose into the southbound lane of the highway -- Horianopoulos was injured and after attempting to put his hazards on he exited the vehicle -- Fajardo was also driving northbound on the highway and he came upon the scene, saw Horianopoulos' vehicle and took evasive action by driving into the southbound lane -- As he did so, he collided with the moose and suffered injuries -- HELD: Action dismissed -- Considering all of the circumstances in the case, the initial collision with the moose was not caused by any ***negligence*** or want of care on the part of Horianopoulos -- However, after the accident Horianopoulos' stationary truck and the moose carcass constituted a hazard to other vehicles and he had a duty to take reasonable care under the circumstances to warn passing motorists -- Therefore, although he was injured and in shock, he remained under a duty to take reasonable steps in the circumstances -- Since the moose carcass was stretched over the whole of that lane, it was determined that Fajardo would still have collided with the carcass -- As the accident would have occurred in any event, Horianopoulos' ***negligence*** was not a cause of the accident. |

**Counsel**

Counsel for the Plaintiff: David A. Warner, Q.C.

Counsel for the Defendant: John L. Perry

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| **ROSS J.** |

INTRODUCTION

**1**  This action arises from an accident that occurred on the night of January 19, 2004 on Highway 37, approximately one kilometre south of the Terrace-Kitimat airport. On the night in question the defendant, Sam Horianopoulos, was driving northbound on the highway when his motor vehicle collided with a moose. The collision caused his vehicle to come to a halt and threw the moose into the southbound lane of the highway. The plaintiff, Reynaldo Fajardo, was also driving northbound on the highway. He came upon the scene, saw Mr. Horianopoulos' vehicle and took evasive action by driving into the southbound lane. As he did so, he collided with the moose. Mr. Fajardo seeks to recover for the injuries that he alleges he suffered as a result of that collision.

ISSUES

**2**  Pursuant to a consent order dated October 31, 2005, the trial dealt only with the issue of liability, quantum having been severed.

**3**  It is alleged that Mr. Horianopoulos was negligent in two respects. First, counsel submits that Mr. Horianopoulos was driving too fast for the conditions; in effect that he was over driving his headlights, and that this resulted in the first collision with the moose. Second, counsel submits that having collided with the moose, and thereby creating a hazard on the road, Mr. Horianopoulos was negligent in failing to move his vehicle off the road, thereby leaving both lanes blocked.

**4**  Counsel on behalf of Mr. Horianopoulos denies that he was negligent. Counsel submits that there was no opportunity to avoid hitting the moose and that after the accident, Mr. Horianopoulos was in shock. Finally, counsel submits that even if Mr. Horianopoulos' conduct after the collision fell below the requisite standard of care, causation has not been established.

FACTS

**5**  The accidents occurred shortly after 11:30 p.m. on January 19, 2004. Both vehicles were proceeding northbound on Highway 37 heading toward Terrace. Both drivers were very familiar with the highway. Neither driver had consumed alcohol that evening. Both vehicles were in good repair.

**6**  The road was dry and bare; there was no rain or snow. Visibility was curtailed by patchy fog. Traffic was very light.

**7**  The area where the accidents occurred is a straight and relatively level stretch of road. The speed limit is 100 kilometres per hour. There are only two lanes on that portion of the highway, a northbound lane and a southbound lane.

**8**  There are several signs warning of the presence of moose found on Highway 37 between Kitimat and Terrace. The first sign is located 6.7 kilometres from Kitimat warning of moose for 41 kilometres. The next sign, which only displays a picture of a moose, is located 14.6 kilometres from Kitimat. The third sign, which also only displays a picture of a moose, is located 38.1 kilometres from Kitimat. In addition, there is another moose sign located at the bottom of the hill by the airport between Williams Creek and the airport hill.

**9**  The site of the accidents falls outside the "moose warning zone" indicated by the signs. The parties agreed that the flat areas closer to Kitimat are the locations preferred by the moose and where they are usually seen. The site of the accidents is not a location where moose would be likely to be found or expected. Mr. Horianopoulos testified that he had never seen a moose at that site before the night in question and that he had lived his whole life in the area. However, both parties acknowledged that wildlife can be encountered all along the highway.

**10**  Mr. Horianopoulos testified, and I find, that he was travelling somewhat below the speed limit at about 90 kilometres per hour when he encountered the moose. He had been travelling at about the speed limit, but had slowed down for the hill and the fog.

**11**  Mr. Horianopoulos observed the moose trotting across the highway and saw his path moving from west to east. He testified, and I find, that as soon as he saw the moose, he applied his brakes. Unfortunately, the vehicle did not stop in time and his truck hit the moose on the driver's side. He testified that he had considered taking evasive action, but realized that he did not have enough time.

**12**  The moose smashed into the windshield and Mr. Horianopoulos was cut. He had glass embedded in his face near his eyes and on his cheeks and forehead. Blood streamed down his face. His left eye was closed.

**13**  Mr. Horianopoulos testified, and I find, that after the accident he tried to switch on the truck's hazard lights, but could not get them to work because the control knob could not be pulled out. He could not recall if he shut off the truck engine or not. He recalled getting out of the truck and walking across the highway, but he did not recall why. He indicated that he remembered being shocked, dazed and in a panic. He was wandering around without a clear purpose.

**14**  He recalled seeing the headlights from Mr. Fajardo's vehicle as it approached him. He testified that he had at the point when he saw the lights, been across the highway for a few minutes. Eventually, he saw the vehicle hit something, go down the highway and stop about 50 yards from his truck.

**15**  Mr. Horianopoulos testified that he could not recall having any sort of conversation with Mr. Fajardo while at the scene of the accidents. He believed that he then went to his truck and moved it off the highway. He was unable to recall if he started the truck or if it was still running.

**16**  Mr. Fajardo testified, and I find, that he was travelling at about 60 or 70 kilometres per hour at the time of the accident. He had reduced his speed because of the fog. He suddenly saw the back end of Mr. Horianopoulos' truck stopped in his path. It was his testimony, and I find, that the truck's lights were out.

**17**  Mr. Fajardo testified that when he saw the truck, he did not have sufficient time to brake. He took evasive action, drove into the other lane and hit something that caused his van to jump into the air. He testified that he did not see anything on the road before the collision. Following the collision, Mr. Fajardo went back to the location where his van hit the object and for the first time saw the moose on the road. It had been decapitated.

**18**  Mr. Fajardo's first encounter with Mr. Horianopoulos occurred following the accident. Mr. Fajardo noticed that Mr. Horianopoulos had blood streaming down his face and Mr. Fajardo thought that he was in shock. He asked Mr. Horianopoulos why the truck's hazard lights were not on and he answered that they did not work. Mr. Fajardo asked him if he was injured.

**19**  Mr. Fajardo then proceeded to get out a flashlight in order to direct traffic. The police and an ambulance for Mr. Horianopoulos were called. It was Mr. Fajardo's testimony that it was the tow truck driver, and not Mr. Horianopoulos, who moved the truck to the side of the road.

**20**  Mr. Fajardo then helped to pull the moose off the highway. He testified that it was stretched out across the whole lane. Mr. Horianopoulos was taken to hospital in the ambulance where he was treated for his injury.

ANALYSIS

**21**  The first issue to be addressed is whether there was ***negligence*** on the part of Mr. Horianopoulos in relation to his collision with the moose.

**22**  Counsel for Mr. Horianopoulos conceded that because his vehicle was stopped in the travelled portion of the highway, a presumption of ***negligence*** arises. He submits that to rebut the inference of ***negligence*** the defendant need only advance an explanation of how the collision may have reasonably occurred without ***negligence*** on his part. In such a case the burden of establishing ***negligence*** remains with the plaintiff; see Gauthier & Company Ltd. v. The King, [*[1945] S.C.R. 143*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-FBV7-B04P-00000-00&context=); Lynch v. Insurance Corporation of British Columbia [*(1996), 18 B.C.L.R. (3d) 214*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F528-G283-00000-00&context=) (C.A.); Perry v. Banno [*(1993), 80 B.C.L.R. (2d) 351*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-JG02-S19K-00000-00&context=) (S.C.).

**23**  The explanation offered in this case is that the moose darted out onto the highway and into the path of Mr. Horianopoulos' vehicle in such a fashion that despite his reasonable care, the collision could not be avoided.

**24**  Counsel each cited a number of authorities addressing accidents occurring as a result of collisions with wildlife. From those cases, I glean that whether a driver is negligent when he runs into wildlife on the road depends upon all of the circumstances of the particular case: see Pitts Enterprises Ltd. v. Farkes et al., [*[2004] B.C.J. No. 2384*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G0G2-00000-00&context=), [*2004 BCSC 1493*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G0G2-00000-00&context=), aff'd [*[2005] B.C.J. No. 2255*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JS5Y-B276-00000-00&context=), [*2005 BCCA 511*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JS5Y-B276-00000-00&context=) [Pitt Enterprises]. Accordingly, the explanation provided by Mr. Horianopoulos is consistent with ***negligence*** and with no ***negligence***. The presumption of ***negligence*** is therefore rebutted and the onus shifts back to the plaintiff to establish that the accident was caused by a want of reasonable care on the part of the defendant.

**25**  In that regard, plaintiff's counsel submits that the want of care by Mr. Horianopoulos is established by him driving at an excessive speed given the darkness, the presence of fog and the likelihood of encountering animals on the road. In support of this proposition, plaintiff's counsel relies upon Blaine v. Hopkins, [*[1990] B.C.J. No. 2724*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JJYN-B2WR-00000-00&context=) (S.C.) [Blaine]. In Blaine, the defendant was found liable for injuries suffered by the plaintiff passenger who was injured when the vehicle driven by the defendant collided with a moose which had strayed onto the highway.

**26**  While Blaine is similar in some respects to the present case, there are a number of important distinguishing factors. First, the trial judge in Blaine found that the defendant driver had not reacted by applying his brakes upon seeing the animal, despite the fact that they were in a national park and that it was foreseeable that animals would be encountered. In the case at bar, Mr. Horianopoulos did apply his brakes as soon as he saw the moose.

**27**  In addition, in Blaine, the defendant driver was found to have been exceeding the posted speed limit. Expert evidence that was accepted by the court stated that had he been driving at the posted limit, he would have been able to bring his vehicle to a stop and avoid the accident. However in the case at bar, Mr. Horianopoulos was driving somewhat below the posted speed limit and there was no such expert evidence.

**28**  The plaintiff also relies upon 399931 B.C. Ltd. v. MacPherson, [*[1995] B.C.J. No. 556*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F1WF-M2D6-00000-00&context=) (S.C.) [MacPherson]. In MacPherson, the defendant was found liable in circumstances where while driving his truck at the posted speed limit, the defendant saw a moose on the road in his lane. He applied his brakes on an icy road, spun out of control and struck the plaintiff's truck which was travelling in the oncoming lane.

**29**  Again, while MacPherson is somewhat similar to the facts at hand, there are several distinguishing features in MacPherson. The defendant in MacPherson was driving at the posted limit at night on icy roads over a stretch of highway known as "moose alley" where the trial judge found that the presence of moose was more probable than not. The moose was on the road in the defendant driver's lane. The defendant driver agreed that he was over driving his headlights. The trial judge also found that the defendant driver was negligent in locking up his brakes on the icy road.

**30**  In the case at bar, Mr. Horianopoulos acted immediately and appropriately upon first sight of the moose. The moose was not standing in his lane, but rather it was approaching, at a fast pace, from the side. The road was neither icy nor slick. Mr. Horianopoulos was not driving at or beyond the posted speed limit. He had reduced his speed somewhat to take into account the conditions. Moreover, in the case at bar, as in Pitt Enterprises, there is no evidence of what speed the defendant would have to have been travelling at to have been able to stop his vehicle once the moose became visible to him.

**31**  Finally, the collision in the case at bar did not occur in a "moose alley" where it is more probable than not that moose will be found. Rather, I find that the accident occurred in an area where it is possible, but not likely, that wildlife will be encountered.

**32**  In Pitt Enterprises, Mr. Justice Powers cited with approval Maksymetz v. Plamondon [*(1988), 53 Man.R. (2d) 304*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DG1-JTGH-B25K-00000-00&context=) (C.A.) [Maksymetz] and Tabaka v. Greyhound Lines of Canada Ltd. [*(1999), 252 A.R. 373*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9351-JK4W-M3TK-00000-00&context=) (Q.B.) [Tabaka]. In Maksymetz, Monnin C.J.M., speaking for the majority, stated the following at paras. 8-9:

I am of the view that requiring a driver to reduce his speed much below the posted speed limit because of the threat of the sudden appearance on the highway of a large animal, such as a moose or a deer, directly in front of a moving vehicle travelling with dimmed headlights is too high a standard to set for driving on Manitoba roads, especially those in remote areas of the province. That is not a standard which should be set by this court.

What happened was so sudden that defendant could do nothing to prevent the moose from hitting the hood of his tractor-trailer. The action of the moose was the sole cause of the accident and could be termed an act of God.

Tabaka was to the same effect.

**33**  Considering all of the circumstances in the case at bar, I conclude that the initial collision with the moose was not caused by any ***negligence*** or want of care on the part of Mr. Horianopoulos. I find that Mr. Horianopoulos was not driving at an excessive speed given the conditions. I also find that he was not negligent in failing to see the moose earlier than he did.

**34**  I turn next to the plaintiff's second contention, that Mr. Horianopoulos' conduct following the collision showed a want of care. The plaintiff contends that following the collision, Mr. Horianopoulos was under a duty to move his vehicle off the travelled portion of the highway. Counsel submits in response that Mr. Horianopoulos was dazed following the collision, and therefore, not in breach of his duty of care.

**35**  Plaintiff's counsel relies upon Schneider v. Steure, [*[1992] B.C.J. No. 491*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F5KY-B0S2-00000-00&context=) (S.C.). In that case the defendant, despite emergency measures, collided with a moose on a highway. As a result of the collision, the passenger in the defendant's vehicle was showered with glass from the windshield, but was not injured. The defendant did not stop after the collision, but looked back and concluded that the moose had been thrown or returned to the ditch. Concerned for his passenger, the defendant carried on with his journey to Fraser Lake where he reported the incident to the R.C.M.P. by telephone.

**36**  In the meantime, the plaintiff collided with the carcass. Robinson J. concluded that the defendant had been negligent in not taking additional steps to preclude, so far as reasonably possible, the possibility of another motorist encountering the moose carcass.

**37**  The driver of a motor car on a highway is under a duty to conduct himself in a manner that does not, by his fault in the management of himself or his car, expose other users of the highway to unnecessary risk of harm. He is at fault, whether in emergencies or in ordinary circumstances, when he fails to exercise the reasonable care, skill or self-possession that the attendant circumstances require: see Sinclair v. Nyehold [*(1973), 29 D.L.R. (3d) 614*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G25D-00000-00&context=) at 618 (B.C.C.A.).

**38**  Mr. Horianopoulos' stationary truck and the moose carcass constituted a hazard to other vehicles. I find that Mr. Horianopoulos had a duty to take reasonable care under the circumstances to warn passing motorists. The standard is objective. Therefore, although he was, according to the testimony of both parties, injured and in shock, he remained under a duty to take reasonable steps in the circumstances.

**39**  Apart from attempting to put on the truck's hazard lights, he took no other steps. He did not ensure that the truck's lights were on; he did not move the truck off to the shoulder. A driver exercising reasonable self-possession in the circumstances would have taken such steps. Accordingly, Mr. Horianopoulos' conduct was negligent.

**40**  That is not the end of the matter however. Defendant's counsel submits that notwithstanding the ***negligence***, the plaintiff's action must fail because the plaintiff has failed to establish causation. Mr. Fajardo testified that even if Mr. Horianopoulos' vehicle had been on the shoulder, he would still, in taking evasive action, have driven over into the oncoming lane. Since the moose carcass was stretched over the whole of that lane, he still would have collided with the carcass. Thus the accident would have occurred in any event. I find that Mr. Horianopoulos' ***negligence*** was not a cause of the accident. Accordingly, the plaintiff's action is dismissed.

ROSS J.

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[***Ziemer v. Wheeler, [2014] B.C.J. No. 2687***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5GCC-XVB1-JGHR-M4HJ-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Prince George, British Columbia

J.E. Watchuk J.

Heard: July 2-5, 8-11, September 26, 27, April 22 and 23, 2014.

Judgment: October 31, 2014.

Dockets: 1139170 and 1242042

Registry: Prince George

**[2014] B.C.J. No. 2687** | 2014 BCSC 2049

Between Raymond Ziemer, Plaintiff, and Harris John Wheeler, AAEA Application Assistance and Environmental Assessment Ltd., Aron Walter and W. Aron Ventures Ltd., Defendants, and Aron Walter and W. Aron Ventures Ltd., Third Parties, and Harris John Wheeler, AAEA Application Assistance and Environmental Assessment Ltd., Third Parties And between Jessie Ziemer and Elliott Ziemer by her Litigation Guardian, Jessie Ziemer, Plaintiff, and Harris John Wheeler, AAEA Application Assistance and Environmental Assessment Ltd., Aron Walter and W. Aron Ventures Ltd., Defendants, and Raymond Ziemer, Aron Walter and W. Aron Ventures Ltd., Third Parties

(207 paras.)

**Case Summary**

**Tort law — *Negligence* — Duty and standard of care — Causation — Motor vehicles — Liability of driver — Determination of liability for motor vehicle accidents — The defendant Wheeler hit a moose while driving in the dark — Walter then hit the moose carcass, lost control of his vehicle, crossed the centre line, and collided head on with the Ziemer vehicle — The moose and moose carcass were not visible until it was too late to take evasive action — Wheeler breached his duty to warn other motorists of the hazard created by the moose carcass — Walter and Ziemer were not liable for any of the collisions but Wheeler was liable for the Walter-Ziemer collision.**

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| Determination of liability with respect to motor vehicle accidents. On February 21, 2011, the defendant Wheeler was driving on the highway when he hit a moose. The moose, dead or wounded, lay on the highway in the dark. Walter then hit the moose and lost control of his vehicle. His vehicle crossed the centre line and collided head on with the Ziemer vehicle. Before returning to the scene of his collision with the moose, Wheeler did not take any steps to warn other motorists. Ziemer took the position that Wheeler was negligent for hitting the moose and failed in his duty to warn other motorists of the hazard created by the moose carcass. Walter took the position that he was not negligent for hitting the moose and veering into the oncoming lane where he collided with the Ziemer vehicle. Wheeler took the position that if he was negligent with respect to hitting the moose or failing in a duty to warn, the Court ought to consider whether Walter and/or Ziemer were negligent.  HELD: Walter and Ziemer were not liable for any of the collisions but Wheeler was liable for the collision between the Walter and Ziemer vehicles.  The moose was not visible until it was too late to take evasive action. Accordingly, Wheeler and Walter were not negligent in hitting the moose. Ziemer's ability to detect the carcass was constrained by the glare of the headlights of the Walter vehicle. Walter and Ziemer were not negligent for their collision. There was a minimum of nine minutes between the time when Wheeler hit the moose and the Walter-Ziemer collision. By failing to use those nine minutes to fulfill his duty to warn, Wheeler breached his duty. But for his ***negligence***, the Walter-Ziemer accident could have been averted. |

**Statutes, Regulations and Rules Cited:**

Business Corporations Act, [*SBC 2002, CHAPTER 57, s. 346*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FJ1-JPGX-S0JH-00000-00&context=), ss. 347-349

Motor Vehicle Act, [*RSBC 1996, CHAPTER 318, s. 86*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FH1-JSRM-60KK-00000-00&context=)(1), s. 86(2)

**Counsel**

Counsel for the Plaintiff Raymond Ziemer: D. Byl.

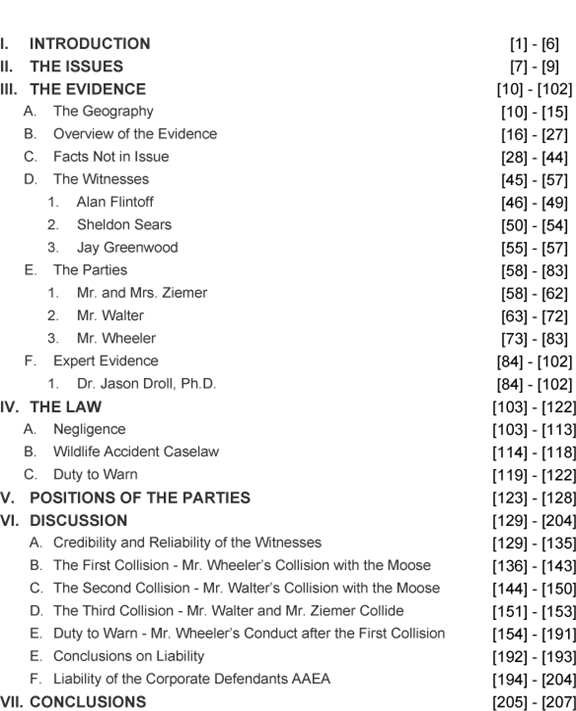
Counsel for the Third Party Raymond Ziemer: Leslie Hibbert.

Counsel for the Plaintiffs Elliott Ziemer and Jesse Ziemer: Stanley T. Cope.

Counsel for the Defendant and Third Parties, Harris Wheeler and AAEA Application Assistance and Environmental Assessment Ltd.: Roger W. Haines.

Counsel for the Defendant and Third Parties, Aron Walter and W. Aron Ventures Ltd.: Lorne A.J. Dunn, Q.C.

**Table of Contents**



**Reasons for Judgment**

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| **J.E. WATCHUK J.** |

**I. Introduction**

**1**  On the Alaska Highway between Dawson Creek and Fort St. John on February 21, 2011, Harris Wheeler as he was driving north in his 2003 Ford F350 truck hit a moose.

**2**  The moose, dead or wounded, lay on the highway in the dark. Aron Walter, who was also driving north, hit the moose and lost control of his vehicle, a 2004 Ford F350 truck.

**3**  Raymond Ziemer was driving south with his wife and baby in his 2003 Chevrolet Avalanche vehicle. His vehicle and the Walter vehicle collided head on when the Walter vehicle came across the centre line into the southbound lane.

**4**  Mr. Wheeler did not take any steps to warn other motorists before his return to the scene of his collision with the moose.

**5**  This trial was limited to the determination of liability. The assessment of damages for injuries sustained by the parties will follow at a later date.

**6**  From these three collisions, Mr. Wheeler hitting the moose, Mr. Walter hitting the moose, and Mr. Walter and Mr. Ziemer colliding head-on ("the collisions"), and from Mr. Wheeler's actions after his collision with the moose, a number of liability issues arise.

**II. The Issues**

**7**  In order to determine liability for the collisions, the following issues of law with respect to the three drivers, Messrs. Ziemer, Walter and Wheeler, must be addressed:

1. What is the standard of care for motorists travelling on the Alaska Highway in the location where these accidents took place taking into consideration the circumstances at the time the collisions took place?
2. Did any driver fail to meet the standard of care for motorists travelling on the Alaska Highway in this location?
3. If so, had that driver exercised reasonable care, would he have been able to avoid the collision?
4. For Mr. Wheeler, would he have been able to detect, then perceive and respond and successfully take evasive action to avoid impact with the upright moose that had entered the highway from the ditch on the opposite side?
5. For Mr. Walter, would he have been able to detect, then perceive and respond and successfully take evasive action to avoid the moose carcass lying in the middle of the highway?
6. For Mr. Ziemer would he have been able to detect, then perceive and respond and successfully take evasive action in response to either the moose carcass lying in the middle of the highway or Mr. Walter's vehicle?
7. With regard to the defendant Mr. Wheeler, did he have a duty to warn other motorists, specifically Messrs. Ziemer and Walter, of the moose carcass which constituted a hazard in the middle of the highway? Did he have a reasonable opportunity to warn other motorists? If so, but for his failure to comply with that duty to warn other motorists, would the collision has been avoided?
8. If more than one party has been negligent, how should liability be apportioned?

**8**  The primary issues are with regard to the defendant Mr. Wheeler and the duty to warn.

**9**  The factual issues to be resolved with regard to the duty to warn include the location of the Ziemer and Walter vehicles at the time of the first collision between Mr. Wheeler and the moose; and the length of time between Mr. Wheeler hitting the moose and the third collision.

**III. The Evidence**

**A. The Geography**

**10**  The Alaska Highway, also known as Highway 97 (the "Highway"), starts in Dawson Creek in the north-east of British Columbia. Fort St. John, 73 km to the north, is the next major centre. Charlie Lake is 4 to 5 km north of Fort St. John.

**11**  Intersecting the Highway between Dawson Creek and Fort St. John are 228 Road and 230 Road. The collisions occurred on the Highway between 228 Road and 230 Road. 228 Road is two miles or 3.2 km south of 230 Road as the roads are numbered by the old way of measuring distances.

**12**  There is a dip in the Highway between 228 Road and 230 Road. The bottom of the dip is 250 to 500 meters south of the location of where the moose was hit by the Wheeler vehicle.

**13**  The Highway is one-way in each direction with shoulders. It is slightly elevated from the ditches on both sides and the surrounding land. There are trees and shrubs set back from both sides of the Highway.

**14**  The area north and south of the locations of the collisions has the following landmarks and topography. South of 228 Road is the crest of a hill known as Tower Hill. From the crest of Tower Hill and past 228 Road until a short distance before 230 Road the Highway is straight. As shown in an aerial photograph of the area, it curves very slightly to the west as it approaches 230 Road. The top of the major hill in the area, Taylor Hill, is 2 km north of 230 Road.

**15**  From the top of Taylor Hill, the Highway descends to the town of Taylor and the bridge which crosses the Peace River. Fort St. John is 14 km north of Taylor.

**B. Overview of the Evidence**

**16**  The three collisions occurred as follows.

**17**  On the evening of February 21, 2011, Mr. Wheeler was driving north on the Alaska Highway towards Taylor, Fort St. John and then to his home at Charlie Lake, north of Fort St. John. He was close to home having driven from Calgary, Alberta that day.

**18**  A moose came across the Highway from his left and collided with the front left of his truck. Mr. Wheeler hit the moose, it went down, and Mr. Wheeler kept driving for a short distance, about 100-150 yards, before he stopped on the side of the road. He stopped to check his vehicle for damage and ensure that it was roadworthy and able to be driven.

**19**  Mr. Wheeler got back into his vehicle after checking for damage. He continued to drive north. An important factual issue is how far north Mr. Wheeler drove before he turned around to return to the location where he had struck the moose.

**20**  Mr. Walter left his home on 228 Road to drive north to Taylor for a floor hockey game. He was driving north on the Highway after Mr. Wheeler had driven the same route. There is also a factual issue as to how far Mr. Walter was driving behind Mr. Wheeler.

**21**  As Mr. Walter drove north from 228 Road towards 230 Road, he struck the moose which was lying on the road and lost control of his vehicle. He veered into the southbound lane and collided with the Ziemer vehicle head on.

**22**  Mr. Ziemer was driving south on the Highway having left Fort St. John and Taylor and driven up Taylor Hill. As he was driving, Mr. Ziemer saw vehicles in the pullouts on both sides of the road at the top of Taylor Hill. He recalls seeing headlights of one vehicle approaching as he continued to drive south. The next thing he remembers is those headlights jumping into his lane.

**23**  Three individuals who arrived at the scene of the Walter-Ziemer collision (also referred to as "the third collision") were witnesses in the trial: Alan Flintoff, Sheldon Sears, and Jay Greenwood. Mr. Flintoff worked for Schlumberger Sun Oil Company, and was leading a convoy of six vehicles north. Mr. Sears resides at Mile 22 of the Alaska Highway and travels daily to his job as a mechanic in Taylor. Mr. Greenwood also works in the oil industry and resides in Charlie Lake. He knew Mr. Wheeler.

**24**  Mr. Flintoff telephoned 911 at 7:15 p.m. The call lasted for 10 minutes and 54 seconds. Prior to the end of that telephone call, Mr. Wheeler returned to the scene of the third collision. Mr. Greenwood saw him return, noting that Mr. Wheeler was not there when he, Mr. Greenwood, arrived at the scene. Mr. Wheeler located Mr. Flintoff a couple of minutes before the end of Mr. Flintoff's conversation with the 911 operator.

**25**  The first emergency responder on the scene was the Fort St. John RCMP at 7:39 p.m.

**26**  When Mr. Wheeler returned to the scene, he identified himself as the person who had struck the moose. It is disputed how much time passed before Mr. Wheeler returned to the scene.

**27**  All individuals involved in the collision survived. The persons injured in the third collision were attended to at the scene and then taken by ambulance. All of the parties except for the infant Ziemer gave evidence in the trial.

**C. Facts Not in Issue**

**28**  The evidence with regard to the following facts was generally consistent or was not in issue.

**29**  The time of the Walter-Ziemer collision was after 7:00 p.m. and close to 7:15 p.m. Mr. Ziemer estimated the time at about half an hour after they left Fort St. John at 6:45 p.m. Mr. Flintoff's 911 call commenced at 7:15 p.m. On Mr. Walter's evidence, Mr. Flintoff arrived within a minute or so after the third collision.

**30**  Mr. Flintoff estimated the time for him to travel north from the crest of Tower Hill to the location of the collision at two minutes. However, because the distance from the crest of the hill to the collision is approximately 4,367 meters according to the evidence of Ray Williams who is an accident investigator, at Mr. Flintoff's speed of 90 km/h the time to travel this distance would be 2.8 minutes, to which I would add time to slow and stop.

**31**  After Mr. Flintoff arrived at the scene, he waved through two of the convoy vehicles before placing the call to 911. It is not known to any certainty the total length of time it took Mr. Flintoff to drive from the crest of the hill, stop his vehicle, direct traffic for his convoy, and place the 911 call. On the evidence, it would have been approximately four minutes total. I find that the time of the third collision was therefore approximately 7:11 p.m.

**32**  The time of the first collision between Mr. Wheeler and the moose is a fact to be determined below on an analysis of the evidence.

**33**  It was fully dark at the time of all three collisions. There was no artificial lighting at the location of the collisions.

**34**  The weather was clear and cold (-10[degrees]C) but it was not yet snowing. Light snow started falling shortly after the third collision. There was snow, described as swirling snow, on the side of the road. The highway conditions were good winter driving conditions. Weather was not a factor in the collisions.

**35**  The speed limit was 100 km/h on the Highway between 228 Road and 230 Road. All three vehicles were being operated at or below the speed limit. Mr. Wheeler was travelling at 90 km/h to 95 km/h. Mr. Ziemer was travelling at 100 km/h or slightly below as was his standard practice. Mr. Walter was likely travelling at 90 km/h although it is possible that it was slightly in excess of 90 km/h. The witnesses, Mr. Greenwood, Mr. Sears and Fire Chief Mike Ryder routinely travel through the area at 100 km/h, the speed limit, day or night. They, who are experienced drivers and experienced in this area, were all of the view that the speed limit was a reasonable and safe speed for this location in these conditions. Excessive speed was not a factor in the collisions.

**36**  The location of the third collision was the subject matter of the testimony of a number of witnesses. Mr. Sears said that the moose carcass was 250 to 500 meters north of the bottom of the dip in the road and that the third collision was about 250 meters south of 230 Road with some distance between the moose and the third collision. Mr. Greenwood estimated the distance from the third collision to 230 Road at 500 meters. Mr. Williams gave evidence that the collision between Mr. Walter and Mr. Ziemer occurred approximately 750 meters south of 230 Road.

**37**  I accept the evidence of the accident investigator, Mr. Williams, as he examined the site in the daylight although his examination was four months later. I find that the location of the third collision was approximately 750 meters south of 230 Road. As these two roads are numbered according to the old mileage system, they are exactly 2 miles or 3.2 kilometers apart. The location of the third collision was therefore approximately 2,450 meters north of 228 Road.

**38**  The site of Mr. Wheeler's collision with the moose was approximately 60 feet or 18 meters south of the third collision. That is the distance at which Mr. Ziemer estimates seeing Mr. Walter's headlights jump into his lane.

**39**  The location of the moose carcass after it was hit by Mr. Walter was, as described by Mr. Flintoff, on the centerline straddling both sides. It is uncertain where the moose carcass was after it was hit by Mr. Wheeler and before it was hit by Mr. Walter. It is probable that most of the carcass was located in the northbound lane.

**40**  With regard to the location of animal warning signs, the evidence was that the closest animal warning signs for both north and southbound traffic were at the top of Taylor Hill which is north of the location of the collisions. There were no signs indicating that drivers should reduce their speed. There are also four or five animal warning signs from the location of the collisions south to Dawson Creek. However, the evidence is that there are wildlife signs all over northern BC, everywhere, even on logging roads. Mr. Dean Daniel who is Operations Manager of the Ministry of Transportation and Infrastructure travels the roads in the south Peace area to patrol and inspect for anything out of the ordinary, including inspections for wildlife issues. He confirmed that animal warning signs are located throughout the Peace River area fairly frequently to indicate that wildlife cross all of the roadways and care is required.

**41**  With regard to whether there is a propensity for moose or wild animals in the area of the collisions, the evidence was consistent that the location of the Walter-Ziemer collision was not in an area known as a moose alley. Mr. Greenwood has been driving between 100,000 km and 150,000 km per year on the roads in northern British Columbia since 1979. He said that personally he has not experienced any excessive moose on the Highway from Dawson Creek to Taylor. The worst place for moose is towards Pink Mountain on the Highway going north from Fort St. John.

**42**  Mr. Sears, who drives that stretch of the Highway 12 times per week, said that he would see moose carcasses on the side of the Highway in the dip once every several months. Although it is an active moose area, he did not describe the area as a moose alley. Mr. Flintoff stated that in terms of moose, his experience is that they are everywhere in the Peace River area, including eating the trees in his back yard. With respect to the section of the Highway from 228 Road to 230 Road, he did not experience any more animals there.

**43**  Mr. Walter, who lives on 228 Road, had never seen a moose in the area of the collisions, and had never heard of this area having a propensity for moose. Mr. Wheeler also stated that this area was no worse for moose than anywhere else in the Peace River area.

**44**  Mr. Daniel, of the Ministry of Transportation and Infrastructure, gave evidence that the propensity for wildlife generally and specifically moose is generally the same all over the Peace River area. It is not any different for the part of the Highway between 228 Road and 230 Road. Mr. Daniel confirmed that the worst area for moose is by Pink Mountain, north of Fort St. John, and the worst area for deer is on Highway 29 towards Hudson's Hope.

**D. The Witnesses**

**45**  The witnesses whose evidence is most relevant to the facts in issue are the parties and the three individuals who arrived at the scene of the third collision shortly after it occurred.

1. Alan Flintoff

**46**  Alan Flintoff was the first person to arrive at the accident scene from the south. He lives in Fort St. John. On February 21, 2011 he was the lead pickup truck in front of a convoy of six Schlumberger Sun Oil Company tractor-trailer trucks.

**47**  Mr. Flintoff did not see the collision occur. As he approached the scene of the collision from Tower Hill, 4.3 km to the south, he first saw the moose carcass, and when he slowed he saw the Ziemer and Walter vehicles angled in the left or west ditch. When he stopped, the moose carcass was still steaming.

**48**  After he stopped, he waved two of the trucks in the convoy through the collision scene. At 7:15 p.m. he placed a call to 911 which lasted for 10 minutes and 54 seconds. Before the end of the call, Mr. Wheeler was waiting to speak to him.

**49**  As he drove north over the crest of Tower Hill visibility was good. Mr. Flintoff did not see any headlights or taillights on the Highway. He also did not see any vehicle on the northbound or east side shoulder of the Highway. The following passages are representative of his unshaken evidence:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q: |  | There were no vehicles parked on the northbound shoulder or the southbound shoulder? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A: | Not that I noticed, no. |  |

He confirmed his evidence that there were no vehicles on the northbound side of the Highway:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q: |  | Did you see anyone pulled onto the west--sorry, the east shoulder, so the northbound side of the Alaska Highway further up the road from the accident site? Did you notice any vehicles? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A: | I didn't notice anything up there, no. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q: |  | So you did not notice any vehicles on the east shoulder with their four way flashers or hazards on? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A: | No. |  |

1. Sheldon Sears

**50**  Sheldon Sears was the first person to arrive at the accident site from the north. He was driving southbound from Taylor where he works as a mechanic to his home at Mile 22 of the Alaska Highway.

**51**  When he arrived at the scene of the third collision, he parked on the west side of the Highway two car lengths north of the Zeimer and Walter vehicles.

**52**  Mr. Sears testified that as he approached the accident scene he did not see any vehicles parked on the east shoulder of the Highway north of the collision scene, other than a minivan. Upon being recalled the next day, he again gave the same testimony. This passage is representative of the totality of his evidence which was consistent throughout:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q: |  | Okay. So let's exclude the minivan. So other than the minivan, can you tell us, sir, as you approached the accident location did you see any other vehicle parked on the northbound shoulder or side of the road? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A: | Not that I recall, no. |  |

**53**  Mr. Sears knew Mr. Wheeler. He described Mr. Wheeler as upset and distraught when he came back to the scene. Mr. Wheeler seemed confused and shocked.

**54**  When Mr. Sears was asked how much time had elapsed after he arrived at the scene until he noticed Mr. Wheeler at the scene, he said "in the vicinity of 10 or 20 minutes" although he qualified his answer by adding "it's really tough to say". His testimony was that it was definitely not within a couple of minutes.

1. Jay Greenwood

**55**  Jay Greenwood had been working in the oil fields in the Dawson Creek area and was driving north on the Alaska Highway towards his home in Charlie Lake. He lived in the same area and did the same type of work that Mr. Wheeler did, and he knew Mr. Wheeler.

**56**  Mr. Greenwood estimated the collision scene to be about half a kilometer south of 230 Road. The Schlumberger lead pickup truck and some of the Schlumberger tractor-trailer units were already there. He testified as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q: |  | ...Now, did you, when you arrived at the scene, see a white Ford F-350 on either shoulder of the highway? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A: | When I arrived at the scene? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q: | Yes. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A: | No. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q: | Okay. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A: | No, I did not when I arrived at the scene. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q: |  | Okay. Did such a vehicle come to the scene at some point in time that you were there? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A: | Yes, it did. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q: |  | And do you know who the operator of that vehicle was? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A: |  | The [indiscernible] of that vehicle is the person that I knew by the name of Red Wheeler. |  |

This passage is consistent with his evidence in this regard.

**57**  Mr. Greenwood testified that 10 to 15 minutes after he arrived at the accident scene, he spoke with Mr. Wheeler.

**E. The Parties**

1. Mr. and Mrs. Ziemer

**58**  Raymond Ziemer, an electrical engineer, was 33 years old in February 2011. He and his wife Jessie Ziemer were travelling with their son Elliott who was 41/2 months old at the time of the collision with the Walter vehicle. They had driven from Fort Nelson that afternoon in their 2003 Chevy Avalanche vehicle which was in good condition. The trip was four hours to Fort St. John; they left there at 6:45 p.m. on their way south. He was driving at or near the speed limit, and probably on cruise control at slightly less than 100 km/h.

**59**  Mr. Ziemer recalls driving up Taylor Hill, and looking at the pull-outs at the top of the hill because they wanted to stop to feed the baby. As there were vehicles in the pull-outs on both sides of the Highway, they decided to keep going for another half hour. His next memory is of noticing headlights in his lane about 60 feet ahead of him and then seeing them jump into his lane. His next memory is of lying in the snow face down and asking about his family.

**60**  When the oncoming lights of the Ford pick-up jumped into his lane, he only had enough time to realise what was happening but no time to react. He has no memory of seeing the moose carcass on the Highway.

**61**  As Mr. Ziemer drove south on a slight downslope past the turn-outs at the top of Taylor Hill, he does not recall seeing any traffic on the Highway ahead or behind of him. He did not see any flashing headlights after seeing the vehicles in the pull-outs.

**62**  Ms. Ziemer had her eyes closed at the time of the collision. She does not remember the trip up Taylor Hill and did not see the oncoming vehicle or the collision.

1. Mr. Walter

**63**  Mr. Walter, who is 29 years old, was born in Russia. English is his third language. He operates his own company which does business in the oil industry in the Peace River area. As a result, he drives long distances for work.

**64**  His vehicle is registered in the name of his company, the defendant and third party W. Aron Ventures Ltd. He resides at the intersection of the Alaska Highway and 228 Road and drives that stretch of highway about four times per day. His plan on the evening of February 21, 2011, was to play drop-in floor hockey in Taylor.

**65**  Mr. Walter was driving his 2004 Ford Super Duty F350 diesel pick-up truck which was in good condition. He testified that when he left his home that evening, he exited from his property to 228 Road, turned right, and then drove north along the Highway. Before he entered the Highway, he looked around and there were no vehicles either way. There were no northbound head or taillights. There were no southbound head or taillights.

**66**  Mr. Walter's speed of travel on the Highway was 90 km/h or possibly a little bit more. Mr. Walter saw no northbound vehicles ahead of him as he drove north. There was one southbound vehicle approaching, but no vehicles following it. As a result, his headlights were on low-beam. He was looking ahead of him on the road and was not distracted by the radio or a cell phone.

**67**  There were no other southbound vehicles other than the one approaching. There were no vehicles ahead of him travelling northbound. There was not a vehicle on the right shoulder, and no vehicle with 4-way flashers or lights or flares. Mr. Walter testified that if he had seen a flare ahead, he would have definitely slowed down because it would be a warning.

**68**  As he was driving, Mr. Walter felt that he had hit something but did not know what he had hit. As soon as he hit it, it threw him out of control and he veered into the opposite lane. Within seconds he saw the southbound headlights coming on him but he could not do anything to avoid the impact.

**69**  Mr. Walter agreed that there was nothing that the driver of the southbound vehicle could have done to avoid the impact.

**70**  Mr. Walter was able to get out of his vehicle after the impact. He recalls the first northbound vehicle arriving within a minute. He knew Mr. Sears who was in one of the first southbound vehicles to arrive. Later while he was standing beside his truck he heard someone (later identified as Mr. Wheeler) say: "I'm the guy who hit the moose." He is fairly certain that the person he came to know as Mr. Wheeler came back 40 minutes to an hour later. However, he is not sure if emergency responders, the first of whom arrived at 7:39 p.m., had arrived yet as he was in shock after the collision.

**71**  Mr. Walter testified that he did not see the white truck of Mr. Wheeler using its flashing hazard lights or any other lights before the collision.

**72**  With regard to the moose carcass, Mr. Walter testified that he did not see it before he hit it. It was a black carcass on a black road surface.

1. Mr. Wheeler

**73**  Mr. Wheeler, who was 71 in February 2011, lives in Charlie Lake, British Columbia. On the day of the collisions, he was driving home from Calgary, Alberta where he had been visiting family. During his 30 years in the oil industry, he drove 90,000 km per year and regularly drove long distances in a day, often in the Peace River area.

**74**  The vehicle driven by Mr. Wheeler was owned by his company, the defendant and third party AAEA Application Assistance and Environmental Assessment Ltd. ("AAEA"). This company was dissolved on January 30, 2012 for a failure to file. At the time of dissolution, Mr. Wheeler was the sole director and officer listed in the material filed with BC Registry Services.

**75**  Mr. Wheeler's vehicle was a white Ford F350 with a diesel engine. It was in good condition. It was equipped with safety equipment including flares kept behind the back seat, a fire extinguisher, a flashlight, tow rope and a set of four chains. He had been told how to operate the flares but had never used flares.

**76**  The truck had aftermarket lighting on the front above the bumper which came on automatically with the high beams. There were also five yellow dome lights on the roof of the truck above the cab, visible from the front and back of the truck, which were tied into the running lights of the truck and always on, but not tied into the four-way flashers. On the back of the truck there are two taillights which flash and two lights the width of the tailgate which do not flash. On the roof near the back of the cab of the vehicle there is a red tube light approximately 8 to 10 inches long which is tied into the flashing light systems. There were also two interior lights and two flashing lights on the exterior mirrors. Although he did not accede to the suggestion in cross-examination that his vehicle was "lit up like a Christmas tree", Mr. Wheeler described his truck with all the lights on as being "definitely a light show".

**77**  Mr. Wheeler was driving at a speed of 90 km/hr although it may have varied 5 km/h either way. While driving north between 228 Road and 230 Road on the Alaska Highway, a moose ran across the Highway from the left side. As soon as Mr. Wheeler saw the animal he tried to avoid it by hitting his brakes and steering to the right. The moose ran into the front left corner of his vehicle and spun off after impact. He testified that did not know whether the moose had been killed or, if so, whether the carcass remained on the highway. However, he intended to go back to the scene after he checked his truck.

**78**  Mr. Wheeler continued braking and brought his truck to a stop in order to check for damage inflicted by the moose. He stopped ten to fifteen seconds later a couple hundred yards north of the site of the collision with the moose.

**79**  As he was coming to a stop he checked his rear-view mirror and saw a cloud of snow behind him on the left side of the road, and brake lights. He thought that a southbound vehicle had swerved off the road. He also saw two southbound vehicles go by him then two northbound vehicles go by as he was coming to a stop.

**80**  When he was stopped to check his vehicle, the motor of his diesel truck was still running. The four-way flashers were activated. He was stopped for between 5 and 10 minutes.

**81**  In order to check his vehicle to determine whether it was still roadworthy, he got out of his vehicle. While he was checking his vehicle he observed lights in the general area where he had hit the moose, and he concluded that another vehicle had either hit the moose or gone off the road and that other vehicles were stopping to assist.

**82**  Mr. Wheeler testified that he got back into his vehicle and drove north a "couple of hundred yards at most" to look for a spot to turn around. His hazard lights were on. He returned to the scene not more than five minutes after the impact with the moose and parked in line behind 4 to 6 southbound vehicles. He told onlookers that he was the guy who had hit the moose. He located Mr. Flintoff on the phone with 911 and waited to speak with him. He was there when the RCMP first arrived and spoke with them to tell them he had had contact with the moose. He does not recall speaking with Mr. Greenwood who he knew from Charlie Lake.

**83**  Only after he returned to the scene did he learn that there had been a head-on collision between the Ziemer and Walter vehicles.

**F. Expert Evidence**

1. Dr. Jason Droll, Ph.D.

**84**  Dr. Jason Droll, who is a Human Factors Scientist, testified at the trial on behalf of the defendant Mr. Walter. His report entitled Human Factors Report and dated March 26, 2013 was filed in evidence. He was qualified to give opinion evidence in the area of perception, response and decision making, and visibility. Dr. Droll was the only expert witness who gave evidence.

**85**  Dr. Droll has substantial qualifications. He holds Ph.D. and Masters Degrees in brain and cognitive sciences, and perceptual psychology which deals with how humans see the world. His specific area of education was visual attention. He attended the University of California, Santa Barbara, as a postdoctoral scholar with studies in visual attention and contrast detection. He also was the recipient of a Central Intelligence Agency grant with respect to visual detection and human expectation dealing with real world detection. He has worked as a Senior Human Factors Scientist since 2008, being involved in numerous matters involving low illumination, visibility factors and contrast.

**86**  Dr. Droll was asked to assess human factors issues relevant to the potential for each of two drivers, Messrs. Walter and Wheeler, to have avoided collision with the moose. His analysis addressed the likelihood that a driver in either of their situations, approaching either a moving or a prone moose on the road, would be able to detect the moose from a sufficiently far distance to allow a successful avoidance maneuver. He also considered whether any additional visibility aids which could have been utilised by Mr. Wheeler would have lessened the likelihood of collision.

**87**  The main components of the analysis are detection; perception response time (or "PRT"), which is the time drivers require in order to respond to a visible hazard; and potential vehicle maneuvers for an attempted avoidance response such as a swerving or braking. The potential for collision avoidance will depend on the remaining distance to the hazard once the driver begins to respond.

**88**  Dr. Droll performed a detailed scientific analysis of detection distance through an analysis of headlight illumination, through mathematical models of visibility contrast, and through review of scientific studies in which experimenters directly measured the distance at which drivers respond to similar hazards.

**89**  It was assumed that the moose was young, and less than the average height of 2 meters tall for an adult moose. When prone it was 2 meters long, and extended 1.5 meters into the northbound lane.

**90**  With respect to detection, as there was no street lighting in the vicinity the detection of the moose was constrained by the illumination cast by headlights. Headlight illumination was considered with low beams for both drivers. Excluding other factors such as glare, a vehicle distance of 38.5 meters from the moose is the threshold of headlight illumination required for detection for young drivers, and at 31.5 meters the threshold required for detection by older drivers is met.

**91**  Dr. Droll states that visual detection is not strictly a function of illumination, in this case headlight illumination, but there must also be sufficient contrast between the hazard and its background. A dark hazard against a dark background will require a closer detection distance in order for a driver in the position of Mr. Walter to visually observe the hazard. In this case the hazard was a dark moose pelt against dark asphalt, so there was not significant contrast.

**92**  The visibility of the moose was calculated using the Adrian Model in laboratory conditions. According to this model a driver is not presented with sufficient detectable contrast between the moose and the asphalt in the background until 32 to 44 meters from the moose. However, validation of the Adrian Model under driving conditions shows that an average young driver may require at least 26 times more contrast than what would be required under ideal laboratory conditions.

**93**  The glare of the approaching Ziemer vehicle headlights must be taken into account in determining the ability of Mr. Walter to observe the moose carcass on the road. Even if the degree of glare was not debilitating, any illuminance directed towards an observer can drastically undermine his or her ability to detect roadside hazards. Each of the estimated detection distances has significant potential to be lessened, or abolished entirely, due to glare.

**94**  When a hazard becomes visible, a driver cannot respond immediately. Following detection, a driver still must undergo their perception-response time, or "PRT".

**95**  Dr. Droll reviewed scientific studies which measured driver detection and response to roadway hazards at night. He concluded that a 2 second PRT would conservatively approximate the response time for a typical driver.

**96**  Dr. Droll addressed the relationship between detection distance and PRT. He stated: "Many of the scientific measurements on driver detection of similar hazards show drivers often reach, or pass, the hazard before detection. Obviously, in these cases, the duration of the driver's perception response time is moot: the collision would have already occurred".

**97**  The opportunity for avoiding collision is limited by the remaining distance available before impact. If Mr. Walter was traveling 90 km/h and detected the moose from an estimated 38.5 m, he would have no remaining distance for an avoidance maneuver, since accounting for 38.5 to 50 meters for response time would mean that he would already be past the object by the time he began an avoidance maneuver. The same would be true if the detection occurred at a distance of 44 meters.

**98**  Dr. Droll concludes that: "Based on calculations of detection distance from headlight illumination, a review of scientific studies on driver detection to similar hazards and perception response time, and remaining distance for vehicle braking, both Mr. Wheeler's and Mr. Walter's collision with the moose was a natural outcome of the inherent constraints of visibility, reaction time, and available vehicle response."

**99**  In lengthy cross-examination, Dr. Droll's analysis and opinions were not shaken. Dr. Droll opined that given PRT and estimates of detection distances, the speed that a vehicle would have to go would be far, far slower than any vehicle would be going on the highway in order to be able to potentially avoid this hazard, and if he was going that slow, then he would be a hazard himself. In further cross-examination, Dr. Droll stated that Mr. Walter had a harder time identifying a prone moose or a carcass as opposed to Mr. Wheeler seeing a walking, standing moose, but he opined that both Mr. Walter and Mr. Wheeler would have had exceptional difficulty detecting the moose carcass and the moose, respectively.

**100**  Dr. Droll went on to consider whether any additional visibility aids would have lessened the likelihood of collision.

**101**  Dr. Droll's conclusions with respect to visibility aids are as follows:

1. Flashing hazard lights within northbound lane - If Mr. Wheeler had positioned his vehicle in Mr. Walter's northbound lane immediately south of the moose carcass with flashing lights, Mr. Walter would have been expected to be able to stop behind the Wheeler Ford thus avoiding collision with the moose.
2. Flashing hazard lights on shoulder, headlights pointed towards moose - If Mr. Wheeler had positioned his vehicle on the shoulder, slightly south of the moose, and angled his vehicle such that the headlights would illuminate the moose carcass, more light would be cast on the moose carcass than would reach the carcass from Mr. Walter's own vehicle as he approached. The hazard lights would allow Mr. Walter to prepare himself for a possible hazard ahead. The Walter vehicle would be capable of significant deceleration, possibly coming to a stop before the moose or reaching the moose at a significantly reduced speed, and allowing Mr. Walter to steer his vehicle around the moose on the right side of the lane.
3. Flares - Mr. Wheeler could have put flares out near the moose and/or behind his vehicle to alert approaching motorists. Flares have proven to be exceptionally effective at communicating potential hazards.
4. Flashlight - In addition to positioning his car south of the moose with flashing hazard lights, Mr. Wheeler could have attempted to alert approaching motorists by waving a flashlight directly towards the oncoming vehicle. Such a waving light together with the flashing lights would further increase a driver's awareness and anticipation of potentially hazardous conditions ahead.
5. Flashing headlights - If Mr. Wheeler had positioned his vehicle either in the northbound lane or on the shoulder, turned off his flashing hazard lights, he could have flashed his headlights on and off or from low to high beam as approaching vehicles came near. This would alert drivers to pay attention, and distinguish the incident conditions from those of a stopped vehicle which is disabled with no other nearby hazards.

**102**  Dr. Droll's conclusion with regard to visibility aids is as follows: "If Mr. Walter had approached the Wheeler Ford with flashing hazard lights, stopped in the northbound lane or on the shoulder, illuminating the moose with its headlights, Mr. Walter would be expected to have been able to stop his vehicle before collision or to have steered around the moose. Additional visibility aids such as flares, a waving flashlight, or actively flashing headlights would have all further helped alert Mr. Walter of the hazard ahead."

**IV. The Law**

**A. *Negligence***

**103**  The elements of ***negligence*** are well-established in Canadian jurisprudence. 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 (*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).

**104**  The driver of a motor vehicle has a duty to conduct himself so as not to expose other users of the highway to unnecessary risk of harm. That driver will be at fault if he does not exercise the reasonable care, reasonable skill or reasonable self-possession that are required in the circumstances, whether they are in emergency or ordinary circumstances (*Sinclair v. Nyehold* [*(1973), 29 D.L.R. (3d) 614*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-K054-G25D-00000-00&context=) (B.C.C.A.) at 618). In short, each driver owes a duty of care to not expose other drivers to unreasonable risk of harm.

**105**  Conduct is negligent if it creates an objectively unreasonable risk of harm. In determining whether a person's conduct creates an objectively unreasonably risk of harm, the court must assess whether or not that person has exercised the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The Supreme Court of Canada outlined the standard of care in *Ryan v. Victoria (City),* [*[1999] 1 S.C.R. 201*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M41J-00000-00&context=) at pp. 221-222 as follows:

Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.

**106**  In *Berk v. Brent*, [*2001 BCSC 1441*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S781-F27X-619N-00000-00&context=), Stromberg-Stein J., as she then was, stated that the standard of care does not require perfection. Rather, the standard of care requires a person to act reasonably in the circumstances (at para. 28).

**107**  Even if a defendant has created a hazard to other drivers, other drivers must exercise reasonable care to avoid that hazard. A driver has failed to exercise reasonable care in circumstances where that driver became or should have become aware of the hazard and had in fact a sufficient opportunity to avoid the accident and where a reasonably careful and skilful driver would have availed himself of that opportunity (*Walker v. Brownlee,* [*[1952] 2 D.L.R. 450*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YH41-JX8W-M05P-00000-00&context=) (S.C.C.) at p. 461). The onus is on the party alleging that a driver failed to exercise reasonable care to prove on the balance of probabilities that that driver did not meet the required standard of care (*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.) at p. 279, aff'd [*[1971] S.C.R. 669*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JBDT-B55K-00000-00&context=)).

**108**  A court may draw an inference that a driver has breached the standard of care because that driver was driving in the wrong lane, but any such inference can be rebutted by evidence that the defendant's conduct was equally consistent with ***negligence*** and no ***negligence*** (*Pitts Enterprises Ltd v. Farkes*, [*2005 BCCA 511*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-JS5Y-B276-00000-00&context=) at paras. 3, 5, aff'g [*2004 BCSC 1493*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-F7ND-G0G2-00000-00&context=)).

**109**  However, there is no automatic presumption of law that a party has been negligent solely on the basis that that party lost control of his car (*Chow-Hidasi v. Hidasi,* [*2013 BCCA 73*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-JGHR-M3D7-00000-00&context=) at para. 20 and *Nason v. Nunes*, [*2008 BCCA 203*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7G1-JX3N-B2HR-00000-00&context=) at para. 14). Some older caselaw indicates that the mere fact that a driver has lost control of their vehicle and been in a collision gives rise to an inference of ***negligence*** (*Savinkoff v. Seggewiss* [*(1996), 77 B.C.A.C. 98*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-F57G-S1SV-00000-00&context=) at para. 28). This case law has now been overturned by the Supreme Court of Canada's decision in *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=), in which Major J. explicitly rejected the argument that the mere fact of a vehicle leaving a roadway gives rise to an inference of ***negligence***. Whether or not such an inference can be drawn can only be determined after considering the relevant circumstances of the particular case, including the weighing of circumstantial evidence (at pp. 432-435). The burden of proof remains with the plaintiff (at p. 433).

**110**  Generally, a plaintiff who suffers personal injury will be found to have sustained damage. Damages may include psychological injury but will not include minor, transient upsets (*Mustapha* at paras. 8-9).

**111**  As a general rule, a plaintiff cannot succeed unless she shows as a matter of fact that she would not have suffered the claimed loss "but for" the negligent act or acts of the defendant. Scientific proof of causation is not required. See *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. 46 and *Hansen v. Sulyma,* [*2013 BCCA 349*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7P1-JCRC-B228-00000-00&context=) at paras. 22-28.

**112**  A person's negligent actions can be the cause of the plaintiff's harm even if there are multiple causes that contribute to that plaintiff's injury or if the ***negligence*** of the plaintiff has contributed to her injury (*Skinner v. Fu,* [*2010 BCCA 321*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-22C6-00000-00&context=) at paras. 19-23, rev'g [*2009 BCSC 1828*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-DXWW-253K-00000-00&context=)).

**113**  The particular concerns that affect causation with respect to the duty to warn are discussed in further detail below.

**B. Wildlife Accident Caselaw**

**114**  With regard to wildlife collision cases, "no general propositions of law can be extracted from them except to say that these cases all depend on the facts" (*Pitts Enterprises* at para. 12). Whether a driver is negligent when he runs into wildlife on the road depends on all of the circumstances of the particular case (*Fajardo v. Horianopoulos*, [*2006 BCSC 147*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7D1-FBFS-S1S7-00000-00&context=) at para. 24).

**115**  There are a substantial number of cases involving motor vehicle collisions with wildlife: see *Pitts Enterprises*; *Fajardo*; *Racy v. Leask*, [*2011 BCSC 846*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-JNCK-22CR-00000-00&context=); *Giffen v. Quesnel* [*(1995), 16 M.V.R. (3d) 252*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-JNJT-B1YJ-00000-00&context=) (B.C.S.C.); *Berk*; *Skinner*; *Schneider v. Steure,* [*[1992] B.C.J. No. 491*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S711-F5KY-B0S2-00000-00&context=) (S.C.); *Maksymetz v. Plamondon,* [*[1988] 5 W.W.R. 281*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DG1-JTGH-B29F-00000-00&context=) (Man. C.A.); *399931 B.C. Ltd. v. MacPherson* [*(1995), 54 A.C.W.S. (3d) 194*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F1WF-M2D6-00000-00&context=) (B.C.S.C.); *Blaine v. Hopkins,* [*[1990] B.C.J. No. 2724*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S701-JJYN-B2WR-00000-00&context=) (S.C.); and *Tabaka v. Greyhound Lines of Canada Ltd.*, [*1999 ABQB 894*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9351-JK4W-M3TK-00000-00&context=). In these authorities, the following factors have been viewed as significant:

1. the time of day when the accident took place;
2. the visibility of the animal, including type and colour of fur, contrast with its surrounding environment, and direction of approach;
3. road conditions and weather conditions, including the presence of rain, ice or fog, and whether the road and surrounding land was straight and level or at a slope;
4. whether or not the accident occurred inside a moose or deer "warning zone", as indicated by signs, generally known to the public, or familiar to the drivers;
5. the applicable speed limit on the road where the accident took place, and the actual speeds of the drivers;
6. the lighting of the area where the collision took place, including the use of any headlights, highbeams, warning flashers, or other lighting equipment;
7. whether traffic was heavy or light; and
8. the condition of the drivers' vehicles.

**116**  With respect to the so-called "moose alley" cases, a "moose alley" is described as being where it is more probable than not that moose will be found (*Racy* at para. 102 and *Fajardo* at para. 31).

**117**  Canadian courts have reached different conclusions on whether a driver is required to significantly reduce their speed when entering a moose warning area. The Manitoba Court of Appeal has held that requiring a driver to reduce speed much below the posted speed limit because of the threat of the sudden appearance on the highway of a large animal, such as a moose or a deer, directly in front of a moving vehicle travelling with dimmed headlights is too high a standard, especially on roads in remote areas. See *Maksymetz* at p. 283.

**118**  In contrast, the Newfoundland and Labrador Court of Appeal has held that the failure to decrease speed appreciably upon entering a moose warning area may create an unreasonable risk of harm, and that the appropriate standard of care may well require drivers to reduce vehicle speed in moose warning areas. See *Baker v. Russell,* [*2008 NLCA 51*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-T8X1-JK4W-M13F-00000-00&context=) at paras. 31-32.

**C. Duty to Warn**

**119**  As stated above, the driver of a motor vehicle owes a duty of care to other users of the highway, and that driver will be at fault if he does not exercise the reasonable care, skill or self-possession that are required in the circumstances. In circumstances where a driver's management of his vehicle exposes other users of the highway to unnecessary risk of harm, that driver may be subject to a duty to warn other motorists of a potential hazard. To be effective, a warning must be near the danger it warns of and must perform the function of warning while the condition or danger exists (*Dagneault v. Hatton* [*(1995) 59 B.C.A.C. 55*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F60C-X178-00000-00&context=) at paras. 42-51). The standard for assessing reasonableness when discharging this duty to warn is objective (*Fajardo* at paras. 37-40).

**120**  A driver who has collided with an animal must take reasonable steps to preclude the possibility of another motorist colliding with that wildlife, but the actions that will constitute reasonable steps will vary depending on the circumstances. Examples of the actions that may be reasonable were provided in *Schneider*, in which the defendant collided with a moose and that moose carcass was later hit by the plaintiff. The defendant did not stop after the collision, but slowed down, looked back through his rear window and believed the moose had been thrown or returned to the ditch area to the side of the road. The defendant continued on his way and phoned the R.C.M.P. when he reached his destination. In the meantime, the plaintiff collided with the carcass of the moose, which was lying largely in her lane of travel. In this case, Robinson J. held that:

...the defendant was negligent in not taking additional steps to preclude, so far as reasonably possible, the possibility of another motorist encountering the moose either in a wounded or deceased condition. The defendant could have, as counsel for the plaintiff argues, made a U-turn and searched some stretch of the road with his headlights or at least stopped and backed up some distance, or perhaps waited in a stationary position for a reasonable time until an oncoming car approached to pass on a warning of the possibility of a moose in the path of that oncoming car. I appreciate that that is of limited value, but any one of these steps would substantiate the defendant's position that he was not negligent. It is to be noted that the defendant's passenger, upon inquiry from the defendant, disclaimed any injury.

(at para. 7)

**121**  A driver is not negligent for a failure to warn other motorists of a hazard if the accident would have occurred regardless of the driver's reasonable steps to warn oncoming traffic. In other words, the plaintiff is still required to prove causation on the balance of probabilities. In *Fajardo*, Ross J. held that because the moose carcass was stretched over the entire oncoming traffic lane, the collision would have occurred in any event. In these circumstances, the plaintiff had failed to establish causation, and his action failed (at para. 40).

**122**  However, causation will be proven if the plaintiff can demonstrate that the failure to take reasonable steps to warn other motorists caused or contributed to the plaintiff's injury. In *Hansen*, the Court of Appeal upheld a decision finding that the driver of a parked vehicle was negligent because he had failed to turn on his hazard lights, even though he was parked off the paved portion of the road. In the result, the driver of the parked vehicle was found to be negligent on the basis that if the parked driver had turned on his hazard lights, the intoxicated second driver would likely have been alerted to the presence of the parked vehicle and the collision would have been avoided or the plaintiff's injury would have been less severe. Significantly, the Court of Appeal held that "Even if deceleration would not have totally avoided the impact but would only have reduced Ms. Hansen's injuries, the 'but for' test was still met" (at para. 29).

**V. Positions of the Parties**

**123**  On behalf of Mr. Ziemer it is submitted that Mr. Wheeler was negligent for hitting the moose, and failed in his duty to warn other motorists of the hazard created by the moose carcass. It is strongly submitted that Mr. Wheeler had sufficient opportunity to take steps to warn other motorists. Mr. Walter bears some responsibility for not keeping a careful lookout as he drove north on the Highway.

**124**  Mr. Ziemer, as a third party, denies his liability and submits that liability for the third collision rests with Mr. Walter.

**125**  The plaintiff Ms. Ziemer on her own behalf and on behalf of the infant Elliott Ziemer submits that Mr. Wheeler is negligent for striking the moose and creating a hazard, and for failing in his duty to warn other motorists of the hazard. It is also submitted that there should be some liability attributed to Mr. Walter for his ***negligence*** in hitting the moose carcass and veering into the lane of oncoming traffic and the Ziemer vehicle.

**126**  Mr. Walter submits that he was not negligent for hitting the moose and veering into the oncoming lane thus colliding with Mr. Ziemer. Nor, he submits, was Mr. Ziemer negligent for failing to see the moose carcass or for the collision with the Walter vehicle. He has no further submissions with respect to whether Mr. Wheeler was negligent for failing to avoid impact with the upright moose. However, if Mr. Walter breached the standard of care and is negligent, then so was Mr. Ziemer as he was travelling at a higher speed in the same circumstances with oncoming glare.

**127**  It is submitted by Mr. Walter that as a further alternative, Mr. Wheeler had a duty to warn and that there were steps that Mr. Wheeler could have taken to warn other drivers in the sufficient time that he had to discharge his duty to warn.

**128**  On behalf of Mr. Wheeler it is submitted that if he was negligent with respect to impacting the moose or failing in a duty to warn, then the court should consider whether Mr. Walter and/or Mr. Ziemer were negligent. Had Mr. Walter been keeping a proper lookout he would have had an opportunity to avoid the collision. Mr. Ziemer's liability would be on the basis that he was travelling too fast and failing to keep a proper lookout. Apportionment should be 33 and 1/3% to each driver.

**VI. Discussion**

**A. Credibility and Reliability of the Witnesses**

**129**  I agree with counsel for the plaintiff Mr. Ziemer that Mr. and Ms. Ziemer's testimony is unimpeachable. Mr. Ziemer's evidence was understated and given in a manner of meticulous caution. His evidence of seeing vehicles in the pull-outs at the top of Taylor Hill is accepted as is his evidence that he recalls seeing no other vehicles between the top of Taylor Hill and the location of the collision other than the approaching Walter vehicle.

**130**  As his next memory after seeing the vehicles in the pull-outs is seeing the oncoming headlights, I conclude that if there had been a vehicle either parked on the shoulder of the northbound lane with various warning lights activated or traveling in the northbound lane towards him, he would have seen and recalled it. In this regard I note particularly the nature and extent of the lights on the Wheeler vehicle.

**131**  Both Mr. and Ms. Ziemer were very credible witnesses. Mr. Ziemer's answer to the question, "And do you recall any flashing headlights, four-way flashers, anything like that as you were climbing the hill?" is given considerable weight. He said:

"No. I recall seeing some vehicles in the pullouts, but I don't recall seeing any oncoming traffic or flashing lights or anything".

**132**  I find Mr. Walter to be a credible and forthright witness. In his testimony, he gave clear yes and no answers to questions when he was sure of the answers, and was also straightforward when he was not certain or did not recall. He had clear recall of matters prior to the collision, such as the traffic on the Highway when he entered from 228 Road and drove north, and less certain recall of events after the collision such as the sequence and timing of events after the impact. Mr. Walter was an accurate and reliable historian of the events prior to the third collision, and I accept his evidence of those events.

**133**  Mr. Wheeler was not attempting not to be truthful with the court. Throughout lengthy cross-examination I cannot find that he intentionally answered any question inaccurately. However, in many respects I do not find Mr. Wheeler's evidence to be reliable. As all counsel described, Mr. Wheeler has to some extent innocently or unwittingly re-constructed some portions of the events of the evening of February 21, 2011 after his collision with the moose. Rather than state that he did not remember or was unsure of the answer to a question, he often attempted to piece together his prior evidence and statements along with the other evidence. His cadence and pauses in responding were indicative.

**134**  I will specify below which portions of his evidence I do not accept, primarily because it is not supported by the evidence of any other witness, and also due to some internal inconsistencies. I note that Mr. Wheeler was distraught, shocked and confused when he returned to the scene of the third collision, states which make it more difficult to have accurate recall of difficult events.

**135**  The three independent witnesses who arrived at the scene after the third collision, Messrs. Flintoff, Sears and Greenwood, were all credible and reliable. I accept their evidence as being forthright and dispassionate, and of assistance to the court in determining the factual issues which must be resolved.

**B. The First Collision - Mr. Wheeler's Collision with the Moose**

**136**  Mr. Wheeler testified that the moose ran across the Highway from his left as he travelled north at approximately 90 km/h. He stated that his headlights were on low beam because of oncoming traffic. I accept his evidence in this regard. As will be discussed below, I find that Mr. Wheeler was travelling north in that area some time prior to when Mr. Walter and Mr. Ziemer were on the stretch of highway between 228 Road and 230 Road. The oncoming traffic did not include the Ziemer vehicle.

**137**  When the moose came into his line of vision, he was barely able to get his foot on the brake. He had his foot on the brake, slowing, at the time of impact.

**138**  As indicated above, whether a driver is negligent when he runs into wildlife on the road depends on all of the circumstances of the particular case (*Fajardo* at para. 24). In this case the most significant factor was visibility.

**139**  The other factors did not contribute to the circumstances leading to the collision. Mr. Wheeler was driving at a safe speed at or below the speed limit and the traffic was very light at the time of the collisions. The weather and road conditions were good for winter driving. His vehicle was in good condition and equipped for winter driving in the north. Further, although moose were common in the area, the collisions did not occur in a moose alley. As in *Fajardo,* the collisions happened in an area where it was possible but not more probable than not that moose would be encountered (at para. 31).

**140**  However, as set out in the evidence of Dr. Droll, visibility was problematic in these circumstances. I rely on the report of Dr. Droll. He considered detection, perception response time, and potential vehicle maneuvers. He concludes that Mr. Wheeler's collision with the moose was a "... natural outcome of the inherent constraints of visibility, reaction time, and available vehicle response."

**141**  As in *Pitts Enterprises,* the moose in this case was not visible until it was too late to take evasive action. The moose had a dark pelt, and was contrasted against a dark background. Further, the road was not illuminated by artificial light, so the moose would not be illuminated until it was within the reach of the Wheeler vehicle's low beam headlights. Given Mr. Wheeler's speed of 85 to 95 km/h, he would not have had an opportunity to take evasive maneuvers in the time between seeing the moose and colliding with it.

**142**  The standard of care for this stretch of highway is the same as it is generally throughout the Peace River area, namely that wildlife including moose are a known hazard generally. A driver must be actively observing the road and must be equipped to perceive and respond to possible hazards including moose, for example, by having working headlights and functioning brakes. However, that does not require each driver to be able to see animals in circumstances where they could not be expected by a reasonable driver, such as before an animal suddenly runs in front of a vehicle or when an animal is not readily visible such as a dark, prone carcass on a dark highway at night. The standard of care does not require a driver to take unreasonable precautions.

**143**  Taking into account all of the circumstances of Mr. Wheeler's collision with the moose including that he was travelling below the speed limit on a familiar road, that the location of the collision was not a moose alley, and that the dark animal was minimally visible in the dark against low beam headlights, I find that Mr. Wheeler did not breach the standard of care by colliding with the moose. He is not negligent for this collision.

**C. The Second Collision - Mr. Walter's Collision with the Moose**

**144**  I come to the same conclusion with regard to Mr. Walter's ***negligence*** in hitting the moose carcass and find that he was not negligent for that collision.

**145**  Mr. Walter lived close to the location of the collision and was therefore very familiar with the area. I accept his evidence and find that he was travelling at a safe speed below the speed limit, paying attention to his driving and the road in front of him, and keeping a proper lookout.

**146**  Similarly as with Mr. Wheeler's collision with the moose, visibility is the most relevant circumstance. I rely on Dr. Droll's expert evidence that the collision was a natural outcome of inherent constraints. However that conclusion is stronger in the case of Mr. Walter as the moose carcass was a prone stationary dark mass lying mostly in his lane on dark asphalt. Mr. Walter had his headlights on low beam as the Ziemer vehicle was approaching, and thus was faced with glare from the oncoming Ziemer vehicle as well as an inherent inability to detect the carcass. As indicated by the expert evidence, a driver's perception response time is further reduced in the case of glare.

**147**  The circumstances in this case are similar to *Pitts Enterprises*, in which the plaintiff collided with a moose and swerved into the opposite lane, resulting in a head-on collision with the plaintiff. Powers J. held that the defendant driver was not negligent on the basis that moose was not visible until it was too late to act:

In the present case, the moose was dark, almost black with non-reflective eyes. The defendant was simply unable to see the moose within time to stop. I have already found that this is not an area which could be described as a "moose crossing" or "moose alley" as referred to in some of the cases. I also find that given the roads conditions, lighting conditions and the possibility, but not necessarily the expectation that moose would be on this road, the defendant was not negligent in driving at 90 to 95 kilometres per hour. Driving at 80 kilometres per hour would not have made a material difference. The earliest the moose would have been visible to the defendant was when the defendant's lights would have illuminated the moose. The evidence is that the lights illuminated the highway 40 to 50 yards ahead. Even if the moose were not a dark object, as it was, at best the defendant would only have been able to see the moose a fraction of a second before he actually did. The headlights illuminated a distance of 40 to 50 yards, which is 120 to 150 feet. Even travelling at 80 kilometres an hour, he still would have travelled approximately 73 feet per second. This would not have made a material difference in this accident.

(at para. 35)

**148**  A comparison with the circumstances of Mr. Flintoff is not of assistance. Although Mr. Flintoff did see the moose carcass when he approached, he was travelling at a lower speed as a lead vehicle, using his high beams and did not have glare from oncoming vehicles.

**149**  The facts of Mr. Walter's collision with the moose carcass are well discussed in the report of Dr. Droll. He fully considers the ability of a driver such as Mr. Walter to detect a hazard by examining headlight illumination, contrast, and glare in these circumstances. Dr. Droll determined that the PRT is such that the collision would have already occurred by the time the driver has detected the hazard. I accept his conclusion that "it is expected that a typical driver in Mr. Walter's situation would have very likely collided with the moose."

**150**  Mr. Walter therefore did not breach the standard of care by colliding with the moose in these circumstances.

**D. The Third Collision - Mr. Walter and Mr. Ziemer Collide**

**151**  Mr. Ziemer observed the oncoming headlights jump into his southbound lane at about 60 feet or 18 meters from his vehicle which was approaching at approximately 100 km/h, or approximately 28 meters per second. It is apparent that, together with the approach time of the Walter vehicle towards the Ziemer vehicle, there was no opportunity for Mr. Ziemer to respond to the oncoming hazard in his lane of travel.

**152**  With regard to Mr. Ziemer's ability to see the moose carcass on the road, it is accepted that the carcass was mostly in the northbound lane. The analysis and conclusion of Dr. Droll are also applicable to the Ziemer vehicle: Mr. Ziemer's ability to detect the prone, dark carcass against the dark asphalt background was constrained by the glare of the headlights of the Walter vehicle.

**153**  I find that both Mr. Ziemer and Mr. Walter were not negligent in these circumstances for their collision.

**E. Duty to Warn - Mr. Wheeler's Conduct after the First Collision**

**154**  A driver who has collided with wildlife must take reasonable steps to preclude the possibility of another vehicle colliding with that wildlife. The actions which will constitute reasonable steps will vary depending on the circumstances. The time available to the driver who has collided with the wildlife is an important factor to consider in assessing reasonableness.

**155**  Mr. Wheeler does not dispute that he had a duty to warn; he says that he had no opportunity to warn because the third collision occurred before he stopped to check his vehicle.

**156**  In order to resolve the issue of whether Mr. Wheeler had sufficient time to warn other motorists, the factual issues of the length of time between Mr. Wheeler hitting the moose and the third collision, and of the distance of Mr. Walter behind Mr. Wheeler must be resolved.

**157**  It is also Mr. Wheeler's position that he discharged his duty to warn other drivers of the hazard, the moose carcass on the Highway. He testified that he returned to the scene of his collision with the moose as soon as possible and within 5 minutes. I am satisfied that Mr. Wheeler was aware that the moose constituted a hazard to other drivers based on his eventual return to the scene of the collisions.

**158**  In order to resolve the issue of whether or not Mr. Wheeler fulfilled his duty to warn of the hazard, it is necessary to examine the observations of the other drivers in the vicinity.

**159**  I find that that the entirety of the evidence of Messrs. Walter, Ziemer, Flintoff, Sears, and Greenwood is neither consistent with nor supportive of the evidence of Mr. Wheeler in key areas. It is their evidence which I prefer. These are my reasons.

**160**  In order to commence the analysis I start with a blank map of the area between 230 Road and 228 Road. There are three relevant time frames provided by the evidence.

**161**  The first time frame is after Mr. Wheeler hit the moose and pulled over to the side of the road to check his vehicle but before the Walter-Ziemer collision occurred. His evidence is that approximately three, or a line or string of vehicles was heading southbound at that time and these vehicles passed him. As he was slowing to a stop and pulling over, he saw in his rear view mirror a puff of snow to the left side of the road. It was illuminated in the headlights and taillights of those southbound vehicles. He assumed that a vehicle had gone off the road, thus creating the puff of snow. Other vehicles stopped at that location.

**162**  The location where he stopped at the side of the road was 100-150 yards north of the moose which was lying flat on the Highway. Mr. Wheeler's vehicle at this point was in his words, "definitely a lightshow". After he completed his vehicle check, he testified that he got back in his vehicle and travelled at most another 200 yards north before turning around and returning to the accident scene. According to his testimony, he therefore travelled at most a total of 350 yards north of his collision with the moose before turning around to head south back to the scene of the moose on the road. 350 yards is the equivalent of 320 meters. 230 Road is 750 meters north of the location of the Walter-Ziemer collision, and would be further north of the scene of the collision with the moose. Thus Mr. Wheeler's movements would have been entirely in the area south of 230 Road and south of the slight curve to the west.

**163**  Mr. Ziemer and Mr. Walter provide evidence which is consistent between those two drivers and which differs from Mr. Wheeler's evidence about the events on the Highway between 228 Road and 230 Road during this timeframe between the first and third collisions. As Mr. Ziemer travelled south, after having ascended Taylor Hill and passing the pullouts, he saw no vehicles parked on the side of the road and no vehicles with lights until he saw the headlights which then jumped into his lane.

**164**  As Mr. Walter entered onto and travelled north from 228 Road, he saw no vehicles on the side of the road, and no vehicles with lights visible except for the Ziemer vehicle travelling southbound toward him. If Mr. Wheeler had been on the Highway before 230 Road, stopped or travelling in either direction, Mr. Walter would have seen him.

**165**  The third collision occurred more or less 750 meters south of 230 Road. Again, 228 Road and 230 Road are numbered according to the old mileage system, and the two crossroads are exactly 2 miles, or 3.2 kilometers, apart. Thus, the point of the accident was approximately 2,450 meters north of 228 Road. A speed of 90 km/h is equivalent to 25 meters per second. It would have taken Mr. Walter approximately 110 seconds to traverse the distance from 228 Road to the accident site (98 seconds to traverse this distance plus 12 seconds to get up to speed). In this entire time frame, he did not see any vehicles proceeding northbound ahead of him. The Alaska Highway from 228 Road to just south of 230 Road is straight. I conclude that Mr. Walter did not see Mr. Wheeler because Mr. Wheeler was out of sight, having driven north of 230 Road.

**166**  I prefer the evidence of Messrs. Ziemer and Walter. I conclude from their evidence that at the time of the collision between them and for the duration of their travel south from 230 Road and north from 228 Road respectively, they were the only vehicles on that stretch of highway.

**167**  The second relevant timeframe is the period between the Walter-Ziemer collision and the arrival of Mr. Sears and Mr. Flintoff, who were the first witnesses southbound and northbound respectively to arrive at the scene of the Walter-Ziemer collision. Mr. Sears and Mr. Flintoff both testified that they recall no vehicles parked on the side of the Highway. As Mr. Sears drove south having crested the Taylor Hill and come around the bend towards the straight stretch south of 230 Road, he did not see the collision. He did not see any other vehicle except the Schlumberger convey.

**168**  As Mr. Flintoff travelled north from 228 Road, he did not see the collision. At first the moose then the motor vehicle accident came into view. He did not observe any vehicle and no vehicle or any lights matching the description of the Wheeler vehicle. It was his role as lead driver to be aware of the road ahead. I put significant weight on his evidence. Mr. Wheeler was not there to be seen.

**169**  The third relevant timeframe is the period while the witnesses waited for emergency responders. The evidence for this timeframe was provided by Mr. Sears, Mr. Flintoff, and Mr. Greenwood, whose evidence indicated that there was a line of cars parked in the southbound direction behind the Sears vehicle. At this time Mr. Flintoff was on the telephone to 911. Mr. Wheeler arrived and parked in the line of southbound vehicles about fifth or seventh. He then located Mr. Flintoff and waited for him to finish his telephone conversation with the 911 operator.

**170**  Neither did any of Messrs. Flintoff, Sears, or Greenwood observe a vehicle stopped on the shoulder or driving north or south bound north of the third collision in the third scenario above. Mr. Sears testified that Mr. Wheeler arrived at the scene more than a couple of minutes after he arrived. Mr. Wheeler spoke to Mr. Flintoff as he completed the 911 call at 7:26 p.m., and had waited a couple of minutes for the call to end.

**171**  From these observations, I conclude that after Mr. Wheeler pulled over to check his vehicle after the moose collision, he drove further north than the distance he described. If he had travelled 200 yards after his vehicle check or 350 yards total after the collision, his vehicle would have been observed by Messrs. Walter and Ziemer as they approached each other. It would also have been observed by the three independent witnesses as they approached the scene of the third collision. This is particularly so given the quantity and luminance of the lighting built into his truck which is illuminated when driving and when parked.

**172**  Mr. Wheeler submits that the Ziemer vehicle was the last of this group of southbound vehicles, and that Mr. Walter was 100 meters behind him. Thus the puff of snow he saw was the Walter-Ziemer collision. Since it occurred 10 to 15 seconds after Mr. Wheeler hit the moose, he had no opportunity to warn.

**173**  I do not accept the submission that the puff of snow was the Walter-Ziemer collision. Again, it is entirely inconsistent with the evidence which I prefer of Mr. Walter whose evidence establishes that there were no other vehicles on that stretch of the Highway at the time of the Walter-Ziemer collision. Specifically, I accept Mr. Walter's evidence that neither the Wheeler vehicle nor two unidentified vehicles in front of the Ziemer vehicle were on the road at that time.

**174**  Further, the conclusion that the puff of snow was the Walter-Ziemer collision is an example of reconstruction. There is no evidence that Mr. Ziemer was in a line of vehicles at the time he collided with Mr. Walter, and no evidence that Mr. Wheeler's truck, slowing or parked, was observed by anyone at the scene.

**175**  From the entirety of the evidence and the conclusion that Mr. Wheeler was north of 230 Road and out of sight during the time of the third collision and the arrival of the independent witnesses, a time-line can be determined. The time of the 911 call is known; Mr. Flintoff's arrival time at the scene of the collision can be estimated; Mr. Walter's driving time for the distance of 2,450 meters from 228 Road to the collision scene can be calculated; and Mr. Wheeler's evidence of the time from his collision to the stop and the time taken for the vehicle check is taken into account.

**176**  I conclude that the Walter-Ziemer collision occurred at approximately 7:11 p.m. in the following sequence of events:

1. 7:02 p.m. - Mr. Wheeler collides with the moose;
2. 7:03 p.m. - Mr. Wheeler comes to a stop and checks his vehicle;
3. 7:08 p.m. - Mr. Wheeler continues to drive north;
4. 7:09 p.m. - Mr. Wheeler drives north past 230 Road and is out of sight to drivers to the south;
5. 7:09 p.m. - Mr. Walter leaves home and sees no vehicles as he enters the Highway from 228 Road;
6. 7:11 p.m. - Mr. Walter collides with the moose carcass, loses control and veers into the oncoming southbound lane where he collides with Mr. Ziemer;
7. 7:14 p.m. - Mr. Flintoff arrives at the collision scene and waves through 2 vehicles in his convoy;
8. 7:15 p.m. - Mr. Flintoff calls 911;
9. 7:23 p.m. - Mr. Wheeler arrives at the scene of the third collision, finds Mr. Flintoff, and waits for him;
10. 7:26 p.m. - The 911 call ends and Mr. Flintoff speaks with Mr. Wheeler; and
11. 7:39 p.m. - The first emergency responders arrive.

**177**  Minimum times have been utilised in this timeline. For example, Mr. Wheeler could have resumed his travel north earlier than 7:08 and still been outside the view of Mr. Walter as he entered 228 Road. Mr. Wheeler could have taken closer to 10 minutes rather than 5 minutes to complete his vehicle check.

**178**  I conclude that the latest time possible for Mr. Wheeler's collision with the moose was 7:02 pm. It was therefore at least 21 minutes after he hit the moose that he arrived at the scene of the third collision.

**179**  More importantly, there was a minimum of 9 minutes between the collision of Mr. Wheeler and the moose, and the Walter-Ziemer collision. Mr. Wheeler's duty to warn arose when he hit the moose. At that time he should have reasonably concluded that he had, although inadvertently, created a hazard on the road. Nine minutes was ample opportunity for him to have taken steps to warn other motorists.

**180**  Warning other motorists of the hazard that he had good reason to believe was lying on the road was a duty. The duty arose at the time that he hit the moose. Not utilising the available 9 minutes to fulfill that duty was a breach of his duty. That breach caused the collisions between Mr. Walter and the moose and the Walter-Ziemer vehicles.

**181**  Mr. Wheeler had options regarding the manner of warning. He could have walked but testified that he did not walk back because he did not think it was a necessity and it was cold out; it was not a problem to drive back. He could have backed his vehicle up on the shoulder. He testified that he understood the use and value of flares.

**182**  It was neither prudent nor necessary to check his vehicle before warning other motorists. However, if it is accepted that Mr. Wheeler, in the agony of collision, made an erroneous decision to attend to his vehicle before fulfilling his duty to other motorists, there remained at least 3 minutes, and more if he had had a sense of urgency in checking his vehicle, between the time that Mr. Wheeler completed his vehicle check and the Walter-Ziemer collision. His second decision, to drive away after checking his vehicle rather than take steps to warn from that location, led directly to the collisions of Mr. Walter with the moose and thus the Walter-Ziemer collision.

**183**  Turning around was not necessary in order to warn other motorists, particularly given that Mr. Wheeler had flares and he had an extraordinarily well-lit truck. Taking the time to turn around is also inconsistent with a timely exercise of the duty to warn. However, as it is Mr. Wheeler's evidence that it was not safe to turn around where he had stopped and he needed to go further north to find a safe place to turn, I will examine that evidence.

**184**  I do not accept his evidence of the difficulty in finding a place to turn. His evidence was that he stopped 100-150 or 200 yards from the moose which is a distance of 91 to 182 meters. 230 Road was 750 meters north of the Walter-Ziemer collision and some distance further (about 60 feet) from the moose hit, which is a total of 768 meters. Mr. Wheeler therefore had at least 586 meters before 230 Road. Even if that one-half kilometer did not afford a safe turning area, he could have turned at 230 Road if his intention was to turn and drive south. His stated intention is not confirmed by his actions after he collided with the moose.

**185**  The report of Dr. Droll lists steps that Mr. Wheeler could have taken to warn other motorists of the hazard. They include engaging hazard lights, pointing headlights or a flashlight towards the moose, using flares, and flashing headlights at oncoming traffic. Many of those steps could have been taken at the location of his stop. Mr. Ziemer in particular would have been warned if Mr. Wheeler had flashed his headlights at him as he drove south. Mr. Walter would have seen flashing lights down the Highway past the moose, and both drivers would have seen the flares.

**186**  In *Francoeur v. Thibodeau*, [*2002 NBQB 97*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7H-KW91-JPGX-S26R-00000-00&context=) the Court of Queen's Bench of New Brunswick examined the kind of actions that could satisfy the duty to warn following a wildlife collision. The trial judge estimated that a period of approximately 12 minutes had elapsed between the time of the defendant driver's initial collision with a moose and the plaintiff's subsequent collision with that moose carcass (at para. 41). During this time, the defendant pulled his vehicle into the right-hand shoulder of the road, engaged all his lights and hazard flashers, and began to install his safety triangles (at paras. 28-29, 33, 49). In the result, the trial judge was satisfied that "all of the time spent by Mr. Thibodeau between the two collisions, was time prudently and reasonably necessary to secure the scene and warn other users" (at para. 42).

**187**  Mr. Wheeler failed to take any reasonable or entirely possible steps over the period of approximately 9 minutes before the third collision. He did not return to the scene until a minimum of 21 minutes had passed. I find that in these circumstances, his failure to take any steps to warn other motorists of the hazard posed by the moose carcass fell below the standard of care.

**188**  I further find that but for Mr. Wheeler's failure to warn other motorists, the Walter-Ziemer collision would not have occurred or would have been likely to result in significantly decreased injury.

**189**  This is not a case like *Fajardo,* in which the collision would have occurred even if the defendant driver had taken reasonable steps to warn other motorists (at para. 40). Unlike in *Fajardo,* the hazard in this case did not take up the entire highway lane. Further, because the weather was clear and Mr. Walter and Mr. Ziemer could see each other approaching, it is unlikely that they would have collided if they had taken evasive action to avoid the moose, which also distinguishes this collision from the accident in *Fajardo.*

**190**  Most importantly, I find that both Mr. Ziemer and Mr. Walter would have been likely to avoid or lessen the impact of the collision if they had been warned that there was an approaching hazard. I accept Mr. Walter's evidence that he would have slowed if he had seen flashing lights which he would have understood as a warning. I also find that Mr. Ziemer was an attentive driver and that he would have been likely to respond to a warning signal from Mr. Wheeler. Both of these findings are supported by the persuasive expert evidence of Dr. Droll which indicated the ways in reasonable drivers could be assisted by roadside warnings of an upcoming hazard.

**191**  In conclusion, I find that Mr. Wheeler breached his duty to warn other motorists of the hazard posed by the moose carcass, and that this caused the Walter-Ziemer collision.

**E. Conclusions on Liability**

**192**  I therefore find that: Mr. Wheeler was not negligent for the collision with the moose; Mr. Walter was not negligent for the collision with the moose or for crossing the center line and colliding with Mr. Ziemer; and Mr. Ziemer was not negligent for the collision with Mr. Walter. No liability arises from these collisions.

**193**  Mr. Wheeler, I find, was negligent because he breached his duty to warn other motorists of the moose, which I find he knew was a hazard on the Highway after he collided with the moose. But for his ***negligence*** the accident could have been averted. He is liable for this ***negligence***.

**F. Liability of the Corporate Defendants AAEA**

**194**  One outstanding issue to be addressed is the liability of the corporate defendant, AAEA. Mr. Wheeler argues that s. 346 of the *Business Corporations Act,* *S.B.C. 2002, c. 57* precludes the claims of the plaintiffs Jesse and Elliott Ziemer. For the reasons that follow, I disagree with Mr. Wheeler's interpretation, and find the defendant AAEA jointly liable with Mr. Wheeler to all three plaintiffs.

**195**  The vehicle that Mr. Wheeler was driving at the time of the collision was registered to AAEA. Mr. Wheeler testified that this was his company. Mr. Wheeler is listed as the sole Director and President and Secretary of this company in the BC Company Summary filed with BC Registry Services on June 19, 2008. This company was dissolved on January 30, 2012 for a failure to file. At the time of dissolution, Mr. Wheeler was still the sole director and officer listed in the material filed with BC Registry Services.

**196**  Although the vehicle was registered to AAEA, the evidence at trial was that Mr. Wheeler used this as a personal vehicle as well as a business vehicle. On the night in question, he was using the vehicle solely as a personal vehicle, driving to his home at Charlie Lake from a family visit.

**197**  The owner of a vehicle may be vicariously liable for the ***negligence*** of a driver as a result of that driver's deemed employment by operation of s. 86(1) of the *Motor Vehicle Act,* *R.S.B.C. 1996, c. 318*. However, s. 86(2) provides that nothing in paragraph (1) relieves a negligent driver from his or her liability for the loss or damage resulting from an accident. Obviously liability rests with the negligent driver and the statute does not extinguish that driver's liability (*Yeung (Guardian ad litem of) v. Au,* [*2006 BCCA 217*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B22N-00000-00&context=) at para. 35, aff'd *Transportaction Lease Systems Inc. v. Yeung (Litigation guardian).* [*286 D.L.R. (4th) 193*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B19T-00000-00&context=) [S.C.C.]). In other words, in ordinary circumstances both Mr. Wheeler and AAEA would be liable for any damage caused by Mr. Wheeler's ***negligence***.

**198**  Section 346(1) of the *Business Corporations Act* provides that despite the dissolution of a company under that Act a legal proceeding may be commenced against that company within two years of its dissolution and that such proceedings may be conducted as if the company had not been dissolved. There are very few cases decided under s. 346. However, it is clear that because of s. 346 it is no longer a defence to claim that a company has dissolved and has no assets (*Carmanah Pacific International Industries Corp. v. Westex Timber Mills Ltd.,* [*2009 BCSC 1102*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-625G-00000-00&context=) at para. 36).

**199**  Section 346(1) of the *Business Corporations Act* causes AAEA to remain liable under s. 86(1) of the *Motor Vehicle Act* despite its dissolution. The remedies that may be taken against AAEA are laid out elsewhere in the *Business Corporations Act,* including ss. 347 to 349. Although these remedies may be impracticable in certain circumstances they are available to an injured plaintiff.

**200**  Mr. Wheeler has noted that Raymond Ziemer's claim was brought before the date that AAEA was dissolved, but the claims of Jesse Ziemer and Elliott Ziemer were brought later on after AAEA's dissolution. Based on a strict reading of s. 346, Mr. Wheeler argues that because paragraph (a) explicitly deals with proceedings commenced before a company's dissolution, and because paragraph (b) deals with proceedings that are commenced after dissolution, paragraph (a) does not apply to the claims of Jesse Ziemer and Elliott Ziemer.

**201**  I do not agree with Mr. Wheeler's interpretation of the statute. Section 346(1)(b) provides that as long as the litigation has been brought within two years after the dissolution of a company, legal proceedings may be brought against that company. Section 346(1)(a) provides that if proceedings are brought against the company, then they continue as if the company had not been dissolved. The structure of s. 346(1) is one continuous sentence, which makes it clear that these provisions are to be read together and that the subsequent clause, paragraph (b), is to be read into the prior clause, paragraph (a). Therefore, proceedings that are commenced under s. 346(1)(b) may proceed as if the company had not been dissolved.

**202**  Mr. Wheeler has argued that s. 346(1) does not state that judgment can be brought against a dissolved corporation. Again, I disagree with this interpretation. Although paragraph (b) does not explicitly state that judgment may be taken against a dissolved corporation, the purpose and structure of the entire provision make it clear that judgment can be acquired from a dissolved corporation. If it were not possible to collect judgment in the course of such proceedings, then the right to commence proceedings would be a meaningless right. The entire object of s. 346 requires that judgment can be taken from a dissolved corporation if a plaintiff is successful. This interpretation is supported by reading s. 346 alongside s. 349, which provides a mechanism for plaintiffs to collect judgment from dissolved corporations.

**203**  The claims brought against AAEA by Raymond Ziemer, Jesse Ziemer and Elliott Ziemer are valid under s. 86 of the *Motor Vehicle Act* and s. 346 of the *Business Corporations Act*. AAEA is jointly liable to each of the plaintiffs along with Mr. Wheeler.

**204**  Given my finding that Mr. Walter is not liable for the plaintiffs' damages, the defendant W. Aron Ventures Ltd. is not vicariously liable to the plaintiff under s. 86 of the *Motor Vehicle Act*.

**VII. CONCLUSIONS**

**205**  In Action No. 1139170, Mr. Ziemer is entitled to judgment against the defendants Wheeler and AAEA. His claim against Mr. Walter and W. Aron Ventures Ltd. is dismissed. The third party claims against Mr. Walter and W. Aron Ventures Ltd. are dismissed. The claim by Mr. Walter and W. Aron Ventures Ltd. that they are entitled to judgment in their third party claim against Mr. Wheeler and AAEA for indemnity is dismissed.

**206**  In Action No. 1242042, Ms. Ziemer on her own behalf and on behalf of the infant Elliott Ziemer are entitled to judgment against the defendants Mr. Wheeler and AAEA. The claims against Mr. Walter and Aron Ventures are dismissed. The third party claim against Mr. Ziemer is dismissed.

**207**  If counsel cannot otherwise agree they should make arrangements with Supreme Court Scheduling to speak to the matter of costs.

J.E. WATCHUK J.

**End of Document**

[***Allen (Litigation guardian of) v. Bishop of Victoria (c.o.b. St. Joseph's General Hospital), [2016] B.C.J. No. 1221***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K2F-CNC1-JKPJ-G2X0-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

T.M. McEwan J.

Heard: June 8-11, 15-18, 22-25, 29 and 30, 2015.

Judgment: June 13, 2016.

Docket: S130659

Registry: Vancouver

**[2016] B.C.J. No. 1221** | 2016 BCSC 1078

Between Brenna Allen, an infant by her litigation guardian Melissa Allen and Melissa Allen, Plaintiffs, and The Bishop of Victoria, A Corporation Sole operating as St. Joseph's General Hospital, Dr. B. Mathew Bagdan, Dr. Donald G. Wilson, Dr. Dennis L. Hartman, Dr. Natalie J. Aird, Lisa Bradley, RN, Leah McCarthy, RN, Robyn Clarke, RN, T. Norris, RN, J. Hall, RN, Mary Robertson and Drs. John Doe and/or Drs. Jane Doe #1, 2, 3, and John Doe, RN, #1, 2, 3, and/or Jane Doe, RN #1, 2, 3, Defendants

(142 paras.)

**Case Summary**

**Health law — Health care professionals — Liability (malpractice) — *Negligence* — Duty of care — Standard of care — Particular professions — Nurses — Action by infant Brenna for damages against Nurses Bradley, Robertson, and hospital for *negligence* for injuries experienced during her birth dismissed — Bradley attended on Brenna's mother during labour and delivery — During birth, Brenna's brain was deprived of oxygen for period of 20 minutes or more — As result, Brenna had spastic quadriparetic cerebral palsy, and was profoundly disabled — Bradley did not fail in her duty of care or in applying requisite standard of care — Claims against Robertson and hospital were not proven — There was no basis to infer that Bradley did not accurately monitor fetal heart rate.**

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| Action by infant Brenna for damages for ***negligence*** for injuries experienced during her birth. When Brenna's mother, Melissa, attended at the hospital in labour, Nurse Bradley applied EFM, showing normal fetal heart activity. Melissa was discharged, and returned to hours later when her labour had progressed. Brenna was born at 5:30 am. During the process of birth, Brenna's brain was deprived of oxygen. Brenna experienced an acute profound hypoxic ischemic brain injury, and as a result had spastic quadriparetic cerebral palsy, and was profoundly disabled. At some point before birth, Brenna's brain was deprived of oxygen for a period of 20 minutes or more, which would have been reflected in a marked deceleration of the fetal heart rate. Bradley was continuously monitoring Brenna's heart rate, and nothing of concern was noted by Bradley. Brenna submitted that Bradley failed in her duty of care to her by failing to ensure timely medical intervention to prevent injury before and after her birth. Brenna submitted Robertson failed in adequately developing training and education regimes for other nurses and failing to adequately supervise or manage hospital staff. Brenna submitted that the hospital failed to have appropriate policies and procedures, failing to ensure training and supervision, and in discharging Brenna's mother without a plan for medical follow up.  HELD: Action dismissed.  Bradley did not fail in her duty of care or in applying the requisite standard of care. Therefore, the claims against Robertson and the hospital were not proven. There was no basis in the evidence to infer that Bradley did not accurately record the fetal heart rate. It was clear from her evidence that she was sure she was meeting an appropriate standard. It was evident that Bradley was experienced and confident that she was not mistaking the maternal and the fetal heartbeat. There was nothing in the evidence to suggest that Bradley wasn't paying attention. Applying the standards set out in the applicable guidelines, and the standards to which Bradley was trained, there was no point at which alternative action appeared to be required. There was no apparent deterioration. At the estimated time when the cord compression occurred, the doctor was in the room and did not find any reason to expedite delivery. |

**Counsel**

Counsel for Plaintiffs: D.J. Renaud, I.R. Campbell.

Counsel for Defendants, St. Joseph's General Hospital, Lisa Bradley, RN, Leah McCarthy RN, Robyn Clark, RN, T. Norris, RN, J. Hall, RN and Mary Robertson: C.L. Woods, Q.C., D. Hwang.

Counsel for the Defendants, Dr. B. Mathew Bagdan, Dr. Donald G. Wilson, Dr. Dennis L. Hartman and Dr. Natalie J. Aird: J.M. Lepp, Q.C., K.J. Jakeman.

**Reasons for Judgment**

**I**

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| **T.M. McEWAN J.** |

**1**   The Plaintiff Brenna Allen brings action by her mother, as litigation guardian, for damages suffered at her birth on January 4, 2008, at Comox, British Columbia.

**2**  The Bishop of Victoria is joined as the operator of St. Joseph's General Hospital in Comox.

**3**  The defendants Mary Robertson and Lisa Bradley are nurses employed at the Hospital at material times.

**4**  Brenna Allen was delivered at 5:33 a.m. on January 4, 2008. She suffered an acute profound hypoxic ischemic brain injury and as a result has spastic quadriparetic cerebral palsy. She is profoundly disabled.

**5**  On the ninth day of the trial the Doctors named in the style of clause, including the unknowns, John and Jane Doe, were dropped from these proceedings.

**6**  The case as it proceeded to conclusion is against the Hospital, and the nurses Bradley and Robertson.

**7**  Lisa Bradley was the nurse who attended Melissa Allen in the hours before birth. It is alleged that she owed both Melissa Allen and Brenna Allen "a duty of care to the plaintiffs to ensure timely medical intervention to prevent injury before and after her birth."

**8**  The particulars of ***negligence*** alleged against Nurse Bradley include:

1. failing to properly investigate, assess, and/or evaluate the medical history of Mrs. Allen;
2. failing to properly examine, assess and/or evaluate Mrs. Allen's vital signs and/or physical presentation;
3. failing to properly assess and/or evaluate fetal health;
4. failing to properly anticipate, assess and/or detect fetal distress and/or take appropriate and/or timely action in response thereto;
5. failing to relieve fetal distress by undertaking appropriate obstetric maneuvers in a timely fashion or at all;
6. failing to conduct adequate maternal/fetal assessments during labour and/or delivery of the infant plaintiff;
7. failing to adequately monitor maternal/fetal conditions during labour and/or delivery of the infant plaintiff;
8. failing to recognize signs and symptoms of fetal distress during labour and/or delivery of the infant plaintiff;
9. failing to alert allied health professionals and/or physicians of fetal distress during labour and/or delivery of the infant plaintiff;
10. failing to look for and/or make clinical findings and/ or chart those findings appropriately and/or at all.

**9**  The particulars of ***negligence*** alleged against Nurse Robertson include:

1. failing to adequately develop training and education regimes for other defendant nurses, as delegated by the defendant Hospital;
2. failing to adequately train, supervise and/or manage hospital staff to ensure safe and timely delivery of an infant under circumstances as presented by Mrs. Allen.

**10**  The particulars of ***negligence*** alleged against the Hospital include:

1. failing to have appropriate policy and/or procedures to offer safe and timely delivery of an infant under circumstances as presented by Mrs. Allen;
2. failing to ensure training, supervision and/or management to ensure a safe and timely delivery of an infant under circumstances as presented by Mrs. Allen;
3. failing to design, review, update, implement, and/or communicate appropriate protocols for obstetrical delivery;
4. failing to have in place appropriate policies and/or procedures and/or resources for safe delivery of an infant under circumstances as presented by Mrs. Allen;
5. failing to have in place a system to ensure effective communication among health professionals and/or failing to maintain such a system;
6. discharging Mrs. Allen without adequate and/or any plan for medical follow up;
7. failing to have available adequate and/or properly maintained medical equipment and/or devices to permit adequate maternal and/or fetal health surveillance and/or assessment; and
8. failing to properly delegate training, supervision and/or management to ensure a safe and timely delivery of an infant under circumstances as presented by Mrs. Allen.

**II**

**11**  The harm that caused Brenna Allen's injuries is not controversial. Sometime during the process of birth her brain was deprived of oxygen. Immediately upon her birth Brenna showed a marked degree of acidosis, which "develops progressively while the tissues are inadequately supplied with oxygen" according to Dr. A.J. Macnab.

**12**  Dr. Macnab noted that an MRI performed on July 30, 2009, and interpreted by Dr. Kathrine Wambera confirms his opinion:

The MRI has been formally reviewed at the Children's Hospital and demonstrates bilateral symmetrical abnormalities within the Thalami, basal ganglia and motor strip consistent with acute profound hypoxic ischemic injury.

Brenna Allen's global delay and spasticity are the result of an episode of acute/near total (profound) hypoxia and ischemia which caused brain injury. Hypoxia occurs when the level of oxygen in the blood becomes abnormally low and ischemia is present when the amount of blood perfusing an organ is insufficient to support normal function. The evidence that Brenna experienced an acute/near total hypoxic/ischemic event is provided by the MRI which identifies the specific anatomical regions of her brain which were damaged. The damage involves deep structures of the brain, including the basal ganglia and thalami, which are selectively damaged when there is an acute and profound reduction in the provision of oxygenated blood to the brain. These structures have a high metabolic requirement for oxygen and hence are the first to be damaged when a near total disruption of oxygenated blood flow occurs. Also, as noted by Dr. Wambera and in the radiological consultation, Brenna's physical signs of spastic quadriplegia, the global development delay she exhibits, and the finding that her head circumference is in the normal range (rather than small) are compatible with hypoxic ischemic damage to the anatomical areas of the brain identified to be abnormal on the MRI.

The causal relationship between Brenna's brain injury and the events surrounding her birth include the abnormal cord blood gases which show a marked degree of acidosis in pH of 6.92 (low) and base excess of -20 (very high).

**13**  Dr. Macnab described the mechanism of injury:

The acidosis that develops as a consequence of ongoing hypoxia leads to depression of fetal heart function, and as acidosis increases progressively as hypoxia continues the fetal heart rate falls. Because of the structure and physiology of the fetal heart a reduced heart rate causes a proportional reduction in cardiac output, and when cardiac output is reduced sufficiently this compromises cerebral blood flow. And, with a sustained fall in fetal heart rate the end result is a fall in brain blood flow which ultimately causes brain ischemia (lack of adequate perfusion). Thus ischemia is the principal mechanism that causes brain damage in hypoxic ischemic injury, with the effect of hypoxia being predominately to 'trigger' increasing acidosis that results in depression of fetal heart rate, progressive impairment of cardiac function and decreasing cardiac output that causes brain blood flow to fall.

Because Brenna's MRI shows that her brain injury was caused by an acute/near total hypoxic ischemic event, and her cord blood gas, neurological condition at birth and subsequent encephalopathy indicate this was an intrapartum event, it is more probable then not that a marked reduction in her fetal heart rate occurred for a significant period during labour. In my opinion, sustained normality of Brenna's fetal heart rate cannot have occurred as this would be incompatible with the pattern of brain injury evident on her MRI, and the physiologic mechanisms understood to result in hypoxic ischemic brain injury of the acute/near total type she experienced.

[emphasis added]

**14**  Dr. Macnab's view respecting the timing of the injury was that "[it] is more probable than not that the acute/near total hypoxic ischemia event that caused Brenna's injury occurred within 45 to 60 minutes prior to birth."

**15**  Dr. Andrew Pendleton concurs in this opinion.

**16**  *What* happened is, therefore, clear. There is no contradictory evidence. Brenna's brain was deprived oxygen. This was incompatible with a sustained normal heart rate throughout the birth process.

**17**  Hypoxia is, moreover, a recognized hazard of childbirth. It is the reason medical professionals attending live births monitor fetal heart rates. It is the subject of a number of published guidelines. One, current at the time of Brenna Allen's birth, was the Journal of Obstetrics and Gynecology Canada, September 2007 (JOGC). In Chapter 2 at p. 527 of this journal, the objective of fetal heart monitoring is described:

The goal of intrapartum fetal surveillance is to detect potential fetal decompensation and to allow timely and effective intervention to prevent perinatal/neonatal morbidity or mortality. The fetal brain is the primary organ of interest, but at present it is not clinically feasible to assess its function during labour. However, FH characteristics can be assessed, and the fact that changes in fetal heart rate *precede* brain injury constitutes the rationale for FH monitoring; that is, timely response to abnormal fetal heart patterns might be effective in preventing brain injury. During the contractions of normal labour there is a decrease in uteroplacental blood flow and a subsequent increase in fetal pCO**2** and a decrease in pO**2** and pH. In the healthy fetus, these values do not fall outside critical thresholds, and the fetus does not display any changes in heart rate characteristics. However, in the fetus with compromised gas exchange, there may be an increase in pCO**2** and a decrease in pO**2** and pH which exceed critical thresholds and the fetus may display changes in heart characteristics.

[emphasis added]

**18**  Two forms of fetal monitoring are commonly employed, and are pertinent on the facts of this case. The issue relating to their use is described in the JOGC, immediately following the last quoted passage:

Over the past two decades, research findings have led to challenges about the clinical value of electronic fetal heart monitoring. First, EFM compared with IA [intermittent auscultation] has not been shown to improve long-term fetal or neonatal outcomes as measured by a decrease in morbidity or mortality. Continuous EFM during labour is associated with a reduction in neonatal seizures but with no significant differences in long-term sequelae, including cerebral palsy, infant mortality, and other standard measures of neonatal well-being. Secondly, EFM is associated with an increase in interventions, including Caesarean section, vaginal operative delivery, and the use of anaesthesia.

**19**  The difference between intermittent auscultation (IA) and electronic fetal monitoring (EFM), is that EFM gives a continuous reading while intermittent auscultation, which involves the nurse counting out heartbeats in response to the pregnant mother's advice as to when contractions are starting, gives a "snapshot" at intervals. While it may seem regressive to go from a standard involving a sophisticated technological test to a cruder semi-manual procedure, EFM was being replaced at the time of Brenna's birth by IA for uncomplicated pregnancies. This was explained in *Fetal Health Surveillance in Labour* (3rd Ed, September 2002), a manual that is recognized as authoritative in the field of obstetrics in Canada, at p. 11:

1. Recommendations: Low-risk pregnancies

"There is fair evidence to exclude EFM from routine intra-partum care in low-risk pregnancies because studies have consistently shown no benefit in reducing the risk of perinatal complications and death whereas they have shown an increased risk of cesarean section and other operative procedures among those monitored."

"Since the operative procedures are associated with a high risk of maternal complications and costs, the routine use of EFM could increase the risks and costs." (Anderson, 1994, p. 161)

**20**  In other words, the continuous tracing of EFM monitoring stimulates a greater number of interventions in the birth process, than the less detailed monitoring afforded by IA.

**21**  St. Joseph's Hospital in Comox had adapted to this trend. Nurse Bradley explained her understanding of the change:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And as far as the intermittent auscultation was concerned, what steps did you take in, say, 2008 to perform intermittent auscultation? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I was here in 2008. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Yes |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | And we were sort of on the cusp of using EFM all the time versus just IA. So basically at the time we would assess if there were any risk factors with the pregnancy, with the baby or the mother. If it was a normal pregnancy with no risk factors, we were to just go directly to IA. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | What do you mean you were on the cusp of using EFM all the time? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Well, we -- when I first came here, you would always do a tracing for everybody who came in. And then they wanted to change that because there was no -- there was no reason to monitor everybody continuously if they had a normal pregnancy. There was studies done that showed it was detrimental and led to some more operative deliveries, and -- and you would get as much information from IA as you would from an EFM. |  |

So we were just sort of all trying to get used to that crossover of continuously doing the EFM versus the IA, when people such as myself were used to doing the EFM most the time.

So that's what I mean by "being on the cusp". So sometimes you'd do EFM if you didn't need to just because we're used to it and sometimes we would go directly to IA.

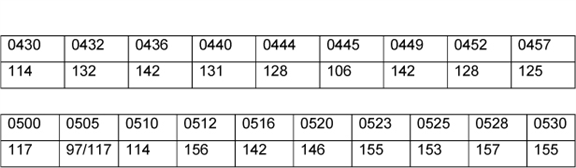
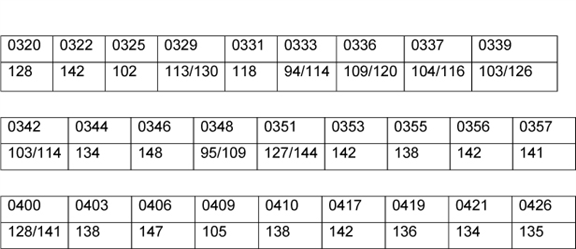
**22**  At this point a description of Melissa Allen's hospital admission and the time line until Brenna's birth would be useful.

**23**  Melissa Allen was 29 years old on January 4, 2008. She came to the hospital at 12:15 a.m. Her membranes had ruptured at 10:30 p.m. Her pregnancy was considered low-risk. Nurse Bradley applied EFM out of habit. The Fetal Heart Strips showed a fetal heart baseline of 140 beats per minute with "good variability, accelerations and no decelerations". Dr. Bagdan, the attending obstetrician was advised of these findings. He prescribed Ativan and instructed that Melissa Allen be discharged until labour had progressed further. She was sent away at 12:50 a.m.

**24**  Melissa Allen returned at 2:45 a.m. She was having contractions every 2 to 3 minutes. She had progressed quickly since her discharge and her dilation had increased from 3 cm to 9 cm. Nurse Bradley again attached the EFM monitor and called Dr. Bagdan at 2:50 a.m. He arrived at 3:15 a.m. He left the room a few minutes later.

**25**  From 2:47 a.m. to just after 3:20 a.m. the EFM trace ran steadily with some variations at about 140 beats per minute. At about 3:20 a.m. there is a dip to about 110 beats per minute and thereafter there are gaps and partial tracings down to 100 beats per minute. There is considerable evidence that at this point the tracing was uninterpretable. At 3:27 a.m. the EFM was discontinued and Nurse Bradley switched to IA. By this time Melissa Allen was fully dilated.

**26**  The IA measurements, manually recorded by Nurse Bradley, are reflected in the following table. The first three were taken before the EFM was switched off. The top line represents the time (0320 = 3:20 a.m.) and the bottom line the fetal heart rate in beats per minute. The first reading following the disconnection of EFM is at 3:29 a.m.



**27**  Dr. Bagdan was back in the room at 4:40 a.m. and remained until the baby was delivered at 5:33 a.m. Nurse Bradley was unaware of any concerns about Brenna Allen's condition until she received notice of this proceeding some years later.

**28**  The case thus turns on what happened in the early morning hours of January 4, 2008. During that period Brenna Allan must have suffered a period of 20 minutes or more of oxygen deprivation. This should have been reflected in a marked deceleration of the fetal heart rate. The fetal heart rate was continuously monitored and nothing of concern was noted by Nurse Bradley. The question is why?

**III**

**29**  There is no question that Nurse Bradley owed a duty of care in the circumstances, to both Melissa and Brenna Allen, as noted in *Ellen I. Pacard and Gerald B. Robertson, Legal Liability of Doctors and Hospitals in Canada, 4th ed. (Toronto:Carswell, 2007) at p. 334:*

One significant aspect of obstetrics that distinguishes it from other areas of medical practice is that the physician owes a duty of care of two patients simultaneously: the expectant mother and her fetus.

**30**  The standard of care was described in *Crits v. Sylvester*, [*[1956] O.R. No. 132-151*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJS1-JN6B-S3M8-00000-00&context=) at para. 13 (C.A.), aff'd [*[1956] S.C.R. 991*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JNS1-M131-00000-00&context=) (2d) 601:

Every medical practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. He is bound to exercise that degree of care and skill which could reasonably be expected of a normal, prudent practitioner of the same experience and standing ...

**31**  The test applies to nurses (See: *Heidebrecht v. Fraser-Burrard Hospital Society*, [*[1996] B.C.J. No. 3042*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DXPM-S17F-00000-00&context=) (S.C.)).

**32**  The standard is not a standard of perfection. There will be no ***negligence*** if a generally accepted standard of practice is followed. In *ter Neuzen v. Korn*, [*[1995] 3 S.C.R. 674*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3KJ-00000-00&context=) at paras. 33 - 34:

33 It is well settled that physicians have a duty to conduct their practice in accordance with the conduct of a prudent and diligent doctor in the same circumstances. In the case of a specialist, such as a gynaecologist and obstetrician, the doctor's behaviour must be assessed in light of the conduct of other ordinary specialists, who possess a reasonable level of knowledge, competence and skill expected of professionals in Canada, in that field. A specialist, such as the respondent, who holds himself out as possessing a special degree of skill and knowledge, must exercise the degree of skill of an average specialist in his field: see Wilson v. Swanson, [*[1956] S.C.R. 804*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JNS1-M12J-00000-00&context=), at p. 817, Lapointe v. Hopital Le Gardeur, *[1992] 1 S.C.R. 351*, at p. 361, and McCormick v. Marcotte, [*[1972] S.C.R. 18*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3S1-JBDT-B008-00000-00&context=).

34 It is also particularly important to emphasize, in the context of this case, that the conduct of physicians must be judged in the light of the knowledge that ought to have been reasonably possessed at the time of the alleged act of ***negligence***. As Denning L.J. eloquently stated in Roe v. Ministry of Health, [1954] 2 All E.R. 131 (C.A.), at p. 137, "[w]e must not look at the 1947 accident with 1954 spectacles". That is, courts must not, with the benefit of hindsight, judge too harshly doctors who act in accordance with prevailing standards of professional knowledge. This point was also emphasized by this Court in Lapointe, supra, at pp. 362-63:

... courts should be careful not to rely upon the perfect vision afforded by hindsight. In order to evaluate a particular exercise of judgment fairly, the doctor's limited ability to foresee future events when determining a course of conduct must be borne in mind. Otherwise, the doctor will not be assessed according to the norms of the average doctor of reasonable ability in the same circumstances, but rather will be held accountable for mistakes that are apparent only after the fact.

No issue is taken with this proposition which was applied both in the trial judge's charge to the jury and by the Court of Appeal.

**33**  The standard of care requires that reasonable precautions responsive to the recognized risks must be taken. In *Ediger v. Johnston*, [*2013 SCC 18*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X22V-00000-00&context=), the Court, in the context of a bradycardia at birth case, endorsed the finding of the trial judge:

1. ... the "immediately available" standard of care endorsed by the trial judge nonetheless requires that the attending physician take precautions that are responsive to the risk of persistent fetal bradycardia resulting from the mid-level forceps procedure. That the standard of care was tied to the risk and harm posed by the forceps procedure is evident from the trial judge's reasons. At the outset, for instance, the trial judge summarizes her reasons by stating: "Minutes mattered, and because of Dr. Johnston's failure to ensure that surgical back-up was reasonably available, the damage was done before Cassidy could be delivered by Caesarean section and resuscitated. Cassidy's claim in ***negligence*** is proven."

**34**  This standard was said to be "consistent with the guidelines of the Society of Obstetrician and Gynecologists of Canada".

**35**  Specifically, in the context of obstetrical cases, *Picard & Robertson* states at p. 322 - 335 that three particular areas of obstetrical care stand out as being especially significant with respect to malpractice litigation":

Urgency:

This is an area where, in many cases, "time is of the essence." As one judge noted, when obstetrical problems occur, "wasted minutes can have tragic consequences." Thus, given that the degree of risk is one of the essential factors in determining the standard of care, physicians in charge of obstetrical care must respond in a timely (and often urgent) manner when problems arise.

Picard & Robertson (supra) at p. 332

Anticipation:

The second theme that is apparent from litigated obstetrical cases is linked to the first. Not only must obstetrical physicians respond in a timely manner to urgent problems that arise, they must also take reasonable care to anticipate those problems and plan accordingly ... Given that problems in obstetrics can so often have devastating (and rapid) consequences, physicians are expected to be alive to the possibility of those problems occurring and, where appropriate, to anticipate them and plan in advance to deal with them.

Communication:

This is described in *Canadian Medical Law 3rd edition Sneiderman*, *Irvine, Osborne Thomson/ Carswell 2003 p. 149:*

It is a question of taking sensible initiatives, wherever commonsense and sound medical practice seem to dictate them, to compare notes on the patient's case. Only in this way can one make sure that no procedure or precaution has been overlooked because every physician involved has assumed that "someone else has done it."

*Canadian Medical Law 3rd*

*Sneiderman, Irvine, Osborne*

*Thomson/Carswell 2003 p. 149*

**36**  Guidelines are very important. In *Vuong v. Morton*, [*2009 CanLII 60661*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SF81-JJK6-S0Y8-00000-00&context=) (Ont SC), at para. 72(c), the court observed:

Patients in this country have the right to expect that application of clinical care be based on published, objective and clearly articulable standards.

**37**  It is true that competent medical professionals may disagree on a particular practice or course of treatment. In *Bolam v. Friern Hospital Management Committee*, [1957] 2 All E.R. 118 McNair J. of the Court of Queen's Bench, at p. 121-2, cited Lord Clyde in *Hunter v. Hunter*, [1955] SLT 213 at p. 217:

In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion, and one man clearly is not negligent merely because his conclusion differs from that of other professional men, nor because he has displayed less skill or knowledge than others would have shown. The true test for establishing ***negligence*** in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care.

**38**  In *Maynard v. West Midlands Regional Health Authority*, [1985] 1 All E.R. 635 at p. 638, the House of Lords observed:

It is not enough to show that there is a body of competent professional opinion which considers that theirs was a wrong decision, if there also exists a body of professional opinion, equally competent, which supports the decision as reasonable in the circumstances. It is not enough to show that subsequent events show that the operation need never have been performed, if at the time the decision to operate was taken it was reasonable in the sense that a responsible body of medical opinion would have accepted it as proper...

Differences of opinion in practice exist, and will always exist, in the medical and in other professions. There is seldom any one answer exclusive of all others to problems of professional judgment. A court may prefer one body of opinion to the other: but that is no basis for a conclusion of ***negligence***.

**IV**

**39**  The test of causation has recently been restated by the Supreme Court of Canada in *Hanke v. Resurfice Corp.*, [*2007 SCC 7*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B18F-00000-00&context=). There, at paras. 22 - 23 the court said:

22 This fundamental rule has never been displaced and remains the primary test for causation in ***negligence*** actions. As stated in *Athey v. Leonati*, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=) at 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." Similarly, as I noted in *Blackwater v. Plint*, [*[2005] 3 S.C.R. 3*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B153-00000-00&context=) at para. 78, "[t]he rules of causation consider generally whether 'but for' the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities."

23 The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and 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.

**40**  In *Jackson v. Kelowna General Hospital*, [*2007 BCCA 129*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-F7VM-S427-00000-00&context=), our Court of Appeal applied the test in the context of a medical ***negligence*** case where the issue involved an alleged failure to monitor vital signs as often as the relevant policy required. The problem was that the expert opinion failed to establish that there would have been anything to pick up, that is, that better monitoring would have made a difference. The court noted:

In addition to *Snell*, the appellant relies on the more recent case of *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=), to support his argument that the court should have drawn an inference of causation, on policy grounds. Essentially, as I understand his argument, it is that where the plaintiff in a medical ***negligence*** case cannot prove causation (because of the defendant's ***negligence***, or "the facts lie particularly within the knowledge of the defendant" *(Snell* at para. 30), or "due to factors that are outside of the plaintiffs control (*Resurfice* at para. 25), the court may fill in a gap in the evidence by drawing a logical inference, in order to avoid unfairness and injustice.

Mr. Justice Sopinka rejected that approach in *Snell,* when he said (at paras. 25 to 26):

The question that this court must decide is whether the traditional approach to causation is no longer satisfactory in that plaintiffs in malpractice cases are being deprived of compensation because they cannot prove causation where it in fact exists.

If I were convinced that defendants who have a substantial connection to the injury were escaping liability because plaintiffs cannot prove causation under currently applied principles, I would not hesitate to adopt one of these alternatives. In my opinion, however, properly applied, the principles relating to causation are adequate to the task.

\*\*\*

The appellant's reliance on *Resurfice* is of no assistance. In the absence of evidence that the monitoring of his condition when it was required would have revealed a change in his condition that would have alerted his medical caregivers that an event of respiratory distress could occur, he is unable to prove causation applying either the "but for" test or the "material contribution" test. Further, the Supreme Court's articulation of the "special circumstances" where the "material contribution" test may be applied does not apply to this case, but to cases where it is truly impossible to say what caused the injury, such as where two tortious sources caused the injury, as in *Cook v. Lewis* [*[1951] SCR 830*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-FBV7-B0H9-00000-00&context=), or it is impossible to prove what a particular person in the chain of causation would have done in the absence of the ***negligence***, such as the blood donor cases *(Walker Estate v. York Finch Hospital* [*[2001] 1 SCR 647*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M47J-00000-00&context=)).

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This is an ordinary medical ***negligence*** case, where the difficulty in proving causation is the absence of any evidence to support either a finding or an inference that the respondent's ***negligence*** caused the appellant's injury. The required evidence is missing because the hypothetical question was not asked of the experts. In the absence of that evidence, there is no positive evidence that the ***negligence*** caused the breach. The contrary evidence found in the experts opinions demonstrated that drawing an inference, in the absence of the positive evidence, was not appropriate, as the trial judge found.

**41**  The plaintiff submits that causation has been relaxed in some circumstances permitting an inference of causation to be made where "positive or scientific proof has not been advanced." In *Snell v. Farrell*, [*[1990] 2 S.C.R. 311*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JFKM-655K-00000-00&context=), the court observed:

33 The legal or ultimate burden remains 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. If some evidence to the contrary is adduced by the defendant, the trial judge is entitled to take account of Lord Mansfield's famous precept. This is, I believe, what Lord Bridge had in mind in Wilsher when he referred to a "robust and pragmatic approach to the ... facts" (p. 569).

34 It is not therefore essential that the medical experts provide a firm opinion supporting the plaintiff's theory of causation. Medical experts ordinarily determine causation in terms of certainties whereas a lesser standard is demanded by the law.

**V**

**42**  Lisa Bradley testified respecting her training in Montreal before she came to work as an obstetrical nurse at St. Joseph's Hospital in Comox. She did not recall her involvement in the care of Melissa Allen except to say that as far as she was concerned it was a "very normal straightforward labour and delivery". She testified that in her opinion the fetal heart strip and the other investigations she did when Melissa Allen was first admitted to the hospital were reassuring. When Melissa Allen returned to the hospital at 2:45 a.m., Nurse Bradley described how she monitored the fetal heartbeat.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And is there any printing or monitor display of the heart? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | The fetal heart's displayed on the screen of the fetal -- electronic fetal monitor. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And can anyone who is present in the room hear it and see it? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And you've recorded your intermittent auscultations at the bottom of this where the narrative notes are under -- |  |

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

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | -- number 10, second stage? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And you have sometimes recorded more than one fetal heart rate in those boxes, and you are also monitoring the fetal heart more often -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | M'mm-hmm. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | -- than the every five minutes -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yeah. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | -- that the guidelines suggest. Why is that? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Even though the SOGC guideline is for every five minutes, my practice has always been to listen after ever contraction. And where there's the two numbers there, that I have recorded what I hear initially right at the end of the contraction when the heart rate is expected to be a little bit lower, and then the other number is the recovery of the heart rate by the end of the minute. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | So what are you looking for when you're auscultating fetal hearts in second state? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I'm looking for the heart rate to go over 110. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Is it unusual for there to be fetal heart decelerations during second stage labour? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No, not at all. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | To what do you attribute them? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | During second stage when a baby is being pushed down through the birth canal, their head gets squished, and when there is head compression on a baby, there will consequently be a decrease in the fetal heart rate. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And was the fetal heart rate recovering by the end of the auscultations you were doing? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Almost every time. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | All right. Let's go through the times where it wasn't okay and what you did. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Okay. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | I think at 0325 is the first one that had -- |  |

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

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | -- that wasn't. What did you do in response? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | At 0325 the heart rate was 103. So I would auscultate again after the next contraction per the guidelines, and the recovery is to 130. And so I could just carry on normally with IA. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | All right. And what's the next occasion where it had not recovered to within a normal range? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | The next one is at 0348. The recovery is to 109. So I would listen again over the next -- after the next contraction and the recovery is to 144. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Okay. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | And then after that, at 0409 it is 105, but by the end of the next contraction, it's recovered to 142. And then at 0445 it is 106 with recovery at the end of -- by the end of the next contraction to 142. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And was that the last time it was ever not in the normal range? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Did you ever have two consecutive contractions where the fetal heart was below 110? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No. I didn't. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Was it necessary for the fetal heart to recover to the previous baseline of 140 in second stage labour? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | No. If a fetal heart recovers to over the normal of 110 after a contraction, then we're satisfied that the reserves are there. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Was there ever any indication according to your practice or any education or guidelines that you were aware of that would dictate that the electronic fetal heart monitor had to be attached at any point during this second stage labour? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | No. My -- the SOGC guidelines state that if you have a heart rate below 110 after a contraction, you auscultate after the next contraction. If it recovers over 110, then you're fine to carry on as is with the IA. You only need to put the EF on -- EFM back on if you have three consecutive heart rates below 110. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | And did you ever have that here? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No I didn't. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Were you at all concerned by any of the intermittent auscultations you were conducting during second stage? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No, never. |  |

**43**  Nurse Bradley described the EFM strip she ran at the beginning:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | ...At about 0321, 22, in the middle, I'm getting -- starting to get a loss of contact which I assume is because that the mother started pushing at 3:18, and it is very normal to get a loss of contact when you have an EFM applied to a woman who is pushing in second stage. |  |

So because this is what I would have called a reassuring normal strip, that's when I decided shortly thereafter to turn to IA to get a better pickup of the fetal heart rate.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | There have been suggestions from another expert that these little squiggles we see at the end of the strip, they're barely registering, but these squiggles represent decelerations down to 70. Do you agree? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No, I don't. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Did you ever pick up the fetal heart at 70? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | You can put that strip away. And why is it that you didn't just continue running the strip until you got a better pickup? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | There was no need for it. There was no need for the strip in the first place. It was a normal no-risk pregnancy. And again, I had only put it on out of habit, and once the woman started pushing, it's much easier to actually get an accurate fetal heart rate by doing IA. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Why is it more accurate to do IA? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Because when I'm holding the transducer on the belly, I can angle it properly to get a proper heart rate, whereas if it's just strapped on the belly and the woman is moving around, that transducer is going to be moving as well, and you're not going to get an accurate pickup. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | If you had in fact continued the strip until better pickup was established and satisfied yourself that it was normal, would you have continued with electronic fetal heart monitoring, or would you have switched to intermittent auscultation? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I would have switched to intermittent auscultation. |  |

**44**  She noted nothing of concern up to and including after Dr. Bagdan came back:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Could the fetal heart be heard and seen by all in the room? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Would Dr. Bagdan have been aware of the contraction activity? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | If you had seen or heard anything of concern, would you have discussed it with Dr. Bagdan or he with you? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Did either of you have any concerns with the fetal heart throughout the time that you were present in the room together from 0440 until delivery? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Once Dr. Bagdan was in the room, who was in charge of this labour and delivery? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | He was. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Did he ever ask you to apply the fetal heart monitor? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No. |  |

**45**  Nurse Bradley was asked about a difference between the evidence of others and what she was trained to do:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Now, just a few comments about some of the evidence we've heard from an expert in Toronto, a perinatologist, or also called a maternal fetal medicine specialist. He has told the court that in his view a normal fetal heart baseline is not 110 to 160, but is 120 to 160. What were you taught? And what do you -- |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | I was taught that a normal fetal heart rate is between the range of 110 to 160. |  |

...

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And this doctor also said that a fetal heart below 120 or 110 for one minute is a bradycardia in second stage. What were you taught about what is a bradycardia in second stage? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | I was taught that a fetal bradycardia is when the fetal heart goes below 110 for three consecutive contractions, or 10 minutes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | He also said that decelerations below 110 are abnormal decelerations. And what were you taught about what constitutes an abnormal deceleration? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | I was taught that an abnormal fetal heart rate is a heart rate that's 70. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | He also said that if there's a deceleration in second stage labour to below 120 or below 110, you should apply the electronic fetal heart monitor. What is your training about that? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | My training comes from the SOGC guidelines which state that a fetal heart, if it's below 110, you auscultate the next contraction. If it is above 110, then you carry on with IA. If it's below 110, you auscultate again. If you get three consecutive heart rates below 110, then you put the electronic monitor back on; otherwise you can carry on with IA. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Dr. Barrett also told us that the fetal heart should be recovering in second stage to its previous baseline in first stage. What is your experience in this regard? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | My experience is that if -- if a fetal heart recovers to above the 110, which is the normal for a fetus, then it's showing good reserves and we carry on as normal. |  |

**46**  When she was cross-examined Nurse Bradley agreed that one of the duties of an obstetrical nurse is to ensure that the baby was coping with the stress of labour. She acknowledged a responsibility to react if the baby appeared to be in trouble. She acknowledged that the outcome could be catastrophic if warning signs were ignored. She agreed that it was essential to err on the side of caution. She could not say how quickly fetal distress can develop.

**47**  Nurse Bradley described her training as largely in the form of mentoring. She said she was aware of the guidelines of the Society of Obstetricians and Gynecologists of Canada, and knew where to find them if she felt she needed them. She acknowledged, however, that she had never felt a need to read them or consult them. She said:

I just feel like I want to say that these are guidelines here if you have any questions, if you were wondering how to properly do your practice. And I did not feel like I had any questions on how to properly do my practice.

These things were there, if you need them. As well as my colleagues. It's a normal practice for us all to talk to each other if we have any questions. And we know where these guidelines are if we can't come to a conclusion. I would use it if I had any issues, if I had any questions.

**48**  Nurse Bradley said the period of time the EFM strips ran between 2:47 and 3:20 there was no cause for concern. When it began to break up and become uninterpretable, she explained:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | In this case, when the tracing became uninterpretable, it was switched to IA for two reasons: because it was in second stage and it's normal that you don't get the proper pickup; and she didn't even need to have the tracing be -- monitor on in the first place because it was a low-risk pregnancy. |  |

**49**  She explained what happened when she switched from EFM to IA:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And so once the strip is on, you have to have an interpretable strip, don't you? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | There are reasons why the strip can become uninterpretable; correct? |  |

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

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Not just maternal movement? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | That is correct, there are other reasons why the strip can become uninterpretable? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | There are other reasons, yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | You just made the assumption at this point in time, after 3:20, that the strip was becoming uninterpretable because of maternal movement; isn't that right? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Well, I don't think I would have made an assumption if I was in the room watching what was happening. I could see that the mother was moving and starting to push, and I could -- I don't think it's an assumption when I've done however many deliveries that I've done that I've seen that happen when a mother starts pushing and you have loss of contact. |  |

So I don't think it's an assumption. I think it's experience telling me that this happens very often when a woman starts to push, which is why we were often -- unless there was a need to have that continuous monitoring, we were often told to just take it off and do IA.

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Right. But you have to err on the side of caution. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Err on the side of caution when I -- I had had a perfectly reassuring strip up till then, and what was happening was not something that was non-reassuring. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | You were getting gaps; right? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Again, which is something that is very frequent. It is not an ominous thing, and it's not something that would cause concern in a low-risk pregnancy. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | But earlier when you had gaps in the strip -- |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | -- you ascertained that it was a maternal recording that was being picked up. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Because that was the first time that I had the woman on the monitor. She was not in the active pushing stages of labour. I had only seen the woman for maybe five minutes. I didn't know what the fetal heart rate was doing. So, yes, at that point I would want to make sure that that was maternal and not fetal. |  |

This is a completely different scenario when you have a woman who is not actively pushing and I'm seeing this. It's very normal.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | So it's normal for you to depart form the guideline then? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | That's not a departure from the guideline at that stage with a normal term pregnancy with no risk. It's not abnormal. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Right. You did not rule out other possibilities, though? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | What would you mean like that? What would you want? How would you want me to rule out? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | You did not rule out that that could have been -- the gaps could have been there because the fetus was getting weak and the heart rate was not pounding sufficiently to be detected on the monitor. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | No. Because I can see -- if you look at the end of the tracing, if there was an issue with the baby, it would look different. The heart rate would not go down like that with a contraction and come right back up. If there was an issue with the baby, the tracing would look a lot different. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | But it's not interpretable at that stage of the game? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | The parts that you can see of it are and the parts that I can hear. The whole time that this tracing is on, I can still hear it. If I didn't hear the heart rate come back up, I would have taken the monitor off. |  |

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|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | So you're in the room and you've got a strip that's becoming uninterpretable; correct? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And you think it's more likely than not that it's because of maternal movement; correct? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | But there are other possibilities that you did not rule out at that point in time; isn't that correct? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | If there were any other possibilities at that point, they were so slight for me to not think of them. The first, initial, and most obvious reason for that at that point was maternal pushing effort and movement. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | So you went to what was most likely rather than what the other possibilities were? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | I went to what our normal practice is and without any indication otherwise, scientifically speaking by listening and doing whatever, I continued on what our normal practice was. |  |

**50**  Nurse Bradley described her understanding of "deceleration":

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | When you started in the second stage doing intermittent auscultation, the first value with intermittent auscultation that you record is at 0329; correct? Looking at the partogram. |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And at that point in time the first thing that you record is deceleration down to 113 beats per minute; correct? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Well, it's 113, so it's not really a deceleration. It doesn't go below the 110. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | So your definition of a deceleration is just something that goes below 110; correct? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Well, if it continues below that, then it's a deceleration. I mean, it's -- it's a deceleration in the fact that it is below -- 15 beats below the baseline. Is that what you're asking in terms of a deceleration? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | A deceleration is classed as a -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | It's 15 beats below the baseline for 15 seconds. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Right. And -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | This is -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | -- that's what this is; correct? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | That is definitely more than 15 beats below the baseline. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | And it's definitely more than 15 seconds? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | I don't know the -- the - how long it was like that. I had listened for a minute. So during that minute, it goes from 113 to 130. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | This is a deceleration; correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | It is a deceleration from the baseline, yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And it is a deceleration within the class of decelerations that are referred to in the guidelines; correct? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | I'm sorry. I don't understand what you just said. It's a deceleration from the baseline. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | And it does not return to the baseline. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No. It returns to 130, which is not the baseline. |  |

**51**  Counsel for the plaintiffs then referred to a "decision tree found within a document titled "Intrapartum Fetal Surveillance" and which he and nurse Bradley referred to as "the guidelines".

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And so what you have is a deceleration, then, at 0329; correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | There is a deceleration there, yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And then at 0331, you've got a fetal heart rate which you chart for over a minute -- or for a minute at 118 beats per minute; correct? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And it's a deceleration because it's lower than 125 beats per minute. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | It's a deceleration from the baseline. It is not a deceleration that is concerning because it is not below 110. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | It's a deceleration within the definition of the guidelines; isn't that right? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And on the decision tree, again, where it says "auscultate fetal heart rate," that falls under "abnormal fetal heart rate"; correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Under "Further Assessments"? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Yes. |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And so that's what you do then. You've got one deceleration, then you've got another deceleration; correct? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | I have a heart rate that's 118, which is deceleration from the baseline. It is not considered a deceleration when it's not below 110. A concerning -- |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | All right. Well, let's have a look at this little box that says "abnormal fetal heart rate." Okay? It's got two -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I'm sorry. Where are you? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | I'm back at the decision tree, "auscultate fetal heart rate." |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | "Auscultate fetal heart rate," "abnormal fetal heart rate." |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | It says "fetal heart rate less than 110 beats per minute"? |  |

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

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | And it also says at the bottom "decelerations"? |  |

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

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | There's no need for them to have said |  |
|  |  | "decelerations" if this fits within your |  |
|  |  | definition; isn't that right? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | A deceleration, as I said before, is classified as a heart rate that is below 110 for more than 10 minutes. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | That's a bradycardia? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | That's a bradycardia. Deceleration is down to 70. I'm sorry. So never once was the heart rate down to 70. Never once did I have any worries with a heart rate of 118, 113, 109. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | So following the decision tree that this is a deceleration that is an abnormal fetal heart rate, indicates abnormal fetal heart rate and requires you to do the further assessment? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Which is to auscultate further. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Assess the potential causes; correct? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Check the maternal pulse, blood pressure, and temperature? Yes? |  |

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

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | And perform a vaginal exam as indicated; correct? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And you decided that, well, the only further assessment that you were going to do was auscultate the fetal heart rate again after the next contraction? |  |

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

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | And so that's what you did? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Under the circumstances, yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | At 0333, you checked it, and what did you end up with but another deceleration; correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | 94. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. 94. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And so then after, at 0333, following the decision tree, said oh, my goodness, I've got another deceleration. What did you do? Did you assess for potential causes? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Well, I would be continuously assessing for causes because she's pushing. This is not -- this is someone who's in the first stage of labour that you do all these things for. That's why I said "under the circumstances." This is very different when a person is pushing than it is right here. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Where does it say in the guidelines that this decision tree for intermittent auscultation doesn't apply when a woman is in second stage? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Because it is just common practice. This is from experience. This is from doing thousands of deliveries where you know -- when you know the -- the effect on the fetal heart rate that maternal pushing does, the effect that having that pressure on the head will cause the heart rate to go down. We know that. So this -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | So you -- |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | We know that this is what is happening as this child is being pushed through the birth canal. Its head is being squished. We're expecting the heart rate to go down. This is not the case here. If she were in early labour, or even first stage of labour and these things were happening, then you would absolutely go through all of these steps to check. But this is second stage. This is a woman pushing. This is what we're expecting to see. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | All right. So then if you have decelerations in the second stage of labour and it's under "abnormal fetal heart rate," you're to do fetal assessments; correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I am to listen again. I'm to auscultate again, yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And you're to do some other things; correct? If you're following the decision tree. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | If I'm in second stage of labour and I get a heart rate that's below 10 - 110 -- I beg your pardon -- I am to listen again after the next contraction, which I always did. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | If you are in the second stage of labour and you're auscultating the fetal heart rate and you hear decelerations, according to this decision tree you're to go to do further assessments; correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Again, this is not specific to second stage. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Where -- |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | This is what would happen in first stage of labour, in early stages of labour. If you were even going up to second stage, it's not the same in second stage. It can be written on a paper. I know that. And I'm reading the same things that you're reading, but it's different when you're listening, when you're in there and you know what a normal thing is in second stage. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | So what you can do, then, in second stage, according to your evidence -- and I just want to be very clear on this -- is that you don't need to follow this guideline, this decision tree at S31 -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I need to -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | -- if it's under second stage -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | -- follow the guidelines -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | -- is that right? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | I need to follow the guidelines that tell me that if I have a heart rate that's under 110, I need to listen again for a minute after the next contraction. If I still have heart rate under 110, I need to listen again after the next contraction. If I still have a heart rate under 110, I need to put a monitor back on. Those are the instructions that I follow in second stage if my heart rate is not recovering. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Okay, Listen to the question. Okay? |  |

Is it your evidence that you are not obliged to follow the decision tree that's set out at S31 of the guidelines when the labour is in second stage? Is that your evidence?

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | My evidence is that I do exactly as I said, and, no, it does not follow what this decision tree says. |  |

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|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And so overall, though, what we've got here from 3:25 when you've recorded a deceleration down to 102 beats per minute -- |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | -- all the way to 3:44, we've got a period of almost 20 minutes; correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | --3:25 to 3:44 is almost 20 minutes, yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And over that period of time you've got nine contractions; correct? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And over that period of time you don't have a recovery to the baseline, do you? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | There is not a recovery to the baseline. There is recovery over the normal parameters of fetal heart rates of 110 -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Well, that's a -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | -- all but once. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Sorry, I didn't mean to -- |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | All but once. All but that 102. Otherwise, every other one recovered to over 110. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Well, what you have, then, is at a minimum a prolonged decel don't you? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | I would not agree with that, no. I have a babe who is having decelerations while it is being squished, and I have a babe who's got good reserves because the heart rate is coming up over 110 within a minute of each contraction. That would be my opinion. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Well, anything that goes below the baseline for more than 15 seconds and stays there and doesn't return to baseline very quickly is a prolonged decel; isn't that right? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | It could be a decel, but it is still not a concerning heart rate. |  |

**52**  Nurse Mary Robertson was the nurse manager at St. Joseph's Hospital on January 4, 2008. She was examined for discovery on April 29, 2015. Portions of her examination were read in by plaintiffs' counsel. She was asked about her job description, which was put to her:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And under "Job Summary," it says -- just on the first page, it says: |  |

[As read] "Responsible for the management of a nursing unit by ensuring the provision of effective, high-quality patient care, which encompasses the following responsibilities: Management of clinical practice and/or patient care delivery?

Do you see that?

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Mm-hm. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Is that "yes"? |  |

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

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Now, what did that mean to you? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | It meant the provision of adequately trained staff and equipment and supplies in order for them to be able to carry out appropriate delivery - |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | All right. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | -- of patient care. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And then carrying on down, it says: "Development of personnel." what did that mean to you? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | That meant either mentoring new staff so that they would be able to work independently; it also meant providing access to education and learning. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | And then the next line: |  |

"Evaluation of service through implementation and maintenance of a quality management program." Now what does that mean to you?

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | That means regular job evaluations. It means participating in the quality management program that was organized at the hospital to ensure appropriate patient care and staffing levels. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | So then you were responsible for overseeing the education, the evaluation, and the quality of services provided by the nurses doing obstetrics in your unit; correct? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And, in fact, that's what it says further on down under "Organization Structure": Responsibility -- or "responsible for the supervision of all nursing staff"; correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Correct. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And under "Job Duties" number 1, you accept it was your responsibility as the nurse manager of the obstetrics nurse -- of the obstetrics unit to direct the clinical practice and management of patient care in that department; correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Correct. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And, likewise, over the next page at number 4, you accept that you were responsible for managing the human resource need of the unit by performing duties such as hiring, supervising, coaching, orientation, educating, and evaluating staff; correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Correct. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And number 5, you accept that it was your duty to facilitate the development of registered and non-licensed health care personnel; correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Correct. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And by "registered health care personnel," that would be obstetrical nurses, RNs working in your department; correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Correct. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And under 6, you also accept it was your responsibility to establish and maintain a department-based quality management program and support the institution's continuous quality improvement program; correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Correct. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And at 7, you accept it was your responsibility to ensure that the obstetrics department was compliant with departmental, divisional, professional, and governmental standards of care and acts of legislation; correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Correct. |  |

**53**  Nurse Robertson acknowledged that there was a change over from EFM to more frequent use of IA during her tenure in this position.

**54**  Nurse Kelly Phillips was examined for discovery as the main representative of St. Joseph's Hospital. She is the clinical coordinator, who followed in Mary Robertson's position. Portions of her examination for discovery were read into the record by the plaintiffs' counsel. She was asked about the purpose of fetal monitoring:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | What's the purpose of fetal health surveillance? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | To monitor the baby's heart rate during labour and to ensure -- or to try to ensure that the baby is able to cope with labour. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Why is the baby's heart rate monitored during labour? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Because it can be an indicator of fetal distress. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | What is fetal distress? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | When the baby is not getting enough -- may not be getting enough oxygen for a variety of reasons. |  |

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|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | So how is -- how can you tell whether the baby is getting enough oxygen or not? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | There's a set of criteria outlined by B.C. Perinatal Services that we follow. |  |

**55**  Nurse Phillips was asked about the guidelines respecting fetal heart rate:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Well, in 2008, then how did the perinatal nurses working at St. Joseph's, how were they expected to monitor this? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | We follow B.C. Perinatal Services' guideline. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And that guideline entailed surveillance of the fetal heart rate. |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And so you would be looking for all sorts of things, like the rate of the heartbeat? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That would be your baseline. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | All right. And what do you mean by "baseline"? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | "Baseline" is defined as the average fetal heart rate rounded off to the 5; either 140, 145. Not -- you don't say 143. Measured in -- between contractions, not during the contradiction. And it has to be a two-minute period over a period of time. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | All right. And what's the purpose of -- of determining the fetal baseline -- the fetal heart rate baseline? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | They establish a normal, which is between 110 and 160. And if the baby's baseline is in that range, the baby is presumed, in the absence of other things, to be developing normally. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | In the absence of what other things? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | If you had decelerations or ... or no fetal heart. Because if you were listening to a fetal heart rate strip and all of a sudden it -- you lost a fetal heart rate; perhaps you had an abruption. |  |

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|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | What do you mean by "decelerations"? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Decelerations is a drop in the fetal heart rate. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Okay. And what does that mean? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | The heart rate drops from the -- what is determined as the baseline, define -- now, I'm giving you today's terminology though. Determined -- today it is if you drop 15 beats for 15 seconds, that would be a decel. But there's many different types of decelerations that have many different types of meanings. |  |

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|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Is there a problem, then, if this lack of oxygen goes on for any length of time? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | There can be. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | All right. What kind of concern? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Babies can die or have other outcomes that can cause problems. There can be brain damage. Same as an adult, if you lose -- if you don't have oxygen. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | So the objective is -- is to detect oxygen deprivation prior to any damage to the baby's brain; is that right? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | I would say the objective is to intervene before you have a problem to -- to -- to note -- to -- if there's anything concerning happening with the fetus, that you're able to interject and correct it before it becomes a problem. |  |

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|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | All right. But you are aware there are things such as obstetrical emergencies. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Absolutely. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And those obstetrical emergencies mean that there has to be some sort of obstetrical intervention undertaken very quickly in order to -- in -- in an effort to either spare the baby some brain damage or save the baby's life; correct? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Okay. And so because there are emergencies, then people are moving quickly; correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | At times yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Right. And they're moving quickly because there is a limited time frame. They can't wait around. They've got to get things done quickly; correct? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Yeah. And because of that, there needs to be close attention to the fetal heart rate and fetal health surveillance; correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. We watch the fetal heart rate, yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Yes, you watch it. And it's watched as a matter of course. The effort is to watch that fetal heart rate very closely for any signs of irregularities; correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | As per the criteria of B.C. Perinatal Services, yes. |  |

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|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And you'll agree with me that the data that's obtained from doing either electronic fetal monitoring or intermittent auscultation is important in terms of fetal health surveillance? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | In fact, it's the primary way to assess the health of the fetus during the course of labour and delivery; correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | In our hospital, yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | In 2008 that was something that each one of the nurses who were involved in labour and delivery were required to do correctly. |  |

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

**56**  Nurse Phillips was referred to the January 3, 2008 partogram and agreed that the fetal heart rate baseline was 140. She also agreed that nurses in St. Joseph's Hospital were expected to adhere to the BCRCP guidelines:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And so the expectation was that labour and delivery nurses were to adhere strictly to the guidelines as set out in Exhibit 6; correct? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | "Adhere strictly" I would say is strong wording. I would say we would try to maintain one-to-one nursing at all times, which is part of this. |  |

There have been many discussions across the island when you live in rural hospitals and people exceed the number of nurses that walk through the door. You provide the best care you can in those circumstances.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | But there wasn't a difficulty here because it was quite rare -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No. It was one-to-one. Yes, it was one-to-one. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And so it would have been incumbent upon Lisa Bradley to adhere as closely as possible to the guidelines set out in Exhibit No. 6: correct? |  |

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

Just a moment here. It -- it does refer to "scalp sampling" in this, which is done in tertiary care hospitals only. There are some things that are not performed in our hospital.

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Yes. But intermittent auscultation -- |  |

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

Q -- certainly. Yes.

**57**  Dr. Howard Pendleton, a highly experienced and accomplished obstetrician gave evidence. He noted that Melissa Allen appeared to be an entirely healthy pregnant woman with no obvious risk factors when she presented at St. Joseph's Hospital. He noted a fetal heart rate base line of 140 beats per minute on the initial partogram. He noted that the planned method of observation for such a low risk pregnancy would be intermittent auscultation but that Nurse Bradley had applied the EFM as a matter of habit or training rather than out of anxiety. He felt the fetal heart rate was entirely re-assuring until 3:20 a.m. He notes that the trace then became less than satisfactory. He noted that the IA record between 3:20 a.m. and 5:30 a.m. (birth occurred at 5:33 a.m.) were, in his view, in the normal range, or, on two occasions, returned rapidly to the normal range. It was his opinion that there was no point at which the readings indicated urgent delivery. He opined that childbirth, while safer than ever in much of the world, remains a mystery.

**58**  Dr. Pendleton testified at some length, mostly under cross-examination. There was considerable back and forth about "guidelines".

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | No, Doctor, what do the guidelines say that you must do? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | There isn't a "must" in guidelines. There is an advice in guidelines. That's the whole purpose of the guidelines. That's why they're called "guidelines'. It says that you more carefully observe the person and you act as necessary step by step. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | So if the guidelines say "must", you say they don't mean "must"? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | No, I don't say that. I say that the guidelines are telling you that this is the way you should continue to practise, but it's important to realize that this particular idea of fetal heart monitoring using an electronic thing is not the total of that delivery. The people in the room are the ones who judge that. So that's why they are guidelines, and they are guidelines as to good practice. |  |

**59**  Dr. Pendleton was taken to a document entitled "British Reproduction Care Program":

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Right. And you'll agree with this comment that's made about four lines into that guideline is: |  |

Normal EFM tracings have a high predictive value.

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I would agree with it. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | So if you have a normal tracing on, you've got a really good shot of that baby being okay and not hypoxic acidemic; right? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That quite correct. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And these guidelines are the guidelines that were given to you and these are the guidelines that you're relying on to determine what the standard of care is here; correct? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | That and my knowledge of management of obstetrics, yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And these safety guidelines, then, also go on to talk about the obligation to obtain an interpretable tracing. You're familiar with that, aren't you? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I am. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Okay. And so you should be able to find quickly for us, then, where the nurse's obligation to obtain an interpretable tracing is. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Well, yes, if I thumb through it all, I will. I don't have it right in front of me. "Management of Non-reassuring Tracing" 3.7, page 4. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Okay. Well, let's actually go about that. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | All right. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Because at that same page, page 12. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes, it says at the top: |  |

All registered nurses providing intrapartum care should have knowledge and skills regarding fetal monitoring equipment.

Yeah.

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | That's right. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | We've agreed that that would be the case. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | And three bullet points down, it says: |  |

Registered nurses performed EFM are responsible for obtaining an interpretable EFM tracing with both ultrasound and toco transducer channels.

Correct?

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And you'll agree with me that that is their responsibility according to the standard of care? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | It's part of their care. They're expected to know how to look after the patient and to do external monitoring and to do auscultation, yes. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Okay |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | It's one of their skills |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Right. And in carrying on at 3.6, "Internal or Direct Monitoring" that internal or direct monitoring is the scalp electrode; right? When you put a scalp electrode on, then you're doing internal or direct monitoring? |  |

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

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Right? |  |

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

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | And there are indications for doing that; correct? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And the indication is the external tracing is inadequate for accurate interpretation; correct |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | It's one of the indications, certainly, yeah |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Well, that's the only indication there. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That's correct. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And you'll agree with me also, since you're very familiar with these guidelines, that there are references to the guidelines at the end, at page 16; correct? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Let me go to page 16. There are many references, yes, to -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Many references. |  |

...

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | And it carries on to say: |  |

The quality of tracing of both the fetal heart rate and uterine activity channels must allow for accurate interpretation.

1. That's --

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | You'll agree that that's correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That's correct. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And you'll also agree that if there is insufficient duration, breaks in the recording, artifact, or a general poor quality tracing, then it must be continued until interpretable data are obtained? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | That's correct. But you'll remember that this nurse used the monitor box which was not required of her. Intermittent auscultation was the policy of the hospital, and she acknowledged that she did more than that and she used the box. I think with Dr. Bagdan assessing things, she was perfectly entitled to continue with intermittent auscultation. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Well, she actually switched from electronic fetal monitoring to -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Because she considered -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | -- intermittent auscultation? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | -- that she wasn't getting a good trace, so she went to listening with her ears, and her ears gave her good recordings. That's perfectly acceptable practice for low risk. |  |

We have established that this woman was of very low risk. She had no bad features suggesting cesarean, forceps, or anything else.

She didn't get a good trace, so she had two choices. She could put an internal scalp clip on or she could listen with her ears, and if listening with her ears was not effective, then she should have put a scalp clip on.

We've also established the partogram shows a normal heart rate through the time when interference should have been taken. I see no time when I would have interfered. That's my problem. And I think it's your problem. Because there is no moment when you say in this case, oh goodness, I must get on and get this baby out. And that's the real problem.

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | That's my problem, eh? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yeah. I think so. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Well, we -- |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Because I haven't heard from your experts or from myself or anybody else at what time interference should have been undertaken to save this baby. |  |

This is an enigma. This child is a very unusual child. His Apgars were 8 at four minutes. So it recovered very quickly.

And I don't know the answer. I've been at this game a long time, and I'm not in the business of harming babies, but I don't know when the moment should have been that we should have interfered. I don't think there is displayed, for you or for me, a moment of that type.

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | That's because we've got inadequate data; right? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Yeah, because -- no, not because we have totally inadequate data, but because there is no moment when the fetal heart rate went to 60 or 70, which it should have done with this hypoxia, and remained at 60 or 70. Not 140 or 150 as it was for the whole of the last half an hour or so of this observed labour when that damage was being performed. |  |

**60**  Dr. Pendleton was taken to the "Journal of Obstetricians and Gynecologists of Canada" chapter on "Intrapartum Fetal Surveillance".

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Okay. And you can't point to me where in any of the guidelines or any of the SOGC material or anything from the American College of Gynecologists -- of Obstetricians and Gynecologists where it says that when you've got a poor quality tracing, it's okay just to say, forget about it, we'll go to intermittent auscultation. It doesn't say that anywhere in any of that literature -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No, I -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | -- that you can point to. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | It says in all those guidelines that you should continue to observe carefully, and if necessary you ratchet up the observation. And I don't believe in this case there was a necessity because -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | And we -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | -- I see a perfectly good record. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | And a damaged baby? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | And a damaged baby, an enigmatically damaged baby because we have no warning in the course of that labour as to what was going on in that baby. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Because we don't have adequate data. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I'm sorry? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Because we don't have adequate date; correct? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | No, because we don't know everything there is about the birth of babies and we don't know everything about the function of the baby in the -- I'm enormously distressed at this outcome. I can't believe that this happens but it is a learning experience, but there is no moment when you would say make a cesarean or a forceps delivery. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | No, but there are lots of moments when you can upgrade the quality of surveillance. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | It wouldn't have made any difference, would it, because you're getting a recording every two or three minutes by the mother's and everybody else's ear in the room. And if the damage to that baby occurred in the last half an hour or so, all the fetal heart recordings from 5:10 through 5:30 are entirely within the normal range. |  |

**61**  Counsel for the plaintiffs asked about the baseline:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Can you have a look at that for me, please. So you'll agree with me and Dr. Bagdan and the nurses who were asked questions on examination for discovery that the baseline of this fetus going into second stage was 140 beats per minute; correct? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Yes, it was approximately. Yes. You can see that on the monitor trace. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Sure. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | M'mm-hmm. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And so what you're looking for, then, is you're looking for decelerations that are at a rate of 125 beats per minute or lower to be a deceleration? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | You can call it a deceleration, but it does not produce hypoxia in the baby. It's within the normal range of heartbeat. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Right. But that's another flag, isn't it? If you're getting decelerations on intermittent auscultation, you've got to take steps? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | It depends how long those decelerations last. If they last a short period of time with a return to normal, that's not a red flag. That's uterine activity pushing the baby down. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | With a -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | If they last for two or three minutes, then, yes. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | With a return to baseline? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | With the return close to baseline, yes. Within the normal range of heartbeat. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Okay. So if it's a return to baseline, then, that's a return to about 140 beats per minute? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | The baseline, as we established earlier this morning, is variable. It doesn't have to be 140 beats a minute. It might be 120 beats a minute. It's got to be within the range of the normal fetal heart rate, which is 110 to 160. So going down from 140 to 110, yes, you take notice. If it stays down for three or four minutes, you take more notice. If it returns to 120, 130, no problem. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Right. So if it goes down -- if the baseline's 140 and it goes down to 125, that's a deceleration and you take notice? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | That's a deceleration, but it is not a sinister deceleration. It doesn't produce hypoxia. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | No, but you take notice? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes, you take note. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And if it goes down again following the next contraction to 125 or lower, if the baseline is 140, again you take notice; right? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | You take note. You take note of prolonged decelerations. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | You take note. And then, again, if after the next contraction if it's down to -- in this case where the baseline is 140 -- |  |

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

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | -- it goes down to 125 or less -- |  |

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

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | -- then you again have to take notice; right? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | You do. You listen again carefully. And you see what the next contraction and the next heart rate says. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | You just can't keep doing that all the way along until -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | As long as it goes -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | -- you have a problem. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | -- back to normal, you can. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | As -- |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | And if you take your eyes, as we said, to 5:00 o'clock onwards, that heart rate was within normal range all that time: 140, 146, 155, 153. That is not a sign of asphyxia. That's the time when the asphyxia would have damaged the baby. In a time span, this baby, if it had had severe asphyxia at 3:00 o'clock, would have been born dead, and it wasn't. |  |

**62**  He discussed low fetal heart rates:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And, likewise, if you -- if you come across bradycardia, a fetal heart rate of less than 110 beats per minute, that's also non-reassuring; isn't that correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes. Take action to find out why it's there. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Right. And, likewise, if you've got the presence of decelerations, that's non-reassuring; correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | That's correct. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And each one of those non-reassuring heart rates, according to the guidelines, has its own response that's called for? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And the response for decelerations is a number of different things; correct? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | It's just not one simple response, but you need to look at the entire clinical picture; correct? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | You see a slowing and you want to know more about it and whether it's going to last any length of time. That is basically the problem, yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And it can be a red flag that things further on down the road might not end up all that well? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | It may be a red flag. It may return to normal quite quickly and there'd be no red flag. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Sure. |  |

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

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Sure. But it starts off as being a red flag? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Can be a red flag. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Right. Well ...And those decelerations are the event where the fetal heart rate does not return to baseline; correct? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | It's where it doesn't return to the normal range -- not the baseline, but the normal range -- within a reasonable period of time, that's correct. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | So what's the point of having a baseline at all? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | The purpose of having a baseline is to say that it's within the range of 110 to 160. That's all. It doesn't matter whether it's 140 or 120. There is no evidence that the babies are harmed when their heart is beating at 110, 120, 130. There is every evidence that babies are harmed when their heart is beating at 60 and that remains there for five or seven minutes. That's the whole purpose of this observation. It doesn't' matter a bit if your heart rate is 110 or 160. There is no evidence at all in obstetrics that that harms a child. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | You have a baseline that needs to be established at -- and this was established at 140 beats per minute; correct? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Yes I think you're spending too much time worried about a baseline. The baseline can be varied according to the activities. We've said hot mothers, mothers working hard, and so on and so on, the baseline may change. It matters if the baseline is outside the normal range. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | The baseline is established so that you can determine whether this baby's having accelerations or decelerations; correct? |  |

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

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | And that's the importance of the baseline. |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And in this particular case, after 3:20, this -- there's no evidence that this child was experiencing accelerations of the heart rate; correct? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | We don't know that. We can't measure it from external monitoring. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | You can't measure it, but you can detect it on intermittent auscultation. If there's -- if there's an acceleration -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes, you can -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | -- 15 beats -- 15 beats per minute above 140 -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes, okay. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | -- you can detect that? correct? |  |

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

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | And that's reassuring if it's there; right? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And there are no accelerations after this strip is taken off this baby. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No decelerations? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | No accelerations. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | I don't know that. It's not possible to tell from what is there on the partogram. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | You've got inadequate date. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | No, because the heart rate was within normal range. The date gives you 134, 148, 142, 138. That's all entirely normal. That's not inadequate data. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | You've got inadequate data to answer the question of whether or not there are accelerations after -- |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Yes, you don't know whether there are accelerations. Quite right. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And by the same token, then, if you don't know there are accelerations because you don't have enough date, you don't have enough date to determine whether or not there are decelerations; correct? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Of course you do. Because if that heart rate was down to 60 or 70, that's a significant deceleration. If it's down to 110, it's within the normal range of heartbeat. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Okay. Well, where in the guidelines does it say, then, that a deceleration has to go down that low in order for it to be classed as a deceleration? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | All the guidelines basically say persistent prolonged decelerations are sinister and, as such, actions should be taken. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Right. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | We haven't got that here. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | We've got more than 15 beats per minute below the baseline. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | But we don't have below 110. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | No. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Except in a very small number of cases and not in the last half an hour. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | But we've got it below the baseline, 15 beats per minute below the baseline; correct? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And we've got 15 minutes -- 15 beats per minute below the baseline for a significant period of time, don't we? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Would you draw my attention to where that is. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Well, we'll start at 0325. |  |

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

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | And then we'll finish it off at 0342. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Okay. And she listens twice and she gets 126 and 120 and 114. So there are several of those recordings above 110. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | No, no, no, no -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | And then -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | -- no., that -- sir, a different question. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | -- then it goes on to 134, 148, 142, 138. So it recovers entirely within the normal range to the normal baseline. That's -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | You've got decelerations? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes, you have decelerations. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And you've got several decelerations, and they're lasting from 0325 until 0352. |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And in terms of a period of time, that's -- what? 15 minutes? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Yes. If that baby had been significantly prejudiced at that time, it would have been dead at birth. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | But I'm not talking about that. I'm talking about a red flag. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | About ...? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | A red flag. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Right. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | That's a red flag. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | That's a red flag, but it went back to normal. So she was perfectly entitled to continue observation. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | So when you have a red flag, you just sit there and do nothing -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No, you go on -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | -- and hope it goes up? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | -- recording. She recorded every two to four minutes. Because if it had lasted through several contractions, that would have been your big red flag. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Okay. We've got a contraction at -- if she's recording after each one -- 3:25, that's one. 3:29, that's two. 3:31, that's three. 3:33, that's four. 3:36, that's five. 3:37 -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | 120 -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | -- that's six -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | -- at 3:36, I believe, in the lower panel. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Yeah. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | 109 over 120, that's normal. 110 is only a tiny bit below -- 110. So you've got 109 over 120 at 3:36. 3:37, you've got 104 over 116. That goes back to normal. |  |

**63**  Dr. Pendleton was taken to "Fetal Health Surveillance in Labour", a set of guidelines produced by "The Canadian Perinatal Regionalization Coalition" and endorsed by the Society of Obstetrician and Gynecologists of Canada.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Okay. And so you'd agree that the Canadian Perinatal Regionalization Coalition produced educational materials that were to be used in the teaching of obstetrical nurses? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Yes, I'm familiar with this. This one is dated September 2002, My Lord. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Right. And if you would have a look to page 128. It's numbered on the bottom right-hand corner of each page. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | M'mm-hmm. 120 ...? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | 128. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I'm there. "Decelerations". |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | "Decelerations". |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | These are the benign early decelerations; right? And it says "visual apparent" -- the definition of "early decelerations", which you've agree is head compression? |  |

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

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | "Visually apparent gradual decrease --" |  |

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

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | "-- and return to baseline --" |  |

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

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | "-- fetal heart rate --" |  |

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

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | "-- associated with uterine contraction". |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | It doesn't say to within the normal range of 110 to 160. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | All right. Well, I would agree with that, returning to the appropriately normal range, yes, okay. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And the "appropriately normal range" means a return to baseline? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And so you would have to defer to this teaching material; correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I would use it as a guideline to my practice, yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And, likewise, it goes on to define "prolonged decelerations" at page 152. Would you turn to page 152, please. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | 152. Yes, I have it. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | "Prolonged decelerations?" |  |

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

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Definition: |  |

Visually apparent decrease in fetal heart rate below the baseline.

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | The decrease is calculated from the most recently determined portion of the baseline. |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | The decrease from the baseline is greater than 15 beats per minute lasting greater than 2 minutes, but less than 10 minutes, from onset to return to baseline. |  |

You'll agree with me that that's the accepted definition of a prolonged deceleration.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | I would. And if you open the page on the right, 153, My Lord, you'll see what it looks like, so prolonged low slowing of the heart rate. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Right. And that's only possible to really see on electronic fetal monitoring; correct? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | All you would pick up with auscultation was the fact that the heart rate was slow for a prolonged period of time. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Right. You pick up decelerations on intermittent auscultation; correct? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | You pick up the fact the heart is going slow, yes, and you pick up how long it is slow. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Right. And you can pick up it's more than -- it's 15 or more beats per minute below the baseline and you can pick up that it's that low for more than two minutes? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And then once you've got decelerations, then it's incumbent upon you to take steps further to investigate that situation; correct? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Yes, you may wish to know what's going on, but -- well, we've talked already about how I think about the heart recordings. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Right. So what we've got here at the beginning of second stage -- and we've already talked about this -- is the knowledge of everybody involved that second stage of labour -- |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | -- for a woman who is giving birth to her first baby is typically going to last for an hour to two; right? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Likely, yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And that in this particular case we know that the electronic fetal monitoring strip has become uninterpretable; correct? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | The last part of it was not easily interpretable, quite correct. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And we also know that there was a frequent contraction pattern which the responsible obstetrician in his discovery evidence said bears watching; correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | We do. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And now we've got this situation commencing at 0325, as per the partogram, of decelerations that are 15 or more beats per minute below the baseline of 140; correct? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And that period of decelerations lasts for eight or nine contractions; correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Appears to be so, yes. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And that period of deceleration lasts for between 15 and 21 minutes; correct? |  |

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

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | And that is a big red flag; correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yes, it's a red flag. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | It's a significant red flag that warranted further investigation and steps rather than allow this labour to progress to the point where ultimately things did end up going wrong; correct? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | I don't know there's cause and effect, because at 3:44, it is 134. At 3:46, it was 148, and so on. So it had returned to normal. It was not progressively damaging. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Well, you don't know what was going to happen after that point in time, but you had just experienced a big red flag and there were a lot of other circumstances surrounding this so that one would not have confidence that this was necessarily going to end up with a healthy baby; correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Correct. |  |

**64**  Dr. Pendleton was asked about the relationship of knowledge of the guidelines to good practice:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Now, you said earlier in your evidence that it is important for those who are trained and put in positions of monitoring fetal health -- |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | -- to familiarize themselves with the guidelines and teaching materials, and so on, so that they can do the job properly; correct? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | I believe so. I believe it's part of their training and part of their continued training, yes. |  |

\*\*\*

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And if she didn't -- wasn't familiar with those intermittent auscultation guidelines, then she would not have been well trained or capable of being in that room and doing her job properly. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Well, you're suggesting that everybody has to know guidelines to be competent. That's not true. You can be competent without knowing a lot about the guidelines. She as competent enough that she not only listened when there was a slowing of the heart rate, but she listened -- My Lord, she listened when she heard the heart come back. So she did a double. |  |

I would suggest she gives competence by what her observations have done. I looked to see if I thought she was in incompetent individual. I don't believe her to be the case. This is a small community hospital. They have to put up with the people they get there, but she was by no means incompetent as portrayed in her measurements.

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | She just didn't do her job very well that day? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | I don't believe she did her job badly. I think she did her job appropriately. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | She had the ability to get adequate date; right? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | She got adequate data related to the fetal heart rate right through from 3:20 to 5:30, and all that is written down with care. When the heart slowed, she did further recordings, she did them frequently, and there was no evidence that the heart rate had descended and remained down. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Except for the fact that the baby was acidotic when the baby was born. That's the evidence; right? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | It appears to be, and I can't give you an explanation. I wish I could. I was looking for every possible reason for that baby's acidosis. I don't know. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Right. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | And I' don't think anybody that you're going to talk to knows. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | How does human error sound? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I'm sorry? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Human error? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | No, not human error. Act of God, if you'd like. That's what obstetrics is about. Every now and then there is a problem which we don't understand. We understand a lot more, but we don't understand everything. |  |

**65**  The report of Dr. A.J. Macnab has been referred to earlier with reference to the cause of injury. Dr. Macnab also testified. He elaborated on the mechanism of Brenna Allen's injury:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Now, when you get the situation that we have in Brenna really proven by her MRI, her MRI shows a pattern of brain injury that was caused by an acute lack of adequate blood flow to the brain. This is the ischemic component. |  |

We talked about hypoxic injury where there's inadequate oxygenation. We talk about an ischemic component where there is inadequate profusion, inadequate circulation of blood through the tissue to keep it alive.

And the reason I say it's -- it's -- it's just not possible that her heart rate baseline stayed within this normal range during this period is that in order to get ischemia in the brain, which she has, proven by imaging, the mechanism whereby that ischemia occurs is for the fetal heart rate to fall and for the output form the heart to become inadequate to profuse the brain. And therefore, if you have hypoxic ischemic injury, you must physiologically have had a period of time when the heart rate fell sufficiently below baseline for there to be inadequate brain blood flow. It's a cause and effect.

And that is why I say, in my opinion, she cannot have had sustained normality of fetal heart rate, because under those circumstances the physiologic situation would not have arisen that would have resulted in ischemic injury.

**66**  He explained his view of the specific mechanism of injury:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | The umbilical cord is obviously the conduit from the placenta and the mother's circulation to the baby. All the blood delivered to the baby, all the oxygen delivered to the baby has to go through the umbilical cord, and similarly all the waste products that need to be removed from the infant, the acids and the carbon dioxide, go from the baby back to the mother. |  |

And if one can visualize the baby floating within the amniotic fluid in the uterus -- there are some beautiful illustrations by a Swedish photographer, Lennart Nilsson, who actually photographed the babies inside the uterus, and you can see them a little bit like an astronaut floating with this remarkable umbilical cord floating freely in the amniotic fluid.

The problem is it's a vulnerable structure, and particularly during labour, as the baby moves into the birth canal, this structure can become trapped, it can become pinched between the baby and the rim of the pelvis. It can get caught up around the baby's limbs or around the neck. And under those circumstances the free flow of blood to the baby and back to the mother is compromised. This is why we talk about "cord compromise".

The cord can become compressed with pressure that increases during a contraction. It can become occluded, it can be pinched off. It can drop through the -- down through the birth canal ahead of the baby and prolapse. So it's vulnerable.

And in this situation, as I noted in my original report, this baby's presentation was described as "compound". In other words, it wasn't a conventional presentation with the baby's head coming first. There were -- I think there was a hand as well.

**67**  A nurse, Kathryn Doren, was qualified to give opinion evidence in the field of obstetrical nursing. It was Nurse Doren's view that there were a number of ways Nurse Bradley's care departed from an acceptable standard. She noted:

She was placed on an electronic fetal monitor at 0247 hours. On my review the baseline fetal heart rate was 150 bpm with moderate variability. Occasional early decelerations were observed. Uterine contractions were every 1 1/2 to 3 minutes, lasting 30 to 90 seconds.

Dr. Bagdan was called at 0250 hours. An entry in the nurses' notes documented that he was on his way in. A fetal heart rate determination was documented on the *Partogram*; the fetal heart rate was 140 bpm.

An entry at 0255 hours noted that Mrs. Allen complained of increased rectal pressure and expressed the need to push with contractions.

At 0300 hours Mrs. Allen complained of feeling nauseated, she was noted to be panting through her contractions. The fetal heart rate was 150 bpm. The variability was not documented. The nursing documentation did not indicate whether accelerations or decelerations were present or absent. Mrs. Allen's contractions were every one to two minutes, lasting 30 to 50 seconds and were strong in intensity. The resting tone was not documented. There were no documented maternal vital signs. There was an additional untimed fetal heart determination documented,

Continuous electronic fetal monitoring continued. On my review of the tracing during the period from 0300 to 0310 hours the baseline fetal heart rate was 145 bpm with moderate variability. Early decelerations and occasional variable decelerations were present. There were no accelerations. There were six contractions in a ten minute period of time.

At 0312 hours a narrative note documented that Mrs. Allen was still panting with contractions. Dr. Bagdan arrived at 0315 hours. He examined Mrs. Allen. Her cervix was an anterior lip. She was fully dilated at 0317 hours and began pushing at 0318 hours.

Continuous electronic fetal monitoring remained in place. On my review of the fetal heart tracing during the period from 0310 to 0320 hours the baseline fetal heart rate was 140 bpm with moderate variability. Occasional variable decelerations were present. There were six contractions in a ten minute period of time.

From 0320 to 0329 hours the baseline fetal heart rate initially appeared to be 140 bpm. Repetitive decelerations to 70 to 120 bpm were present. There was also loss of signal. The uterine activity tracing stopped at 0324 hours. Continuous fetal heart monitoring stopped at 0329 hours.

At 0330 hours a narrative note indicated that Mrs. Allen was pushing well. Mrs. Allen's nurse documented that there were decreases in the fetal heart rate to 90 bpm during contractions and she noted that the fetal heart rate recovers well by the end or within 10 seconds after.

Fetal heart determinations ranging from 94 to 148 bpm were noted at 0320, 0322, 0329, 0331, 0333, 0036, 0337, 0339, 0342, 0344, 0346, 0348, 0351, 0353, 0355, 0356, and 0357 hours At 0329, 0333, 0336, 0337, 0339, and 0351 the nurse documented two fetal heart determinations (i.e. 94 and 114 bpm at 0333).

Mrs. Allen was noted to be pushing well at 0400 hours. Her nurse documented the fetal heart rate every one to five minute intervals between 0400 and 0500 hours. The fetal heart rate ranged from 102 to 147 bpm.

Dr. Bagdan was back in the room at 0440 hours, Fetal heart determinations were documented at 0500, 0505, 0510, 0512, 0516, 0520, 0523, 0525, 0528 and 0530 hours and were 117, 97/117, 114, 156,142, 146, 155,153, 157 and 155 bpm respectively.

Baby Girl Allen was born by spontaneous vaginal delivery at 0533 hours. She was dried and stimulated. She received positive pressure ventilation at one minute of age. This was discontinued at 3 minutes of age. Her Apgar scores were 4 at one minute, 8 at five minutes and 8 at ten minutes of age. With her one minute Apgar she was scored 2 for heart rate, 0 for respiratory effort, 1 for response to stimuli and 1 for color.

Her cord blood gases were suggestive of a respiratory acidosis with a pH of 6.93 (low), PC0<sub>2 </sub>of 74 mmHg (high), p0<sub>2</sub> of 22 mmHg and a Base Excess of -22.3 (low). Her initial bedside glucose determination at 45 minutes of age was 11.3. She was noted to be irritable and exhibited some questionable seizure activity on January 6, 2008.

**68**  Her opinion included the following observation:

Mrs. Allen was fully dilated at 0317 hours and began pushing at 0318 hours. From 0320 to 0329 hours the baseline fetal heart rate was indeterminate. Frequent loss of signal was present. There were two short segments of tracing where the fetal heart rate was 140 bpm. Recurrent decelerations to 70 to 120 bpm were observed on the tracing. These decelerations could not be classified due to the loss of signal. The fetal heart did not appear to recover to the earlier baseline of 140 bpm beginning at 0325 hours. The uterine activity tracing stopped at 0324 hours and continuous monitoring of the fetal heart rate stopped at 0329 hours. As the fetal heart rate could not be clearly determined during the last five minutes of the tracing it is my opinion that it was inappropriate to discontinue the electronic fetal monitor at this time as there were features of the tracing that were becoming non-reassuring. The tracing bore watching at this point in time. '

In addition to continuing to watch the tracing for an evolving pattern, the nurse should have taken steps to improve the quality of the tracing. These measures include palpating the patient's pulse to compare it to the audible and printed signal to rule out the recording of the maternal pulse and repositioning the ultrasound transducer in an effort to improve the signal quality. If these actions do not result in an improved signal the nurse may apply a fetal spiral electrode (if this practice is allowed by the Provincial Nursing Regulatory body) or requesting that the physician attend and apply the fetal spiral electrode.

Beginning at 0320 hours the fetal heart rate was documented every 1 to 5 minutes. An entry on the *Partogram* indicated that the fetal heart rate was assessed using intermittent auscultation. The documented fetal heart rates ranged from 94 to 157 bpm [the normal baseline range is 110 to 160 bpm]. The documented fetal heart rate was less than 110 bpm at 0325, 0409 and 0445 hours. At 0325, 0336, 0337, 0348, 0400, and 0505 two fetal heart rate determinations were documented [i.e. 95/109 at 0348 hours] suggesting that decelerations were heard while listening to the fetal heart rate. At 0330 hours Mrs. Allen's nurse documented that Mrs. Allen was "pushing well, very focused FHRJ, into 90's during cntxn [contraction] but recovers well by the end or within 10 sec after."

The accepted procedure for performing intermittent auscultation is to listen to the fetal heart rate immediately after a contraction for a full minute. The maternal pulse should be palpated simultaneously to differentiate the maternal heart rate from the fetal heart rate. During the second stage of labor the fetal heart rate should be auscultated every five minutes once the woman has begun pushing.

When performing intermittent auscultation one can assess the baseline fetal heart rate (counted for one minute between contractions), the rhythm (regular or irregular), as well as the presence or absence of accelerations and decelerations (abrupt or gradual). When documenting auscultated fetal heart rate findings the accepted standard is to document the fetal heart rate, rhythm as well as the frequency, duration, intensity and resting tone of the uterine contractions,

Although the frequency of the assessments exceeded the accepted standard, the nursing documentation suggests that the fetal heart may not have been auscultated for a full minute immediately following a contraction. In addition, the absence of documented maternal heart rates does not support that the maternal pulse was palpated while auscultating the fetal heart rate.

Auscultated fetal heart determinations are considered reassuring if the fetal heart rate [FHR] is within the normal baseline rate of 110 to 160 bpm and accelerations are heard. Auscultated fetal heart rate determinations are non-reassuring if there is an abnormal baseline rate (i.e. FHR > 160 bpm or FHR <110 bpm); a changing fetal heart rate (increasing or decreasing over time); or the presence of decelerations.

As outlined above the auscultated fetal heart rate determinations were abnormal on a number of occasions during the second stage of Mrs. Allen's labor, in particular between 0325and 0409 hours.

When non-reassuring fetal heart rate determinations are found when performing intermittent auscultation, the nurse needs to perform further assessments to confirm the findings and determine potential causes. These include auscultating the fetal heart rate again, check maternal pulse, blood pressure and temperature and perform a vaginal examination. The nurse should also initiate electronic fetal monitoring to determine the baseline fetal heart rate, variability and the presence of accelerations and decelerations. The most responsible physician should also be notified.

Dr. Bagdan was noted to be present in the room at 0315 and 0440 hours. There is nothing documented in the medical record to suggest that he was aware of the non-reassuring fetal heart rate findings which were present between 0325 and 0409 hours.

It is my opinion that Mrs. Allen's nurse fell below the accepted standard of care as she did not notify Dr. Bagdan the non-reassuring fetal heart rate findings that were present between 0325 and 0409 hours.

\*\*\*

Although the fetal heart rate was monitored at an accepted frequency during the first stage of Mrs. Allen's labor, her nurse did not document her assessment of the electronic monitor tracing in accordance with accepted standards, nor did she document Mrs. Allen's uterine activity according to accepted standards. During the second stage of labor the fetal monitor was discontinued and intermittent auscultation was used to assess the fetal heart rate. Immediately prior to discontinuing the fetal monitor, non-reassuring characteristics were present on the tracing and the last five minutes of the tracing could not be reliably interpreted. Continuous electronic fetal monitoring should not have been discontinued. The nurse should have taken steps to trouble shoot the monitor, including repositioning the ultrasound transducer. If this did not result in an interpretable tracing the nurse should have requested the application of a fetal spiral electrode to ensure an interpretable tracing. The frequency of the auscultated fetal heart rate determinations did meet or exceed the accepted standard of care; however Mrs. Allen's nurse in her documentation suggested that she was listening to the fetal heart rate during the contraction rather than listening for a full minute immediately following the contraction. Her nurse also failed to alert Dr. Bagdan to the non-reassuring fetal heart rate characteristics from 0325 to 0409 hours.

**69**  Nurse Doren testified. She addressed the comment in her respect about "systematic interpretation".

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | So why did you use the term "systematic" here? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | In my mind, when I looked at her interpretation and documentation, I did not think that she took the total clinical picture of what was happening at that point in time. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Okay. Carrying on down, then, the next segment is "Fetal health surveillance during the second stage of labour." And what you say in the last two sentences is this: |  |

As the fetal heart rate --

Can you see where I'm reading?

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | M'mm-hmm |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | As the fetal heart rate could not be clearly determined during the last five minutes of the tracing, it is my opinion that it was inappropriate to discontinue the electronic fetal monitor at this time as there were features of the tracing that were becoming non-reassuring. The tracing bore watching at this point in time. |  |

Now, why did you write "the tracing bore watching at this point in time"?

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | There were several features of the tracing that I felt were concerning. There was loss of signal, so you could not clearly see what was happening with the tracing. There had been some decelerations. As well there had been periods of increased uterine activity. I thought -- my feeling is that the tracing should have been continued, steps should have been made to get an interpretable tracing, and watch what was happening before discontinuing the tracing all together. |  |

**70**  In cross-examination Nurse Doren was asked about EFM and IA:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | All right. Now, you also understand that the guidelines currently in place then and now from the Society of Obstetricians and Gynaecologists of Canada and the British Columbia Reproductive Care Program called for intermittent auscultation of the fetal heart during labour and not continuous electronic fetal heart monitoring in low-risk patients? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Correct. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And did you realize at the time you prepared your report that Nurse Bradley had just run a strip out of habit because they were just starting to switch into the use of intermittent auscultation? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I did not realize at the time I wrote my report. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | All right. Now, there was no clinical or medical need to run a continuous monitoring strip on Ms. Allen; correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Initially, no. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | All right. So if the quality of that monitoring becomes problematic in active -- for instance, in active second stage when the mother is pushing and contact is being lost, and assuming there's no clinical or medical need for continuous monitoring, it's perfectly appropriate to switch to intermittent auscultation? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | If you have an unclear tracing where you are seeing features that may not be reassuring, it is not appropriate to stop the tracing. You need to take measures to reassure yourself that what you are seeing -- that you are actually seeing what is going on with the fetus before you can discontinue the monitor's tracing, and that's clearly stated in the SOGC guidelines. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Let me ask this again, If there's no need to have continuous monitoring -- I'll add another portion. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Okay. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | If there's no need to have continuous monitoring, no medical need, and if the data you have obtained up to when you've lost contact with the fetal heart reassures you, then it is perfectly appropriate, if you've lost contact and you don't need continuous monitoring, to switch to intermittent auscultation at second stage? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No. Not -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | You're saying never? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | You can once you reassure yourself that what you are getting is a reliable rate. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | All right. So you've reassured yourself what you're getting is reliable. You can then stop? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | If -- if you have features that reassure you. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | All right. And would you agree that it's not unusual during second stage in labour, the pushing stage -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | M'mm-hmm |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | -- the expulsive effort stage, for contact to be lost with the fetal heart on continuous monitoring due to maternal movement? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | It certainly can during contractions, but following contractions, you should be able to get a reliable tracing. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Right. But you can easily lose contact with the monitor when you're in - |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yeah, during the -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | -- second stage labour? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | -- 60 seconds of the contraction, but in one to two minutes between the contraction, you should be able to get a tracing or resume a tracing. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Well, not always; right? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Usually. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Well, in a patient such as Ms. Allen, you didn't -- you realize she had no pain medication on board? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | I agree |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Yeah. So no epidural? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | No morphine? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | This is all natural? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yeah. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | She's going to be moving about a lot. Women in second stage labour, they just don't lie still, do they? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | No, but we usually reposition them and reassess them in between contractions. |  |

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| --- | --- | --- | --- | --- |
|  | Q |  | And you're repositioning the monitor to try and get better pick-up? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Yeah, yeah. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Right? |  |

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

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Right. And when you're doing intermittent auscultation, that's what you're doing, you're holding that monitor on with your hand. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | M-mm-hmm. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And one of the things I'm going to suggest you should never do as an obstetrical nurse or as a physician interpreting a fetal heart strip is to interpret the uninterpretable. Would you agree? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Agree. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | So why you have a strip which is not continuous and which is not getting good pick-up and which may be displaying what I think you used the term "artifact," it's not appropriate to make an interpretation of that fetal heart strip, is it? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No, you need to try to get a reliable tracing. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Yet when you comment about this portion of the strip when it's uninterpretable, you say it's uninterpretable and I shouldn't be interpreting it, but I'm seeing non-reassuring features -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | There were -- |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | -- correct? |  |

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| --- | --- | --- | --- | --- |
|  | A |  | There were changes that were different from what was before that needed to investigated. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | But you can't interpret the uninterpretable, can you? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | All right. And you can't read into it something that may not be there and which the nurse may not be hearing? No? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | No. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And just because the fetal heart is not being picked up on the continuous printout, doesn't necessarily mean it can't be heard; correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | It can -- that's correct. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Now, the criticism you have for not improving the quality of the tracing obviously assumes, first, that the patient should be on the monitor in the first place, and, second, that the portion that's uninterpretable needs to be interpreted using the monitor. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | M'mm-hmm. |  |

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| --- | --- | --- | --- | --- |
|  | Q |  | The procedure, as we've discussed, for performing intermittent auscultation is to listen to the fetal heart for a full minute? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Correct. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And in that full minute, you're looking for a normal fetal heart rate? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Correct. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Now, you in fact said that the auscultated fetal hearts -- this is in your report, I think it's at page 8 -- they're considered reassuring if they're within the 110 to 160 range; correct? |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | A | Correct. |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And you'd agree that the majority of the fetal hearts that were auscultated in this case were within that range? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | They were, but many were different from the previous baseline. |  |

**71**  Dr. Jon F.R. Barrett, the division chief of maternal fetal medicine at Sunnybrook Health Sciences in Toronto, provided a report and also testified. He provided the chart reproduced herein at para 26.

**72**  Dr. Barrett noted:

At 0327 full dilatation was achieved and at this stage electronic fetal monitoring was discontinued. It should be noted that the baseline fetal heart rate on the electronic fetal monitoring was approximately 140 bpm in addition just prior to the discontinuation of the monitoring there appears to be a series of decelerations. The fetal heart rate just prior to the discontinuation seems to be reading at approximately 100 bpm.

**73**  His opinion was:

The next departure from the standard obstetric care was the discontinuation of electronic fetal monitor at 0327. The fetal monitoring strip shows the presence of a series of decelerations immediately before the discontinuation. Until it was certain that these decelerations would not persist or worsen the electronic fetal monitor should have been kept running. It is below the standard of care to remove electronic fetal monitoring strip in the presence of decelerations.

The EFM however is informative of the baseline heart rate of this baby in labor. It can be seen to be running at approximately 140 bpm. The table of the intermittent fetal heart rate monitor above shows several instances when the fetal heart rate is recorded to be lower than 140 bpm. The usual practice is that when two fetal heart rates are documented one represents the baseline and the other perhaps a deceleration from that baseline. In some time intervals the heart rate episodes are not concerning. For example at time interval 0400, the numbers128/141 are found. This would usually be interpreted as that the baseline was 140 bpm and that a deceleration occurred to one 128 bpm and recovered. This would be a pattern compatible with the normal fetal heart rate response to pushing in the second stage of labor.

However there are several time points at which a single fetal heart rate was documented and is abnormal, example at times 0325 when a heart rate of 102 bpm is documented. This is a bradycardia and is not a normal heart rate. A further example of abnormal rates are shown at 0409 and 0445. The finding of an auscultated fetal heart rate less than 120 beats a minute demands the recommencement of the electronic fetal monitor, which was not carried out.

They are some time points at which two fetal heart rates are documented suggesting a deceleration and then recovery. However in some events neither the deceleration nor the recovery are reassuring as they are less than 120 bpm. Examples of these events are shown at 0333, 0348 and 0505. These time periods represent decelerations with recovery, but not to the recovery of the fetal heart rate baseline which was at 140 bpm. They will indicate that the electronic fetal monitor should have been re-applied.

In my opinion these fetal monitoring time periods reflect fetal heart rate decelerations and bradycardias which were not recognized by the attending nurse, or from 0440, by Dr. Bagdan. It is further my opinion that had the electronic fetal monitoring been reapplied, as the standard dictates, then this abnormal pattern would have been recognized and would have been able to be acted upon by urgent delivery. The consequence of these abnormal fetal heart rates is clearly seen in the significant acidosis measured in the umbilical cord pH. It is this acidosis, which likely developed at some time after the electronic fetal monitor was discontinued, as the EFM pattern prior to the removal was normal. The baby thus entered labor with a normal acid- base status, and became progressively acidotic and likely asphyxiated thereafter.

The condition of the baby after birth reflected this progressive acidosis and possibly the hangover effect of the diazepam, both of which could have been prevented and would have prevented any subsequent consequence to baby Brenna.

**74**  Dr. Barrett also testified. He explained his view of the significance of the base line:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | And at the first full paragraph of page 3, about halfway through the paragraph, you say: |  |

It should be noted that the baseline fetal heart rate on the electronic fetal monitoring was approximately 140 beats per minute. In addition just prior to the continuation of the monitoring there appears to be a series of decelerations.

Now, why do you say "it should be noted"?

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | It should be noted because that's the baseline fetal heart rate is the average fetal heart rate. And when one interprets fetal heart rate monitoring in labour, the baseline or the average is where you start to determine if subsequent changes are normal or not. Once you have established the baseline you can then decide if there are decelerations, if there's bradycardias or there's changes from the baseline. So the baseline is what you have to establish first. And so -- and that's why I say whenever you interpret or use electronic fetal monitoring or intermittent monitoring, you have to first establish the baseline fetal heart rate, which is why I say it should be noted. |  |

**75**  He addressed the timing of the discontinuance of the EFM:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Q |  | Now, what you say as well in that same sentence is that just prior to the discontinuation of the monitoring there appears to be a series of decelerations. What do you mean by "a series of decelerations"? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | So as I mentioned before, the baseline can be established from this electronic fetal monitoring strip, and you can see it quite clearly perhaps in panel 0335. It is the average fetal heart rate. It's stable over a period of 10 minutes. There's good detection on the monitor. The line is solid. So you can establish the baseline. If you follow the strip to the right starting -- beginning 0336 and onwards, there appears to be changes from the baseline. They're in a downward direction. They're more than 15 beats per minute and so therefore they would be qualified as decelerations, and they appear to become -- or there appear to be at least three or four of them. In addition, the baseline seems to be slowly decreasing. It's difficult to get the baseline because what's also happening here is the detection, or the ability to detect or read the monitor is becoming less obvious so that by the end of the strip, 0338, there appears to be a low fetal heart rate based upon about 100 beats per minute. That's the last kind of squiggle you can read just above the number 112. But then the monitor becomes uninterpretable. You can't -- the pickup is not as clear, and that's why I use the term "appears". |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | And then in the next sentence you say: |  |

The fetal heart rate just prior to the continuation seems to be reading at approximately 100 beats per minute.

Why did you use the word "seems"?

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | Because of the general deterioration of the quality of the trace, the detection is not as clear as you can see earlier, and so that's why I didn't use the word "appears." or "seems." |  |

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| --- | --- | --- | --- | --- |
|  | Q |  | Over to the next page, the first whole paragraph which starts off with: |  |

The next departure from the standard of obstetric care was a discontinuation of electronic fetal monitor at 0327.

Why do you make that comment?

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | It was below the standard to discontinue the monitor for three reasons. The first is that the tracing was abnormal at the time that it was discontinued. It shows the presence of decelerations which at this stage in labour would not be a normal thing to occur. You should not get decelerations at least -- if you do get decelerations in this early stage of labour, it is significant. You can see them developing on the fetal monitoring strip and so to remove the strip, once you can see decelerations in this stage of labour, would be the wrong thing to do and below the standard of care. One should continue the electronic fetal monitoring to see if these deceleration patterns continue. |  |

The second reason, is as I have mentioned, you can see that there appears to be the development of a bradycardia or a change in baseline. The fetal heart rate baseline which was running at 140 beats per minute, if you look at the strip it looks like it's slowly declining progressively. So at the point of discontinuation, the last snippet that we can read looks like it's running at 100 beats per minute. So in addition to what appear to be the development of decelerations there could be the development of bradycardia.

And the third reason it was below the standard is because one is losing the ability to really monitor the fetal heart rate accurately because of the improper pickup. The detection rate of the fetal heart rate monitor becomes ineligible. So for those three reasons, it was below the standard of care for the nurse to discontinue the monitor.

**76**  Dr. Barrett commented on the readings in the chart following the start of IA:

What happened in this case the nurse discontinued the electronic monitor and switched to intermittent auscultation. When auscultation is done in labour, it is done at particular time periods, usually after a contraction and/or every five minutes. So the time periods I am referring to are those summarized in the -- or those documented in the table, and you can see at several of those time periods there are one or two -- one or two or both things documented. The first, there are time periods when only a single number is written. And that number is abnormal and therefore represents a bradycardia. So, for example, at time period 0409 a fetal heart rate of 105 is documented, and so that is an abnormal heart rate. It's by definition a bradycardia on intermittent auscultation. So that's one of the time periods. There are other time periods when two heart rates are actually measured, and in that time those usually reflect -- and I think in this case from the discovery, it is a deceleration of the heart rate and then a recovery. A deceleration after a contraction. And then a recovery from that lower number to a higher number.

The problem with many of these is that the recovery is not to the baseline, so they're impartial, improper recovery.

So for those time periods when either there is only one number that is less than the baseline, that is an abnormal measurement. That's a bradycardia. And the second ones are when there are decelerations, but there is not a complete recovery back to what was heretofore recognized as the baseline.

**77**  Dr. Barrett commented on deceleration:

No, what is a deceleration then?

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| --- | --- | --- | --- | --- |
|  | A |  | As I said, a deceleration is a slowing of the heart rate from the baseline which has to be of more than 15 seconds in amplitude [sic] and has to last for more than 15 seconds. That's a deceleration. |  |

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| --- | --- | --- | --- |
|  | Q | I'm sorry. 15 seconds in amplitude? |  |

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| --- | --- | --- | --- | --- |
|  | A |  | No, in depth. So if a baseline is 140 for a deceleration to be classed as a "deceleration," it has to go down to less than 125. |  |

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| --- | --- | --- | --- |
|  | Q | You go on in that same sentence and say: |  |

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| --- | --- | --- | --- |
| -- |  | which were not recognized by the attending nurse or from 0440 by Dr. Bagdan. |  |

Why do you say that?

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| --- | --- | --- | --- | --- |
|  | A |  | So for the attending nurse, I think I've dealt with that. Following the discontinuation of the monitoring there are time periods when the fetal heart rate is abnormal and is not showing to recover at all. And then in the phases that there is some recovery, it does not recover back to the baseline of 140. So that's for the nurse. For Dr. Bagdan who was present from 140 there is a time at -- |  |

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| --- | --- | --- | --- |
|  | Q | Sorry, he was present from what time? |  |

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| --- | --- | --- | --- |
|  | A | I think it was 0440. |  |

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| --- | --- | --- | --- |
|  | Q | 0440, yes. |  |

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| --- | --- | --- | --- | --- |
|  | A |  | There is a period of 0445 when the fetal heart of 106 beats per minute is documented. That is an abnormal rate. It is a bradycardia, and if you see an abnormal rate on bradycardia, you have to do something. Usually you resort to external -- stop doing the internal and go back to the external monitoring to see what kind of pattern you're getting and also to get some assessment of the variability of the fetal heart rate which is a very sensitive measure of the presence of acidosis. You don't get that on intermittent auscultation. It is a good screening tool to see if something's developed. It's a good warning sign, but if you see the warning then you have to resort to get more evidence. And that was not done by the nurse, and at 0445 when Dr. Bagdan was present there was a fetal bradycardia scene which was not acted upon. |  |

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| --- | --- | --- | --- | --- |
|  | Q |  | I'm sorry. Did I understand -- maybe in your answer you said you go back to the external monitoring. What do you mean by that when you said when you go back to the external monitoring? |  |

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| --- | --- | --- | --- |
|  | A | You go back to the continuous external monitor. |  |

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| --- | --- | --- | --- |
|  | Q | I see. |  |

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| --- | --- | --- | --- | --- |
|  | A |  | Or internal continuous. But the first step would be to continue external monitoring. |  |

**78**  Dr. Barrett commented on the appropriate standard:

What is it that the standard dictates?

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| --- | --- | --- | --- | --- |
|  | A |  | The standard dictates that if you find abnormal patterns of measurements or results on intermittent auscultation that you get more information about the status of the baby. If you see red flags on the internal auscultation methods then you resort to the external, the continuous method of auscultation which does provide more information. So the standard means that if you see something developing that's abnormal, like decelerations or that don't go back to the baseline, or bradycardias, you place the patient on the continuous monitor. |  |

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| --- | --- | --- | --- |
|  | Q | You go on to say that: |  |

Then this abnormal pattern would have been recognized.

Why do you say that?

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| --- | --- | --- | --- | --- |
|  | A |  | This baby was born with a severe acidosis, severe intrapartum acidosis and asphyxia. Electronic fetal monitoring is designed to detect that by virtue of the presence of abnormal baselines, abnormal availability and decelerations. It is my opinion that his degree of acidosis, if the baby would have been monitored, would have been probably, almost probably seen on the continuous monitoring pattern. |  |

**79**  Dr. Barrett commented on what could have been done:

What do you mean by that?

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| --- | --- | --- | --- | --- |
|  | A |  | So if you see the development of developing fetal acidosis, then it's usually possible -- and that's the whole basis of monitoring in obstetrics -- that if you see something developing like intrapartum acidosis as a consequence of lack of oxygen that you can expedite delivery. In this patient, the patient had been pushing for a while. It wasn't a big baby. The baby was by all intents and purposes low down in the vagina. It should have been easy and quick to expedite a vaginal birth if the acidosis would have been recognized. |  |

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| --- | --- | --- | --- | --- |
|  | Q |  | I'm sorry. Just one follow-up question on that: Expedite a vaginal birth. What do you mean, "expedite a vaginal birth"? |  |

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| --- | --- | --- | --- | --- |
|  | A |  | Usually it could be an instrument. It could be the performance of an episiotomy which is to open the outlet of the vagina which will facilitate easier delivery sometimes. Sometimes it's a vacuum delivery which is -- it can be usually very quickly done if the baby's head is low enough after pushing for some time if the baby is not too big. And sometimes it could be a Cesarian section depending on what the position was and how far the baby was. But in this case she'd been pushing for a long time. The baby's head was there. I think a vacuum delivery could have been done quite quickly. |  |

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| --- | --- | --- | --- |
|  | Q | In the final sentence you say: |  |

The condition of the baby at birth could have been prevented and would have prevented any subsequent consequence to Baby Brenna.

Why do you say that?

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| --- | --- | --- | --- | --- |
|  | A |  | I believe, if you look at the monitoring, both the external monitoring that was done initially, would show the development and the presence of decelerations, then the intermittent auscultation, that there are enough clues within those fetal monitoring methods to pick up that there was something going wrong here. That if continuous monitoring would have been -- if intermittent monitoring would have been switched to external monitoring, that the progressive acidosis, the development of acidosis, would have been able to be detected and therefore intervened before the damage occurred and this baby became so acidotic. |  |

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| --- | --- | --- | --- | --- |
|  | Q |  | And just again one follow-up question. When you said "switch to external monitoring," what specifically do you mean? |  |

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| --- | --- | --- | --- |
|  | A | The continuous monitoring. |  |

**80**  In cross-examination he was asked about the SOGC guidelines.

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|  | Q |  | Doctor, can we agree, then -- well, these guidelines, the 2007 guidelines, are called consensus guidelines, aren't they? |  |

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

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| --- | --- | --- | --- |
|  | Q | They're created by a committee? |  |

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

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| --- | --- | --- | --- | --- |
|  | Q |  | The committee has what's called principal authors and others, and their names are referenced near the front of the guidelines. |  |

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| --- | --- | --- | --- |
|  | A | Correct. |  |

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| --- | --- | --- | --- | --- |
|  | Q |  | And can you agree -- and do you have the guidelines there, doctor? the SOGC Guidelines? |  |

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| --- | --- | --- | --- | --- |
|  | A |  | Tab 11. Okay. This looks like it's -- so this is from -- this looks like the guidelines, yes. Yes, published in the journal, the *Journal of the Obstetrics and Gynecologists of Canada,* yes. |  |

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| --- | --- | --- | --- | --- |
|  | Q |  | Doctor, I take it that those guidelines are meant to provide clear guidance to practitioners with respect to patient care? |  |

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| --- | --- | --- | --- |
|  | A | Correct. |  |

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| --- | --- | --- | --- | --- |
|  | Q |  | But those guidelines, doctor, are not meant to be followed slavishly, are they? They're just guidelines? |  |

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| --- | --- | --- | --- | --- |
|  | A |  | Well, you always have to think about the interpretation of a guideline in the clinical situation that you are. So slavishly means a blind adherence to policy and procedure. Nobody would do that. On the other hand, they are considered documents, and if you depart from them then you should have a reason why you've done that. |  |

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| --- | --- | --- | --- | --- |
|  | Q |  | The guidelines themselves say that they do not dictate an exclusive course of treatment or procedure. |  |

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| --- | --- | --- | --- |
|  | A | Right. |  |

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|  | Q |  | And just if I may. What I've done, doctor, is photocopies or -- I'll call it the "introduction to the September 2007 guidelines." Do you recognize that? |  |

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|  | A | Yes. |  |

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|  | Q |  | And you can see at the bottom of S-3 the length employed by the SOGC with respect to how these guidelines are to be used? |  |

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

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| --- | --- | --- | --- |
|  | Q | And what the authors say is: |  |

The information should not be construed as dictating an exclusive course of treatment or procedure to be followed. Local institutions can dictate amendments to these opinions.

And so on. Correct?

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| --- | --- | --- | --- | --- |
|  | A |  | Yes. I think, as I've said, they're meant to be guidelines based on best available evidence with expert input with respect to the most appropriate care of a woman in whatever aspect they're talking about, but medicine is not prescriptive. You can adapt it. But when you do so, you should be aware that if you do so, that you are going contrary, and if you are going contrary, then there should be a particular reason why you're doing that. |  |

It's not like they're written as a -- as something a "take it or leave it" kind of ... I don't want to give you that impression. I don't think the SOGC's principle is that, either.

**81**  Dr. Barrett was asked about the recent preference for IA over EFM for low risk pregnancies:

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|  | Q |  | What the SOGC decided, certainly by 2002, was that they would strongly recommend intermittent auscultation providing it's done correctly even though it meant a trade-off in the sense that with IA you would not get the exact same data as with electronic fetal monitoring. |  |

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| --- | --- | --- | --- | --- |
|  | A |  | No, I don't think it's trade-off. I think what it's saying is that if you use intermittent auscultation properly your long-term outcome for the baby will be the same without an increase in intervention rate. I don't think it's a trade-off between the type of information you will get. I think if you're doing intermittent auscultation properly you'll get the same information as doing electronic fetal monitoring. So there's no trade-off. It's just a -- it is a way of assessing the fetus that will give you the similar information because you're not trading better for worse. It is continuum of methods of assessing the baby. And the most appropriate way to start off a low-risk pregnancy is with intermittent. |  |

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|  | Q |  | And what you say is so notwithstanding the fact that, for example, with IA you cannot tell the type of decelerations? |  |

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| --- | --- | --- | --- | --- |
|  | A |  | Correct. You cannot classify decelerations on intermittent auscultation. |  |

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| --- | --- | --- | --- | --- |
|  | Q |  | And you cannot -- you cannot determine variability on IA, correct? |  |

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| --- | --- | --- | --- |
|  | A | Correct. |  |

**82**  Dr. Barrett explained what he thought should have happened:

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| --- | --- | --- | --- | --- |
|  | Q |  | You have considered that during second stage, because there were decelerations and bradycardia -- and I now understand your definition, about decelerations and bradycardia, EFM should have been reinstituted? |  |

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| --- | --- | --- | --- | --- |
|  | A |  | Well, I think it shouldn't have been discontinued in the first place. |  |

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|  | Q | Well, let's leave it aside for the moment. |  |

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| --- | --- | --- | --- | --- |
|  | A |  | It's difficult to leave it aside because you have to interpret the whole thing together. If the tracing was completely fine in the beginning then there were less red flags. Intermittent auscultation is a process of surveillance, of continual surveillance. If you start off with a suspicion, or you should do, then you're going to have a lower threshold of doing something different. In other words, if you had a completely reactive normal admission strip in the beginning and there were no decelerations like I pointed out, and there wasn't a bradycardia, then, yes, you might accept a couple of decelerations or you might be a little bit less meticulous about documenting the recovery like you want me to accept that happened at 0440. But knowing, or should have known, that that tracing was abnormal in the beginning you've got to be really meticulous about continuing with that method. |  |

And I want to point to that, for example. We know the tracing was discontinued at 0320, about there. If you look at the heart rates immediately thereafter, they're all abnormal. None of them were near the baseline of 140. We know the baseline was 140 just three -- ten minutes before, and reactive. All the heart rate measurements from the heart rate of 102, that, by every definition, is abnormal. Everyone agrees 102 is an abnormal rate. None of those rates up until 0346 comes back to the baseline. So how do you know that those aren't just progressive decelerations? The way I read that is it hasn't even come back to the baseline, and I'm not saying it didn't'. I'm just saying it behooves you to prove when you get these progressive decelerations and recurrent, to rethink, oh, maybe I shouldn't have taken the monitor off. Maybe put it back on.

**83**  He again addressed the differences between IA and EFM:

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|  | Q |  | Doctor, two schools of thought. Do you agree that it is reasonable for someone else to say this cannot -- this cannot -- this last eight minutes cannot be interpreted and so I will not try? |  |

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| --- | --- | --- | --- | --- |
|  | A |  | No. If you cannot interpret a fetal heart rate your obligation is to make sure you can interpret it. |  |

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| --- | --- | --- | --- |
|  | Q | So there are no two schools of thought? |  |

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| --- | --- | --- | --- |
|  | A | Well, then you are not monitoring the baby. |  |

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| --- | --- | --- | --- |
|  | Q | We know she starts recording IA at 320? |  |

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| --- | --- | --- | --- |
|  | A | Correct. |  |

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| --- | --- | --- | --- | --- |
|  | Q |  | We don't -- we don't know if she's even relying upon the stirp the last eight minutes, do we? |  |

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| --- | --- | --- | --- | --- |
|  | A |  | The strip is running. Someone in the nurse -- a nurse who is looking after the patient should -- you can't ignore the strip that's running and say, okay, well, I'm going to go to -- switch to IA, so what I'm going to do is document the IA and I'm going to ignore the decelerations that I can see on the strip. That doesn't work. |  |

And the other thing, the other principle which we might have to agree with other experts is that if you've got external continuous monitoring running it overrides the intermittent auscultation. Intermittent auscultation is a screening tool to screen people for a low risk delivery. When you see something is abnormal, you go to EFM. If you've got EFM running and it shows something abnormal, you can't say, oh, I'm taking off the abnormal EFM. I'm going to IA. That doesn't work.

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| --- | --- | --- | --- |
|  | Q | A screening tool? |  |

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|  | A |  | That's what IA is. It is a low-risk surveillance method of detecting abnormalities. It does not have the full range of defining decelerations variability of EFM. |  |

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| --- | --- | --- | --- |
|  | Q | Yeah. |  |

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| --- | --- | --- | --- |
|  | A | Sorry. |  |

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| --- | --- | --- | --- | --- |
|  | Q |  | No, you described earlier how good it was, but it is a screening tool because, for example, it doesn't tell us variability. |  |

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| --- | --- | --- | --- |
|  | A | And you can't classify decelerations. |  |

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| --- | --- | --- | --- | --- |
|  | Q |  | Doctor, in your report -- well, maybe it's self-evident, but in your report you use as examples of intermittent auscultation of 0333 and 0348? |  |

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

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| --- | --- | --- | --- | --- |
|  | Q |  | And those were examples when two numbers were recorded? |  |

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|  | A | Yes. |  |

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| --- | --- | --- | --- | --- |
|  | Q |  | And I know you questioned the reference at 0445 at 106, but you used those, I take it, as examples because neither the first number or the second number will hit 120? |  |

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| --- | --- | --- | --- | --- |
|  | A |  | More important than the 120, is they don't go back to the baseline which was established on the EFM just 10 minutes before. And I don't accept that a baseline can change in 10 minutes like that. So I think what those are all showing is just a persistent low level bradycardia or lower baseline. Sorry. Low-level bradycardia. That's what I think is happening there. |  |

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| --- | --- | --- | --- |
|  | Q | Beginning when? |  |

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| --- | --- | --- | --- | --- |
|  | A |  | Well, I think it starts probably when the strip discontinues at around panel 112, where you can see in the last snippet there is a rate of about 100. |  |

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| --- | --- | --- | --- |
|  | Q | Is that a heart rate or artifact? |  |

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| --- | --- | --- | --- | --- |
|  | A |  | It is difficult to say, which is part of the problem. We should be certain. But it looks like it could be a heart rate of 100. |  |

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| --- | --- | --- | --- | --- |
|  | Q |  | And just for His Lordship you're looking at almost the end of the strip? |  |

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| --- | --- | --- | --- |
|  | A | Correct. |  |

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| --- | --- | --- | --- |
|  | Q | Where we have a vertical line numbered -- |  |

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| --- | --- | --- | --- |
|  | A | Just above -- just to the right of 112. |  |

|  |  |  |  |
| --- | --- | --- | --- |
|  | Q | Page 112? |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | A |  | And the reason I think you can see it, you can see a slow progressive decline of the baseline starting at panel 0336 and ending at 0338. You can see the whole trend downwards. And then if you switch to the intermittent monitoring you can see that the numbers there are all less than 140. It only goes back to the 140 or around the 140 range at about 0344 when it's 134. So I think there is a prolonged area that the heart rate was not at the baseline. Then you can see it goes up to the baseline at around 144, and it stays at the 140 right until almost what I identified as the 106. Which goes to my point, baselines don't change that quickly. It is pretty constant at 140 the whole way. |  |

**84**  Dr. Barrett commented on the last readings:

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|  | Q |  | And then towards the end we have good ranges, don't we? Beginning at 0512. |  |

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| --- | --- | --- | --- | --- |
|  | A |  | The 156 is in a normal range of a fetal heart rate, yes. |  |

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| --- | --- | --- | --- | --- |
|  | Q |  | And then delivery we know is at 0533, so the last one was in the 150 range at 0530? |  |

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| --- | --- | --- | --- | --- |
|  | A |  | Correct. It's interesting. If it is a fetal heart rate, it is elevated. It is slightly going higher which fetal heart rates do go up in response to acidosis. |  |

**85**  Dr. Michael Farmer, a very experienced obstetrician, and the current Head of the Department of Family Practice at B.C. Women's Hospital reviewed the clinical chart. He considered the heart rates recorded by Nurse Bradley to be unremarkable. He noted:

Cord blood gases revealed a pH of 6.93 and a base excess of -20.3. These blood gases are indicative of a metabolic acidosis (lowered pH and a base deficit over 12). This indicates that the fetus experienced prolonged impairment in gas exchange. The base excess indicates that the fetus had attempted to physiologically compensate for the build up of carbonic and lactic acid in the fetal circulation. This was not an acute event.

**86**  He also reviewed Dr. Barrett's and Nurse Doren's reports. Contrary to Dr. Barrett he considered the discontinuance of EFM to be consistent with what guidelines would indicate was best patient care. Contrary to the observations of Nurse Doren he considered Nurse Bradley's conduct of IA appropriate.

**VI**

**87**  The issue before the court is whether the readings taken by Nurse Bradley were indicative of fetal distress, about which something should have done, or whether, as Nurse Bradley felt, they were unremarkable.

**88**  I am satisfied that Nurse Bradley believed she was monitoring the fetal heart rate properly and that nothing about it gave rise to any concern on her part that required immediate action or attention. There is no basis in the evidence to infer that she did not accurately record the fetal heart rate. Her evidence was straightforward. Despite a certain amount of pressure in cross-examination, it is clear that she was sure she was meeting an appropriate standard. There was some suggestion that she might have made the mistake of confusing the maternal heart rate and the baby's heart rate. I am satisfied she did not make that mistake. She explained the difference convincingly and I accept that that sort of error is not at the root of this case. Nurse Doren noted some other deviations from what might be termed "best practices" but I am of the view that none of those observations have any relevant bearing on this case. I specifically do not find that those criticisms, even if they are valid, contributed to any overall impression of carelessness on the part of Nurse Bradley. I accept that she performed her tasks in relation to this birth to a standard she believed was required.

**89**  Nurse Bradley explained her training as essentially derived from mentors and word of mouth among nurses and other professionals. She was aware of the guidelines published in relation to obstetrical procedures, and she knew where to find them, but she did not in fact have recourse to them in the course of her practise.

**90**  The criticisms of Nurse Bradley arise in relation to two aspects of her monitoring of the fetal heart rate. The first is in relation to the transition between EFM and IA. The second turns on the implications, if any, of the readings taken between 3:25 a.m. and 3:48 a.m. and between 5:00 and 5:10 a.m. (see chart in para. 26 herein).

**91**  Prior to disconnection from EFM, a stable fetal baseline pattern of about 140 beats per minute had begun to break up, moving down to 102 at 3:25 a.m. and thereafter producing a tracing that was uninterpretable. Nurse Bradley's evidence is that she attributed this to the fact that Melissa Allen was moving around. She described the transition as unremarkable inasmuch as she could hear the heartbeat throughout.

**92**  The point made by those critical of Nurse Bradley's decision is that *before* disconnecting EFM, she should have ascertained, by re-establishing good EFM contact that the lower values she was getting for the fetal heart rate were in fact due to Melissa Allen's movements and not to something more sinister. In the view of those critical of Nurse Bradley her failure to re-establish a reassuring baseline before the disconnection leaves open the possibility that something else was happening.

**93**  The central controversy in the case is what to make of the readings that were obtained thereafter. We must remember Dr. Macnab's uncontroverted evidence, that the mechanism of injury was oxygen deprivation, and that this does not happen unless the fetal heart rate goes down. The point of fetal heart monitoring is to detect decelerations of the fetal heart rate.

**94**  Nurse Bradley clearly understood that the fetal heart rate should be established between 160 beats per minute and 110 beats per minute (see para 45 herein). Her understanding of decelerations that would give rise to a concern would be those that did not return, after contractions, to within the range of 160-110. It was also her understanding that as long as any reading below that range came back within 3 readings there was no concern (see para. 45 herein).

**95**  The difference between this view and that of, for example, Dr. Barrett is that, as he sees it, once the fetal heart rate was established between 160 and 110 -- and in this case the baseline was established at 140 by EFM before the tracing began to break up -- decelerations are determined relative to that baseline. He interprets the guidelines a deceleration is 15 beats lower than the baseline. This implies that every reading under 125 is a deceleration.

**96**  I emphasize that Nurse Bradley's training and understanding of her responsibilities left her firmly of the view that recovery to a fetal heart rate above 110 was indicative of fetal health (see para. 42 herein).

**97**  Dr. Pendleton's evidence must be considered carefully. Dr. Pendleton commented on the EFM trace that the heart rate was "about 140 beats a minute", and that what was important was that 140 was within the "normal range" of 110-160 beats per minute.

**98**  Dr. Pendleton's first report includes the following observations:

Considerable discussion is found regarding base-line and deviations from it. Nurse Bradley in her discovery was asked (pages 57 -59) to comment about this.

It is important to understand the functioning of the human heart when discussing base-line observations. A baby's heart is very small and beats rapidly. There is no specific base-line for this activity that is why the heart rate is stated to be normal between 110 and 160 beats per minute. Variations in this rate occur as a result of multiple causes. Our hearts are provided with the ability to change rate such being produced by accelerator and decelerator centres in the brain and by direct action on the heart muscle. It is well-known to all that at rest our hearts slow and with significant exercise or fever they beat rapidly.

A base-line in early labour does not continue rigidly the same throughout labour and delivery. What is important is that the heart rate is heard to be within the normal range particularly after slowing as a result of the natural compression of the baby's head with strong propulsive efforts. If this slowing does not recover before another contraction then it is important to follow this carefully. Reference to the Partogram (A19) show Nurse Bradley's double observations when the heart was heard to slow and the rate to which it returned. Through all these observations from 03.20 a.m. to 05.30 a.m. the fetal heart was heard to be well within the normal range apart from that at 03.48 a.m. when it was heard just below 110 but subsequent recordings were all normal.

There is no time in these observations taken at frequent intervals when urgent delivery was necessary.

**99**  In his second report, commenting on Dr. Barrett's report, Dr. Pendleton observes:

Dr. Barrett, Obstetrician, suggests that with some reduction of the fetal heart rate with pushing, continuous electronic monitoring should have been performed stating that "it is below the standard of care to remove electronic fetal monitors in the presence of decelerations". The partogram (A 19) shows only two recorded decelerations below 110 beats per minute from 04.17 until delivery at 05.30 and these occurred at 04.45 recorded as 106 and 05.05 at 97 beats per minute. Both were followed rapidly by normal recordings and indeed from 05.00 to 05.30 when the insult was postulated by the Paediatricians to have occurred, there were no abnormal recordings.

**100**  This, obviously, accords with Nurse Bradley's appreciation of her responsibilities in the circumstances.

**101**  In cross examination, however, Dr. Pendleton was questioned about a text, *Fetal Health Surveillance in Labour*, produced by the Canadian Perinatal Regionalization Coalition, Third edition Sept. 2002, and particularly two passages, the first of which was a definition of "Early Contractions":

Visually apparent gradual decrease (defined as onset of deceleration to lowest point > 30 seconds) and return to baseline FHR associated with a uterine contraction. The lowest point of the deceleration (called nadir) occurs simultaneously with the peak of the contraction.

**102**  He agreed that the definition is not "within a range of 110 to 160 but returns to baseline. Asked if he would "defer" to this he said he would "use it as a guideline in [his] practice".

**103**  The second passage put to Dr. Pendleton was the definition of "prolonged decelerations":

Visually apparent decrease in FHR below the baseline. The decrease is calculated from the most recently determined portion of the baseline. The decrease from the baseline is [greater than] 15 bpm, lasting [greater than] 2 minutes, but [less than] 10 minutes from onset to return to baseline.

Dr. Pendleton acknowledged that the partogram showed decelerations beginning at 3:25 and going on for 15 - 21 minutes at 15 or more beats per second below baseline. He agreed that this was a *red flag*. (see para. 62 and 63 herein). Dr. Pendleton did, however, find it difficult to see where something might have had to be done. Dr. Jon Barrett had less difficulty. In his evidence reproduced in part at paras 73 - 84 herein) he was definitive about the meaning of baseline and deceleration:

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|  | A |  | But if you establish your baseline at 140 and then you get a deceleration with every contractions it goes down to 140 to 90, and then it comes up to 120, even though the recovery is in its normal range the baby has not recovered to its normal range. Then you have to put on the monitor. It will tell you what kind of deceleration is it. Is it late. Is it variable. There are other ways you can assess it just by number counting. If you recover back to your baseline you know that the baby has decelerated. Come down. Come up to its baseline he. Reassured. Let's say a baseline was 150 mother pushes. It decelerates to 90. It recovers at that up to 120. Am I reassured that the baby is healthy? |  |

No. Because that 120 is a significant change from 150 even though it's in a normal range.

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|  | Q |  | From your perspective it is very important to establish the individual baby's baseline and to do your monitoring with that in mind. |  |

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|  | A |  | That is why you're - in every text. When your honour looks back at the guidelines how they're written, the first principle is what is the baseline. |  |

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|  | Q |  | Does that imply that it is possible to have decelerations that are harmful that remain within the 160 to 110? |  |

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|  | A |  | Absolutely. In fact, the depth of the deceleration is one of the things that we are very important. I'll give another example. We could have a baseline of 160 beats per minute per minute. And the deceleration from 160 down to 120. That is a deep deceleration. It is a deceleration of 60 beats per minute. With the old literature with electronic monitoring we used to count the area under the curve as an indication of how is he - that 160 to 120 is probably more significant to the baby than going from 110 down to 105 even though the 105 below the normal baseline. |  |

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|  | Q |  | Is it fair to say that 160 to 110 is what you expect a baby's heart rate to fall within? |  |

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|  | A | That baseline. Exactly. |  |

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|  | Q |  | But once you've established a baseline within that range the important consideration is plus or minus 15. |  |

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|  | A |  | Exactly. Otherwise it is just the variability of the baseline. |  |

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|  | Q | Yes. It runs from 135 to 144 to 1 - and that? |  |

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|  | A | Exactly. |  |

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|  | Q |  | But if it doesn't come back above 125 several times that's a concern? |  |

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|  | A |  | Correct. And the electronic fetal monitoring is full of information how deep the deceleration and the depth is related to the significance of it. |  |

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|  | Q |  | You don't start worrying at 95. You worry when the see the change being greater than - |  |

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|  | A |  | And it's not coming back to its normal nonstressed baseline. |  |

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|  | Q |  | How long does it have to persist? How many reading would it take before you become concerned? |  |

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|  | A |  | That's the trouble. You don't know. Every baby has its own reserves and -- normal decelerations in the second page. Right from the beginning there was this abnormal strip. In my opinion the baby was already accumulating some acid base deficit here. I don't think how long this baby is tolerating it. Some well full- term babies can tolerate it longer. There is a set time I can tell you this amount is dangerous. This amount. What I can tell you if you start seeing it on intermittent you should go to external. The continuous. |  |

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|  | A |  | You wouldn't do that. You would wait probably for a few. On this patient, because there was continuous that something was going on, I wouldn't have waited long at all. Maybe one or two. Maybe that external pattern I saw was real. |  |

**104**  Nurse Phillips, who testified for the hospital had essentially the same "take" on baseline and decelerations. Her testimony (reproduced at para. 38 herein) is in essential agreement with the evidence of Dr. Barrett. It does not accord with Nurse Bradley's "anywhere over 110" evidence, and certainly takes a stronger view of the place of the guidelines in fixing the standard of care expected of an obstetrical nurse.

**105**  Dr. Barrett explained what he thought should have been done (see para. 63) herein). First, he felt that the EFM should not have been turned off when it was because the tracing was breaking up and it was not possible to tell if that was benign or not. He was of the view that the abnormal tracings that followed immediately after the disconnection, which did not return to baseline until 3:46, suggested that the EFM ought to have been reconnected. This is because, in his view IA is a screening tool, adequate for low risk pregnancies, but that when an abnormality is detected EFM is more appropriate because it helps to classify decelerations.

**106**  He said it was below the requisite standard of care to discontinue the EFM because there was evidence of decelerations before the monitor was disconnected, and decelerations at that early stage could be significant. Secondly he said there seemed to be a new baseline developing, which could be a bradycardia. Lastly he suggested that losing the ability to monitor the heart rate required continuance of the EFM monitoring. The inference counsel for the plaintiff invites is that a higher form of surveillance would have led to a timely intervention enabling a healthy delivery.

**107**  Despite his evidence that the birth process is still somewhat of a mystery, Dr. Pendleton suggests that hypoxia beginning at the point at which EFM was discontinued, would have resulted in a still birth and that the near total cord compression must have occurred in the last hour before birth. Dr. Macnab concurred in his estimation of when the damage occurred. It also suggests that the harm occurred during the period when Dr. Bagdan had returned to the delivery room at 4:40. Between 4:45 and 5:10 there were five fetal heart readings that did not recover to within 15 beats of the baseline. Thereafter there was a consistent recovery to values that were somewhat elevated over the baseline assuming a baseline of 140 beats per minute.

**108**  The theory of the plaintiffs' case is that Nurse Bradley did not adhere to the guidelines, which would have led her to continue EFM and obtain better information that would have led to early intervention. As a fall back position, the plaintiffs' theory is that IA was not properly conducted because fetal heart abnormalities must have been there to be seen, given the consensus there is on the mechanism of injury among the doctors.

**109**  It is in this respect that the defence submits that the plaintiffs' submission amounts to *res ipsa loquitur*.

**110**  The plaintiffs suggest that this may be because Nurse Bradley failed to distinguish between the maternal and the fetal heartbeat, because she was "classifying" decelerations or because she was not paying attention.

**111**  The difficulty with these suggestions is Nurse Bradley's evidence itself. It was evident that she was experienced and confident that she was not mistaking the maternal and the fetal heartbeat. In this regard the evidence of Dr. Pendleton was supportive.

**112**  With respect to the submission that Nurse Bradley may not have been paying attention, there is nothing in the evidence to suggest that that was so. Nurse Bradley took readings at more frequent intervals than recommended. Drs. Pendleton and Farmer considered her care to have been conscientious.

**113**  It is my view that the strongest case to be made for the plaintiffs is that the guidelines should be interpreted to mean that following a contraction one should look for a return to the baseline (140) and that failure to achieve that return on several successive recordings called for a reaction.

**114**  Nurse Bradley did not consult the guidelines or consider a deceleration below 125 (140-15) to be a matter of concern. The standard she applied did not call for concern unless there was a return below 110.

**115**  Nurse Bradley's most supportive medical witness, Dr. Pendleton, ultimately acknowledged that readings that did not return the 140 baseline were a "red flag".

**116**  There is also the evidence of Dr. Barrett and Nurse Doren.

**117**  The defence submits that it is evident that the interpretation of fetal monitoring is a matter on which experts are divided and that there is a great deal of inter-observer variability.

**118**  Doctors Pendleton and Farmer disagree with Dr. Barrett about the discontinuance of EFM when the tracing began to break up, and the initiation of IA. Nurse Bradley testified that there was no break in the monitoring but that during the loss of an adequate EFM tracing she continued to hear and see and record a normal fetal heart rate.

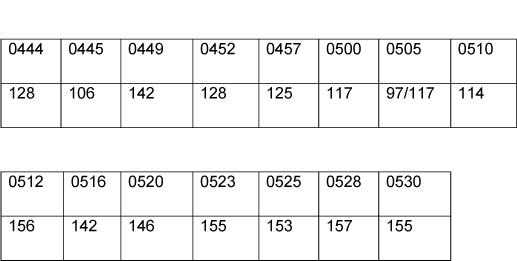
**119**  The defence submits that applying the "but for" (see: *Resurfice* paras. 39 - 40 herein) test there is nothing that indicates a point at which Dr. Bagdan should have intervened. Drs. Pendleton and Farmer made the same point.

**VII**

**120**  The plaintiffs' summary is that "red flags" began to appear more than two hours before Brenna was born. The suggestion is that appropriate adherence to "well established" safety guidelines would have led to a higher form of surveillance which would have enabled delivery in a well-paced, controlled fashion."

**121**  The plaintiff submits that "the unchallenged and uncontradicted physiological evidence is that *significant fetal heart rate abnormalities* were there to be seen. This is based on a notion that" near total cord compression occurred 30-40 minutes before delivery between 04:43 and 05:03 a.m.

**122**  The readings between 4:40 a.m. and 5:30 a.m. run as follows:



**123**  The doctors agree that cord compression must have occurred during that period but the readings do not support that inference. The plaintiffs' case depends on the court accepting some combination of factors including failing to distinguish the maternal heart rate from the fetal heart rate, or classifying decelerations -- understood to be impossible with IA -- or that Nurse Bradley's mind was simply elsewhere. The last seems most unlikely. As I have noted, Nurse Bradley took the readings throughout faithfully and often more often than she was required to do.

**124**  Another consideration is that throughout this period when the damage is believed to have been occurring Dr. Bagdan was in the operating room, from 4:40 a.m. on. There is *no* explanation for his failure to notice that something was amiss, if that was indeed the case. No explanation was offered as to how the attending physician could be in the room and be unaware of that level of fetal distress.

**125**  There has been considerable controversy over the meaning of recovery to baseline. The strict standard posited by Dr. Barrett (+/-15 of baseline, or 140) is not supported by Nurse Doren who agreed that once the fetal heart rate is back within a normal range of 110 - 160 it is safe to continue with IA.

**126**  Dr. Barrett's evidence is troubling. He is a specialist with considerable training and a focus on high risk pregnancies. *His* standard of practice is much stricter than the guidelines. He said that the normal range of the fetal heart rate is 120-160 whereas the SOGC/BCRCP guidelines suggest 110-160. He considered bradycardia to be a fetal heart rate of less than 110 for one minute whereas the guidelines suggest below 110 for 10 minutes. He said it is "abnormal" to see fetal heart decelerations below 110, whereas the guidelines suggest abnormal decelerations are those below 70 beats per minute for more than 60 seconds.

**127**  Dr. Barrett put considerable weight on the period of time when the EFM tracing was breaking up and Nurse Bradley adapted to IA. His evidence is that the strip, as the readings were breaking up should be read as decelerations to 70 beats per minute is at odds with Nurse Doren's evidence that where EFM is not giving a good tracing the fetal heart can still be heard on the operating room and seen on the monitor. It is directly at odds with Nurse Bradley's evidence that she was monitoring the fetal heart continuously and that while the values went down between 3:29 a.m. and 3:42, they returned to baselines within the 110-160 range and, thereafter, to the baseline established by EFM with occasional, but not prolonged, decelerations.

**128**  The deterioration of the EFM tracing and the onset of Melissa Allen's labour occurred at a time the weight of medical opinion suggests is irrelevant in any case. Dr. Pendleton suggested that if the baby had been damaged that far before the birth she would have been still born.

**129**  I have already noted (at paras. 14-15 herein) that the medical consensus is that the event that led to the harm to Brenna Allen occurred *within* the last hour before she was born, at a time where Dr. Bagdan was back in the room. Between 5 a.m. and 5:10 there is one period where the fetal heart rate dipped below the range of 100-160 but it recovered immediately, to readings within the range and went on to several readings at or above the 140 baseline.

**130**  Traversing all of the medical evidence, it is difficult to discern a time when the fetal heart rate suggested a need for intervention. Applying the standards set out in the SOGC guidelines, and the standards to which Nurse Bradley was trained, there was no point at which alternative action appeared to be required. Even applying Dr. Barrett's more rigorous standard, that is, a return to EFM when the fetal heart rate dipped below 120, for example at 3:25 a.m. (102), 4:09 a.m. (105) and 4:45 a.m. (106), there is no reason to believe it would have shown anything sinister. In each case the fetal heartrate was bracketed by heart rates that were not of concern. The readings at 3:22 was 142, it dipped to 102 but was back to 130 at 3:29. The reading at 4:09 was bracketed by reading of 137 at 4:06 and 138 at 4:09. The reading at 4:45 is bracketed by readings at 4:44 of 128 and 4:49 of 142. Dr. Barrett suggests that had EFM been reapplied "this abnormal pattern would have been recognized and would have been able to be acted upon by urgent delivery".

**131**  The notion that one low reading is an "abnormal pattern" is not supported by the weight of the medical opinion in this case. Dr. Farmer's opinion is representative:

It was not inappropriate to discontinue the electronic fetal monitor at 0327. This patient was low risk. There was no indication to have started the electronic fetal monitoring initially (it was inadvertently started out of habit), so it is appropriate to now discontinue the monitoring. The nurse's decision to convert to intermittent auscultation in the second stage was what standardized guidelines would dictate as best patient care. Ms. Allen and her fetus had been assessed and labour was progressing quickly but normally at this point. The fetal heart rate showed good variability. There were a few decelerations, which were not sinister of pathologic and were early type decelerations. Early decelerations represent head compression, as the baby is moving down through the pelvis.

**132**  Dr. Farmer added later that "the nurses and physicians operated at a high level of competence."

**VIII**

**133**  In setting out the basic principles of law at the beginning of these reasons. I alluded to *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 para 41 herein) which was tendered by the plaintiff. Even reasoning retrospectively, it is not possible on the evidence to reconcile the fact that Brenna Allen suffered injury, as a result of oxygen deprivation *in utero*, with the evidence of decreases in the fetal heart rate. There were some decreases, but the weight of the medical opinion is that they were not a signal that the baby was in distress.

**134**  The evidence most favourable to the plaintiffs' case raises some suspicion that more attentive monitoring by more sophisticated equipment, *might* have led to earlier intervention. On balance, however, and gauged in light of all of the other evidence, the plaintiffs' case points a mere possibility insufficient to discharge the burden of proof in the circumstances.

**135**  With respect to the "but for" test, there is no point (even applying retrospective reasoning) as to when there was an indication throughout the monitoring that called for a preventive intervention. Both Dr. Farmer and Dr. Pendleton support this view. The proof falls short of establishing that the application of EFM would have made a difference. In a similar case, *Smith et al v. Grace et al.,* 2004 CarswellBC 627, [*2004 BCSC 395*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7C1-F30T-B23F-00000-00&context=), Satanove J. held:

The plaintiffs submit that the only inference open to the court is Luke's brain damage was caused or contributed to by hypoxia prior to birth and that the defendant's ***negligence*** at the very least increased the duration of Luke's exposure to that hypoxia, thereby materially increasing the risk of the injury he suffered...

Unfortunately, I cannot accede to the plaintiffs' submissions for the following reasons. The existence of hypoxia alone is insufficient to cause brain damage unless the fetus is unable to cope with it. Experts agree that all babies suffer some hypoxia during birth but most are able suffer without injury...

Dr. Mitchell's opinion, and indeed the plaintiffs' entire theory of liability revolves around the assumption that if there had been continuous electronic fetal monitoring, there would have been significant signs of deterioration, which would have led to an earlier delivery. The plaintiffs seem to suggest that because it was the defendant's fault that there is no continuous strip in existence showing the fetal heart beat between 6:45 p.m. and 2:50 a.m., I should draw the inference most favourable to the plaintiffs, which is that the continuous strip would have shown signs of deterioration.

The plaintiffs' submissions might have some merit if there was no fetal monitoring, either electronic or by auscultation, but it flies in the face of the evidence recorded on the strips that do exist and in Nurse Tayler's notes.

I cannot draw the inference the plaintiffs asked me to draw from the expert evidence or from the medical records. To draw such and inference would be worse than speculating or conjecturing because it is inconsistent with the established facts. The only reasonable inference to draw in the circumstances is that electronic fetal monitoring before 2:50 am would not have shown a deterioration of the fetus because there was no deterioration.

**136**  In view of the catastrophic result in this case one is compelled to consider whether EFM would have made a difference. But IA was conscientiously applied. There was no apparent deterioration. The notion that in the face of that evidence, an inference should be drawn that EFM would have shown something different was addressed by Satanove J. in *Smith* at para. 67:

I cannot draw the inference the plaintiffs asked me to draw from the expert evidence or from the medical records. To draw such and inference would be worse than speculating or conjecturing because it is inconsistent with the established facts. The only reasonable inference to draw in the circumstances is that electronic fetal monitoring before 2:50 am would not have shown a deterioration of the fetus because there was no deterioration.

**137**  Here, had Nurse Bradley continued EFM until contact was more satisfactory, she would not have seen a deterioration and EFM would, in accordance with current best practice have been discontinued in any event, before the damage occurred in the 30-40 minutes before delivery.

**138**  At that point the doctor was in the room and did not find any reason to expedite delivery. The question of why the monitoring of the fetal heart rate in this case did not detect Brenna's hypoxic state remains unanswered. It does not, however, turn on any of the alleged delicts set out in the Notice of Civil Claim, reproduced herein at para 8, on a balance of probabilities.

**139**  Likewise, there is no case to answer for Nurse Robertson. She did not participate in the birth and the allegations of ***negligence*** against her, set out in the Notice of Civil Claim and reproduced at para. 9 herein, fail as Nurse Bradley was not shown to have failed in her duty or in applying the requisite standard of care.

**140**  The claims against the Hospital have similarly not been proved and are dismissed.

**IX**

**141**  The plaintiffs' claims are, accordingly dismissed.

**142**  I will retain the materials and submissions relevant to damages should circumstances change and an assessment be required.

T.M. McEWAN J.

**End of Document**

[***Awan v. Canada (Attorney General), [2010] B.C.J. No. 1330***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-22GH-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

A.M. Stewart J.

Heard: June 7-11 and 14-16, 2010.

Judgment: July 2, 2010.

Docket: S006841

Registry: Vancouver

**[2010] B.C.J. No. 1330** | [*2010 BCSC 942*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F81W-23WX-00000-00&context=) | [*190 A.C.W.S. (3d) 1276*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F81W-23WX-00000-00&context=) | [*2010 CarswellBC 1765*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5K6Y-81M1-F81W-23WX-00000-00&context=)

Between Aliza Marsha Awan, Plaintiff, and The Attorney General of Canada, Sewa Pangalia and Dil Pangalia, Defendants

(79 paras.)

**Case Summary**

**Government law — Crown — Actions by and against the Crown — *Negligence* by Crown — Claim by plaintiff army cadet in *negligence* for damages for injuries sustained while demonstrating a game for younger cadets dismissed — The plaintiff failed to prove *negligence* on the part of any of the defendants — For example, there was no evidence of inadequate supervision or that the inspection of the field where the game to be played was negligent — Alternatively, no matter which analytical framework was employed, s. 269(1) of the National Defence Act applied, and the action was statute-barred — National Defence Act, s. 269(1).**

**Government law — Armed forces — Military law — Jurisdiction of Canadian civil courts — Over armed forces — Over individual members — Claim by plaintiff army cadet in *negligence* for damages for injuries sustained while demonstrating a game for younger cadets dismissed — The plaintiff failed to prove *negligence* on the part of any of the defendants — For example, there was no evidence of inadequate supervision or that the inspection of the field where the game to be played was negligent — Alternatively, no matter which analytical framework was employed, s. 269(1) of the National Defence Act applied, and the action was statute-barred — National Defence Act, s. 269(1).**

**Tort law — *Negligence* — Evidence and proof — Claim by plaintiff army cadet in *negligence* for damages for injuries sustained while demonstrating a game for younger cadets dismissed — The plaintiff failed to prove *negligence* on the part of any of the defendants — For example, there was no evidence of inadequate supervision or that the inspection of the field where the game to be played was negligent — Alternatively, no matter which analytical framework was employed, s. 269(1) of the National Defence Act applied, and the action was statute-barred — National Defence Act, s. 269(1).**

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| Claim by plaintiff for damages for ***negligence***. The plaintiff was an army cadet who was injured on Nov. 3, 1996, while participating in a demonstration of a game for the benefit of younger cadets. During the demonstration, a Mr. Earney pushed the plaintiff, who toppled over, and a small stick or stem of grass entered her left ear. The plaintiff suffered hearing loss, tinnitus and balance difficulties. She was 16 at the time.  HELD: Action dismissed.  The defendants met the standard of care of a reasonable and prudent parent. There was nothing in the condition of the field on which the demonstration took place that ought to have resulted in no demonstration being undertaken or the location of the demonstration being changed. The safety sweep missed nothing of relevance that ought reasonably to have been seen and rectified. Delegation of supervision of cadets was both reasonable and at the heart of the cadet program. The two civilian instructors were present and in a supervisory position. There was nothing in the choice of the game of "Stick In The Middle" or the way it was to be played or in the choosing of the plaintiff and Earney, who were about the same size and build, to demonstrate how the game was to be played that fell below the applicable standard of care. There was no evidence of inadequate supervision as the game and rules were explained. The plaintiff had not established ***negligence*** on the part of the named defendants, Dil or Sewa Pangalia. The standard of care observed by all concerned in the case at bar was that of a reasonable and prudent parent and created only a slight and acceptable risk of minimal harm encompassing bumps, bruises, and scrapes be the conduct that resulted in the bump, bruise or scrape, a stumble or a tug on a rope, i.e., conduct within the rules or a push, i.e., conduct contrary to the rules. The fact that a push resulted in not a bump, bruise or scrape but serious injury did not translate into a finding that an unreasonable risk of harm had been created by either of the two named defendants or anyone else of interest here such as the civilian instructors. The claim against the Attorney General of Canada could not succeed. The plaintiff failed to show on a balance of probabilities that any of the defendants were guilty of ***negligence***. Furthermore, the defendants Dil and Sewa Pangalia were, at the material time, acting in execution of the National Defence Act, and thus s. 269 of that Act applied and the plaintiff was out of court. No matter which analytical framework was employed, s. 269(1) had application to the case at bar and the action was to be dismissed. The action was statute-barred as the limitation period provided by s. 269(1) applied. |

**Statutes, Regulations and Rules Cited:**

Crown Liability and Proceedings Act, [*R.S.C. 1985, c. C-50, s. 3*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-B7W1-JTGH-B00Y-00000-00&context=)

National Defence Act, [*R.S.C. 1985, c. N-5, s. 46*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F3B-B9V1-F016-S47F-00000-00&context=), s. 269(1)

**Counsel**

Counsel for the Plaintiff: Robert C. Brun, Q.C.

Counsel for the Defendants: Susanne G. Pereira, Sarah L. Stanton.

**Reasons for Judgment**

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| **A.M. STEWART J.** |

**1**   The plaintiff claims damages for ***negligence***.

**2**  The events in issue occurred on November 3, 1996. The writ was issued on December 27, 2000. Why the case came to trial only in June 2010, I do not know. In any event, not surprisingly, precision is not a feature of the evidence in the case at bar.

**3**  On November 3, 1996, the plaintiff was an Army Cadet participating in "practical field training" (Exhibit 2 Tab 12 Page 1) during a weekend exercise being conducted by the Cadet Corp at Canadian Forces Base Chilliwack.

**4**  The plaintiff was injured while participating in a demonstration of the playing of a game called "Stick In The Middle" for the benefit of younger cadets.

**5**  The plaintiff and a cadet named Robert Earney conducted the demonstration on a field. In the result, during the demonstration Robert Earney pushed the plaintiff. She toppled over. A small stick or stem of grass entered her left ear. The ear bones in the middle ear were disrupted with the third inner ear bone being pushed into the inner ear. The results for the plaintiff include hearing loss, tinnitus and balance difficulties (Exhibit 1 Tab 4 pages 2-4).

**6**  As of November 3, 1996, the plaintiff was 16 years of age. Robert Earney was 15 years of age. Both were senior cadets. Each held the rank of Warrant Officer.

**7**  At the material time - between 10:00 a.m. and 11:00 a.m. on Sunday, November 3, 1996, the third and last day of the field training exercise which was entitled "November Rain" - each of the plaintiff and Robert Earney was a Warrant Officer holding the position of Squadron Sergeant Major in charge of a squadron, i.e., one-third of the Corp. Each squadron consisted of perhaps 20 cadets. Each squadron had a Civilian Instructor (an adult) attached to it in a supervisory role.

**8**  The exercise in field training being conducted the weekend of Friday, November 1, 1996 - Sunday, November 3, 1996 at Canadian Forces Base Chilliwack was carried out pursuant to an "Annual Training Plan" (Exhibit 2 Tab 12).

**9**  The Annual Training Plan revealed where the cadets would be and what they would be doing during the entire three days. As of 10:00 a.m. - 11:00 a.m. on Sunday, November 3, the cadets were to be involved in "Sqn competitions TBA" (Exhibit 2 Tab 12).

**10**  The defendants Dil Pangalia and Sewa Pangalia were adults. They were officers employed by the Canadian Forces. They attended at the November 1 - November 3 cadet training exercise ("November Rain") as part of their duties as members of the Canadian Forces, more specifically as members of the Canadian Forces Cadet Instruction Cadre. The Cadet Instruction Cadre is a section of the Canadian Forces Reserves devoted to instructing cadets. On November 3, 1996, Dil Pangalia was the Commanding Officer and Sewa Pangalia was the Training Officer.

**11**  I note that the writ of summons named many defendants but the case proceeded against only the Pangalias and the Attorney General of Canada, the case against the latter being based on vicarious liability for a tort committed by a servant of the Crown. It is accepted by the Crown that at all material times the Pangalias were acting within the course and scope of their duties as members of the Canadian Forces. As will be seen later, the Crown takes the position that as a matter of law there can be no "direct" claim in ***negligence*** against the Crown.

**12**  As noted above, the plan was to have all three squadrons participate in squadron competitions between 10:00 a.m. and 11:00 a.m. What occurred was that two of the squadrons (the plaintiff's and Robert Earney's) were in a position to commence the competition but the third squadron was not. Not surprisingly, nobody can say what squadron competition would have taken place had all three squadrons been ready to compete.

**13**  I find that the two Civilian Instructors - Deanna Scherger and Ronnie Chandi - discussed with the plaintiff and with Robert Earney just what to do with the two squadrons of cadets who were ready, willing and able to participate in the scheduled squadron competitions.

**14**  Nobody can say whose suggestion it was, but somebody suggested that a game called "Stick In The Middle" be played. That suggestion was adopted by the plaintiff and Robert Earney and the Civilian Instructors, who I note were in a supervisory capacity over the plaintiff and Robert Earney and those below them.

**15**  The game was to be played on the field on which they were all standing. I find that it was simply a grassy field for what can be seen of the general area in question in photographs placed before me tends to confirm or support that conclusion. The game involved the use not of a stick but of a short bit of rope. The idea was that the two teams of cadets, the squadrons, would compete - and competition is what the training plan called for (Exhibit 2 Tab 12) - by forming two lines some distance apart, with the cadets being "numbered off" and then, when it was their turn, running to retrieve the bit of rope placed equidistant from each line of cadets. The running would be done by the two cadets whose number had been called out by whoever was doing the announcing. In other words both number fours, for example, would sprint towards the rope at the same time.

**16**  It was inherent in the game that if the participants laid hands on the rope at the same time a tug of war would ensue.

**17**  Before the game could begin a number of things had to be done.

**18**  The plaintiff and Robert Earney and the two Civilian Instructors conducted a "safety sweep". In other words, they formed a line and walked over the area in which the competition was to occur looking for anything - foreign or natural to the surroundings - that constituted a hazard. Had any such item been found it would have been removed or the location of the competition changed or the competition cancelled. Nothing was found. And I conclude that there is no evidence that anything relevant to this case was missed that ought reasonably to have been spotted.

**19**  Next, someone among the plaintiff, Robert Earney and the two Civilian Instructors spoke up and announced the rules of the game to the cadets. The plaintiff believes it was one of the two Civilian Instructors who spoke up. I find the game was a game not unfamiliar to cadets. But it was standard operating procedure before any activity for just such an announcement to be made. And as the plaintiff testified, the announcement was made on November 3, 1996. The plaintiff testified that the announcement made to the cadets included telling them that if two cadets arrived at the rope at the same time there was to be no physical fighting or punching or hitting. A tug of war was acceptable, but not punching, hitting or kicking. I find that all would know that pushing the other cadet was not permitted for, as the plaintiff herself made clear when she testified before me, what was instilled in the cadets from the moment they became cadets was that respecting your fellow cadet meant that there was never to be physical contact, roughhousing, pushing, hitting, punching, or kicking.

**20**  Consistent with what was standard operating procedure in the cadets before any activity was undertaken by the cadets, a demonstration took place.

**21**  As noted earlier, it was the plaintiff and Robert Earney, i.e., the two Warrant Officers, the two Squadron Sergeant Majors, who set about to perform the demonstration.

**22**  The state of the evidence is such that there are only two useful sources as to the detail of what happened. And both originate with the plaintiff.

**23**  The plaintiff told me when she testified that she and Robert Earney took their places equidistant from the bit of rope. A number was called. They both ran to the rope. They got there at the same time. Both ended up clutching the rope. A tug of war ensued. Both of them ended up on their knees. Robert Earney had a good grip on the rope. The plaintiff had her left elbow on the ground. Robert Earney pushed the plaintiff over. The left side of her head contacted the ground. She was injured.

**24**  As noted, the second useful source of information also originates with the plaintiff. It appears at Exhibit 2 "Plaintiff's Exhibits" Tab 11.

**25**  What appears at Exhibit 2 Tab 11 amounts for the purposes of the law to a narrative of past events by the plaintiff - a statement - placed in evidence at the opening of the trial by the plaintiff with the consent of the defendants.

**26**  No agreement as between counsel as to the use to be made of documents was placed before me. The plaintiff was not cross-examined on the content of Exhibit 2 Tab 11.

**27**  The material part of Exhibit 2 Tab 11 reads thus: "I was playing a game with Earney, then I landed on top of him and he pushed me over" (Exhibit 2 Tab 11).

**28**  I told counsel during their submissions at the end of the case that I saw nothing for it but to treat Exhibit 2 Tab 11 as evidence placed before me to be taken into account by me as the trier of fact for testimonial purposes, i.e., as proof of the truth of what is stated in it, and considered along with all of the other evidence in the case. No one made a submission to the contrary.

**29**  I find that the statement (Exhibit 2 Tab 11) was taken from the plaintiff by the Civilian Instructor, Ronnie Chandi on November 3, 1996 probably while they were at the hospital and shortly after the plaintiff was injured. I find that the statement takes the form of bits and pieces of what the plaintiff was allegedly saying. I find that the statement was taken from the plaintiff at a time when, in all likelihood, she was in distress and in no condition to provide a clear statement of what had happened to her.

**30**  In the result I find that there is nothing in the evidence - including Exhibit 2 Tab 11 - that tends to undermine the weight to be given by me to the plaintiff's testimony before me as to the detail of what happened to her on November 3, 1996. I accept what she told me.

**31**  The plaintiff alleges that one or more of the defendants was negligent and that but for their ***negligence*** she would not have been injured on November 3, 1996.

**32**  Contrary to a submission made by the defendants, it is obvious that the defendants owed the plaintiff a duty of care.

**33**  The appropriate standard of care was the care that would be taken by a reasonable and prudent parent.

**34**  The live issue for the trier of fact alone to decide is whether the defendants met that standard of care on November 3, 1996.

**35**  The plaintiff submits that I should adopt the opinion of the plaintiff's witness, Professor Fishburne, a Professor of Education, and, in the result, find that the standard of care imposed by the law on the defendants - that of a reasonable and prudent parent - was not met.

**36**  Professor Fishburne's opinion is as follows: (Exhibit 1 Tab 1 - A - page 14)

Summary

I have been requested to provide expert opinion as to whether or not the activity being carried out at the time of Ms. Aliza Awan's injury (playing of the game 'Stick-in-the-Middle') was 'safe' and 'appropriate' in all of the circumstances.

It is my considered opinion that the activity being carried out at the time of Ms. Aliza Awan's injury (playing the game 'Stick-in-the-Middle') was not developmentally appropriate for participants. Any potential benefits to meet the goals of the Cadet Program Mandate would be minimal at best. Further, the way the game was organized posed a very high risk potential for injury. Hence in my opinion the activity being carried out at the time of Ms. Aliza Awan's injury (playing of the game 'Stick-in-the-Middle') was neither 'safe' nor 'appropriate'.

**37**  In deciding whether in my role as trier of fact I should adopt that conclusion by Professor Fishburne I take into account the following:

1. Just what is it that has been placed before me?
2. Professor Fishburne's evidence was proffered as the evidence of an expert and placed before me pursuant to Rule 40A.
3. The defendants lodged an objection to the admissibility of Professor Fishburne's evidence. Their objection was not entertained because the defendants had failed to give reasonable notice to the plaintiff of their objections (Rule 40A(13) and (14)).
4. In other words the proffered evidence of Professor Fishburne was never subjected to the screening process demanded by the Supreme Court of Canada in connection with the evidence of experts in *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=).
5. In deciding not the admissibility of the evidence of Professor Fishburne but what weight, if any, to give to the opinion of Professor Fishburne I begin by asking myself just what is it that the plaintiff has placed before me?
6. More particularly, is the proffered opinion "necessary in the sense that it provide[s] information 'which is likely to be outside the experience and knowledge of a judge or jury'"? *R. v. Mohan, supra*, page 23.
7. As the trier of fact I say that the evidence of Professor Fishburne is best described by the following, which appears at *R. v. Mohan, supra*, at 24:

"An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does."

1. More particularly, I say as the trier of fact, and having considered the whole of the evidence together, that what lies behind the ultimate opinion of Professor Fishburne is a number of unspoken basic assumptions and value judgments as well or badly made by a layperson as by a person with Professor Fishburne's academic qualifications.
2. No "scientific information" (*R. v. Mohan, supra*, at 24) is necessary before this trier of fact can consider such things as the condition of the field in question, the wisdom of having both males and females participate, the ages of the participants, the diversity in the size or strength of the participants, the desirability of a competitive game being played at all, the desirability of making use of two bits of rope rather than one and the possibility that hormones or ego might result in a male participant's disobeying the rules in order to succeed against a female opponent.
3. None of this amounts to a ruling as to the receivability of Dr. Fishburne's opinion. That was resolved in favour of the plaintiff during the trial. But it is trite law that the trier of fact may consider things which also happen to go to the admissibility of expert evidence if relevant to the trier of fact's understanding and assessment of what has been placed before the trier of fact and decision as to to what extent, if any, it should influence the decision of the trier of fact.
4. What lies behind Professor Fishburne's conclusion?
5. That part of Professor Fishburne's ultimate opinion that really matters is this - and I quoted this earlier in these reasons for judgment:

"Further, the way the game was organized posed a very high risk potential for injury."

1. In my opinion the trier of fact could arrive at that conclusion only if the trier of fact ignored the fact that from the concept of "injury" must be excluded the usual bumps, bruises and abrasions common to any outdoor game played by children aged 12 - 16 and, additionally, failed to recognize that the level of risk attendant upon any activity must be gauged by considering things which are reasonably likely to happen.
2. I note here that the plaintiff's reliance in this connection on *Fox v. Edwards*, [*2001 BCSC 321*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JJD0-G1HM-00000-00&context=) is not apt. That is a case where an unreasonable risk of injury was created by the defendant and the point made by the court was simply that if an unreasonable risk of injury has been created the defendant remains liable regardless of the fact that the way in which injury came about was "unexpected".
3. What relationship is there between Professor Fishburne's evidence and the plaintiff's cause of action?
4. Professor Fishburne's report is, in part, directed at the positive and negative aspects of the game of "Stick In The Middle" in the light of what he took to be the mandate of the Cadet program.
5. Whether a better choice of game could have been made in light of the perceived goals of the program is of no moment in considering whether the plaintiff's injury would not have occurred but for the creating of an unreasonable risk of injury by Sewa Pangalia and/or Dil Pangalia.
6. Next I note that Professor Fishburne's report is, as became crystal clear during his testimony before me, directed at the playing of the game by a group of 12 - 16 year olds with the vast majority of the players being 12 - 14 years of age.
7. The plaintiff's cause of action is personal to the plaintiff and arises out of an allegation that in having her, a 16 year old senior cadet, demonstrate the playing of the game with Robert Earney, another 15 year old senior cadet, the defendants created an unreasonable risk of harm to her and that but for their creating that unreasonable risk of injury she would not have been injured.
8. Of no significance to Professor Fishburne but, in my opinion, central to an understanding of the standard of care actually observed in the case at bar is the fact that those supervising the plaintiff and Robert Earney knew that both the plaintiff and Robert Earney knew the rules of engagement, i.e., a tug of war was permitted but nothing more, and were senior cadets who had risen through the ranks of an organization in which obeying rules, directions, and orders was fundamental to all that occurred, thus greatly reducing the chances that physical contact between these two senior cadets would result in even so much as acceptable harm such as a bruise, a bump or an abrasion.

**38**  What I have done in my capacity as trier of fact is explain how I went about assessing what weight I should give to Professor Fishburne's evidence. In the result I find that the evidence of Professor Fishburne is simply the unhelpful opinion of an ersatz trier of fact. I do not find Professor Fishburne's evidence persuasive.

**39**  In my opinion the defendants met the standard of care of a reasonable and prudent parent.

**40**  There was nothing in the condition of the field on which the demonstration in question took place - even assuming that it was composed of dry dead grass, small rocks and pebbles as the plaintiff would have it - that ought to have resulted in no demonstration being undertaken or the location of the demonstration being changed.

**41**  The "safety sweep" missed nothing of relevance here that ought reasonably to have been seen and rectified. The injury resulted from a small stick or stem of grass entering the plaintiff's ear and no safety sweep conducted with reasonable care was going to identify such a thing as a hazard.

**42**  The supervision of the cadets was delegated by the defendants Dil Pangalia and Sewa Pangalia to those below them in the hierarchy, i.e., the two Civilian Instructors - Ronnie Chandi and Deanna Scherger - and the two squadron commanders, the plaintiff and Robert Earney.

**43**  The fact that neither Dil Pangalia nor Sewa Pangalia can be precise as to exactly where they were and what they were doing when the plaintiff was injured is not only understandable considering the passing of 14 years but also of no consequence. As noted, delegation of supervision of cadets was both reasonable and at the heart of the cadet program. The two Civilian Instructors were present and in a supervisory position to the plaintiff and Robert Earney. The fact that other officers were probably in the area but cannot be pinpointed is of no moment. Similarly, the fact that Ronnie Chandi can but place herself at the scene and speak to a shard of memory of what exactly happened to the plaintiff is neither here nor there.

**44**  I find that there is nothing in the choice of the game of "Stick In The Middle" or in the way the game was to be played or in the choosing of the plaintiff and Robert Earney - who I find were about the same size and build - to demonstrate how the game was to be played that fell below the applicable standard of care, i.e., the care that would be taken by a reasonable and prudent parent.

**45**  There is nothing before me that reveals inadequate supervision of the plaintiff and Robert Earney as the game and the rules were explained to the cadets and the demonstration began. Closer supervision of the demonstration itself is of no interest for the switching between acceptable conduct and unacceptable conduct - the push - happened in an instant and could not have been stopped. And I did consider but ultimately rejected the plaintiff's submission that I should draw an inference adverse to the defendants from the fact that the Civilian Instructor, Deanna Scherger, was not called to testify before me by the defendants. Her absence from the witness box was adequately explained to me by counsel for the defendants at the end of the case, albeit during submissions, as provided for by *Kokanee Mortgage MIC Ltd. v. Concord Appraisals Ltd.*, [*2000 BCSC 1197*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-F81W-22P7-00000-00&context=), and apparently taken as a given by the Supreme Court of Canada in a case involving a judge and jury: *R. v. Cook*, [*[1997] 1 S.C.R. 1113*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3TS-00000-00&context=), paragraph 51.

**46**  The plaintiff has not established ***negligence*** on the part of either of the named defendants, Dil Pangalia or Sewa Pangalia, or on the part of anyone below them in the hierarchy but superior to the plaintiff and Robert Earney.

**47**  Conduct is negligent if it creates an unreasonable risk of harm (*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=), paragraph 7). I find that the standard of care observed by all concerned in the case at bar was that of a reasonable and prudent parent and created only a slight and acceptable risk of minimal harm encompassing bumps, bruises, and scrapes be the conduct that resulted in the bump, bruise or scrape, a stumble or a tug on a rope, i.e., conduct within the rules or a push, i.e., conduct contrary to the rules. The fact that a push resulted in not a bump, bruise or scrape but serious injury does not translate into a finding that an unreasonable risk of harm had been created by either of the two named defendants or anyone else of interest here such as the Civilian Instructors.

**48**  Insofar as the plaintiff's claim is against the Attorney General of Canada "directly" (Statement of Claim, paragraph 16) it cannot succeed. That is because absent intervention by Parliament the Crown is not directly liable in tort. And the fact is Parliament has provided for liability by the Crown in only restricted circumstances, neither of which assists the plaintiff in her "direct" claim against the Attorney General of Canada.

*Crown Liability and Proceedings Act*, [*R.S.C. 1985, c. C-50*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-WB41-F22N-X4VK-00000-00&context=) - s. 3.

**49**  The plaintiff has failed to establish on a balance of probabilities that any of the defendants were guilty of ***negligence***.

**50**  It follows that the plaintiff's action must be and is dismissed.

**51**  For the sake of completeness I note that it is my recollection that during the submission of counsel for the defendants I indicated that there was nothing to her submission that if one or more of the defendants were guilty of ***negligence*** then the plaintiff was contributorily negligent. If, in fact, I failed to make that point during the submission of counsel then I make it now.

**52**  I turn to the question of the applicability of s. 269(1) of the *National Defence Act*, [*R.S.C. 1985, c. N-5*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5VYK-W9Y1-F2MB-S2P9-00000-00&context=) to the proceedings in the case at bar.

**53**  Section 269(1) reads thus:

269. (1) No action, prosecution or other proceeding lies against any person for an act done in pursuance or execution or intended execution of this Act or any regulations or military or departmental duty or authority, or in respect of any alleged neglect or default in the execution of this Act, regulations or any such duty or authority, unless it is commenced within six months after the act, neglect or default complained of or, in the case of continuance of injury or damage, within six months after the ceasing thereof.

**54**  The plaintiff was injured on November 3, 1996. The writ was filed on December 27, 2000. The plaintiff had turned 19 on January 1, 1999. No matter how one looks at it, if s. 269(1) is otherwise applicable to the proceedings in the case at bar the plaintiff is out of court with respect to her action as against all the defendants.

**55**  The onus is on the defendants to establish that s. 269(1) has application here.

**56**  In *Canada (Attorney General) v. Pacific International Securities Inc.*, [*2006 BCCA 303*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-JK4W-M1P7-00000-00&context=) at paragraph 49, the Court of Appeal said this:

It is trite to say that there is only one rule of statutory interpretation which applies to all federal statutes. The rule was recently reiterated in *R. v. Clark*, [*[2005] 1 S.C.R. 6*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JTGH-B132-00000-00&context=) at para. 43, as follows:

It is now well established that "the words of an *Act* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament": *Bell ExpressVu Limited Partnership v. Rex*, [*[2002] 2 S.C.R. 559*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4CN-00000-00&context=), [*2002 SCC 42*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M4CN-00000-00&context=), at para. 26, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Rizzo & Rizzo Shoes Ltd. (Re)*, [*[1998] 1 S.C.R. 27*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M3X1-00000-00&context=), at para. 21.

**57**  The defendants submit that in applying s. 269(1) to the case at bar I must begin with that rule of statutory interpretation and in this particular case, in connection with s. 269(1), need not and should not go any further than the words "in ... execution ... of this Act."

**58**  The plaintiff submits that in applying s. 269(1) to the case at bar I must reach the analysis that prevailed in *Des Champs v. Conseil des écoles séparées catholiques de langue française de Prescott-Russell*, [*[1999] 3 S.C.R. 281*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M437-00000-00&context=), and was applied by this court in *W.W. v. Canada (Attorney General)*, [*2002 BCSC 1164*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S791-JCJ5-2556-00000-00&context=).

**59**  I say it does not matter whether the defendants are right or the plaintiff is right as to which of the two rules of statutory interpretation I must apply. The answer is the same in both cases.

**60**  Section 46 of the *National Defence Act* reads as follows:

CADET ORGANIZATIONS

46. (1) The Minister may authorize the formation of cadet organizations under the control and supervision of the Canadian Forces to consist of persons of not less than twelve years of age who have not attained the age of nineteen years.

(2) The cadet organizations referred to in subsection (1) shall be trained for such periods, administered in such manner and provided with materiel and accommodation under such conditions, and shall be subject to the authority and command of such officers, as the Minister may direct.

(3) The cadet organizations referred to in subsection (1) are not comprised in the Canadian Forces.

**61**  As of November 3, 1996, at Canadian Forces Base Chilliwack, Dil Pangalia and Sewa Pangalia were carrying out a cadet training activity in execution of s. 46(2) of the *National Defence Act*. Each of them was an officer of the Canadian Forces, more particularly members of the Cadet Instruction Cadre right then and there training a "cadet organization" or a portion of such.

**62**  What the defendants Dil Pangalia and Sewa Pangalia were about at 10:00 a.m. - 11:00 a.m. on November 3, 1996 falls squarely within the language of s. 46 of the *National Defence Act*.

**63**  Thus, applying the "one rule of statutory interpretation" to s. 269(1) and what is thrown up by this case, I conclude that Dil Pangalia and Sewa Pangalia were, at the material time, acting "in ... execution of the [*National Defence Act*]". Thus s. 269 has application to the case at bar and the plaintiff is out of court.

**64**  If I apply the analysis in *Des Champs* and consider the nature of the statutory power relied on by the defendants and the nature of the correlative right being asserted by the plaintiff in the light of what is thrown up by this case I find that: (1) the statutory duty in question here and relied upon by the defendants is of a public character, i.e., a military or departmental duty, for everything of relevance to this case that Dil Pangalia and Sewa Pangalia did or did not do on November 3, 1996 was of a public nature being in direct execution of s. 46 of the *National Defence Act*, the statutory power or duty relied upon by the defendants; (2) the right being asserted by the plaintiff, i.e., the right to have reasonable care taken for her safety is "correlative" to the public duty, i.e., the military or departmental duty imposed by s. 46 of the *National Defence Act* on Dil Pangalia and Sewa Pangalia as officers under whose authority and command the training of a cadet organization was entrusted; (3) in no way could the activity complained of by the plaintiff be considered incidental or ancillary to the discharge by the defendants of their public duty, i.e., their military or departmental duty on November 3, 1996 under s. 46 of the *National Defence Act*.

**65**  That I have gone straight to what in my opinion are the questions that must ultimately be answered rather than proceeding through the steps the Supreme Court of Canada (at paragraph 50) said a court "might" follow is neither here nor there. The result is, again, that s. 269(1) has application here and the plaintiff is out of court.

**66**  In the result no matter which analytical framework is employed, the result is the same, i.e., s. 269(1) has application to the case at bar and the action must be dismissed.

**67**  I note that the plaintiff's submission in connection with s. 269(1) turned on an assumption that what the focus must be is the plaintiff's youth, her involvement in a voluntary activity and the fact she was having fun demonstrating a game. Neither the plain wording of s. 269(1) nor the case law connected with s. 269(1) supports that submission.

**68**  I have dealt with the merits of the plaintiff's cause of action - ***negligence*** - and with the applicability of s. 269(1) of the *National Defence Act* to what is thrown up by the case at bar.

**69**  As to the former, the plaintiff's action has been dismissed for want of proof on a balance of probabilities of an irreducible element of the plaintiff's cause of action, i.e., ***negligence***. As to the latter, I have ruled that the limitation period provided for by s. 269(1) has application here. In the result the plaintiff's action must be dismissed as barred by statute.

**70**  Obviously I have presented two alternative reasons for dismissing the plaintiff's action.

**71**  The question arises as to whether I should exercise my discretion in favour of proceeding to assess the plaintiff's damages regardless of the fact that her action has been dismissed.

**72**  Mr. Justice Bouck discussed the exercising of such a discretion in *Caplan Builders Ltd. v. Royal Bank of Canada* [*(1988), 25 B.C.L.R. (2d) 335*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-F65M-609X-00000-00&context=) (S.C.). I will take that case as read.

**73**  I note that the appeal was dismissed at (1989), [*[1989] B.C.J. No. 1074*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-F4GK-M1RK-00000-00&context=), [*36 B.C.L.R. (2d) xxxvii*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6Y1-F4GK-M1RK-00000-00&context=).

**74**  Mr. Justice Bouck did not set about to establish "rigid rules" as to what a trial court judge should keep in mind when considering the exercising of such a discretion. On the other hand, what he said is helpful. I have kept it in mind.

**75**  In a case such as the case at bar what lies behind a decision to assess the damages "in the alternative" is a belief by the trial court judge that the case is such that if he is reversed on appeal the Court of Appeal will be in a position to enter an appropriate judgment and, thus, end the litigation (absent an appeal to the Supreme Court of Canada) without ordering a new trial.

**76**  In the case at bar the Court of Appeal will have to set aside the two alternative decisions I have made before any assessment of damages by me now will be of any interest whatsoever.

**77**  Anything is possible, but in my opinion in all likelihood if the Court of Appeal were to set aside my decision on the issue of proof of ***negligence***, either because of some reversible error committed by me in the conduct of the case or in my reasons for judgment, the Court of Appeal would have to order a new trial rather than enter judgment in favour of the plaintiff. That is because a trial wrongly conducted generally demands a new trial and flawed reasons for judgment grounded in an assessment of the evidence in a particular case generally result in a new trial. My decision on the question of proof of ***negligence*** is a decision based on settled law and grounded in the evidence peculiar to this case.

**78**  I exercise my discretion against proceeding to assess damages in the alternative.

**79**  The plaintiff's action stands dismissed. Counsel will have to arrange to make submissions on any ancillary matter on which they cannot agree.

A.M. STEWART J.

**End of Document**

[***Bentley Aviation Ltd. v. Homelife Benchmark Realty Corp., [2017] B.C.J. No. 1515***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5P5N-TT41-JKPJ-G257-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

L.A. Warren J.

Heard: July 11, 2017.

Judgment: July 31, 2017.

Docket: S150402

Registry: Vancouver

**[2017] B.C.J. No. 1515** | 2017 BCSC 1332

Between Bentley Aviation Ltd., Plaintiff, and Homelife Benchmark Realty Corp., Randy Evans, Northstar Realty dba Royal LePage Northstar Realty and Steve Anderson, Defendants, and Fraser Valley Aggregates Ltd. and B & B Contracting Ltd., Gary Bailey and Fraser Bruce, Third Parties

(47 paras.)

**Case Summary**

**Real property law — Real estate agents and brokers — Contractual and tort duties — Duty to exercise reasonable skill and care — Application by defendants to strike out claims for *negligence*, injurious falsehood and slander of title for failure to disclosed cause of action dismissed — Plaintiff, a co-owner of a property, sued realtors after they acted on sale of the property without plaintiff's consent — *Negligence* claim did not depend on enforceability of contract to sell but on circumstances created by contact that deprived plaintiff of opportunity to develop and subdivide or accept another offer — Allegation of loss of particular sale was sufficient to meet special damages element of slander of title and injurious falsehood.**

**Tort law — *Negligence* — Duty and standard of care — Duty of care — Application by defendants to strike out claims for *negligence*, injurious falsehood and slander of title for failure to disclosed cause of action dismissed — Plaintiff, a co-owner of a property, sued realtors after they acted on sale of the property without plaintiff's consent — *Negligence* claim did not depend on enforceability of contract to sell but on circumstances created by contact that deprived plaintiff of opportunity to develop and subdivide or accept another offer**

**Tort law — Defamation — Slander — What constituting special damages — Loss of trade — Application by defendants to strike out claims for *negligence*, injurious falsehood and slander of title for failure to disclosed cause of action dismissed — Plaintiff, a co-owner of a property, sued realtors after they acted on sale of the property without plaintiff's consent — Allegation of loss of particular sale was sufficient to meet special damages element of slander of title and injurious falsehood.**

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| Application by the defendants to strike out the claims for ***negligence***, injurious falsehood and slander of title on the basis that it disclosed no cause of action. The plaintiff owned a 25 per cent interest in a parcel of undeveloped land. Pursuant to the joint venture agreement between the plaintiff and the two other owners, the property was to be developed into a 103-lot subdivision. Under the Agreement, any decision to dispose of the property required the approval of 75 per cent of the ownership interests. Without the knowledge or approval of the plaintiff, one of the owners entered into an agreement of purchase and sale for the property. The defendant realtors had drafted the agreement. The seller was not accurately identified in the contract. Neither realtor made any effort to confirm that the plaintiff and the other owner were prepared to sell their interests on the terms set out in the contract or that the purported seller was authorized to sign the contract. Only after the plaintiff received an unsolicited offer to purchase the lands was the plaintiff advised of the existing agreement of purchase and sale. To avoid costly litigation, the plaintiff sold his interest in the property to the seller for $1,522,750. In the present action, the plaintiff claimed that by virtue of their roles as agents in brokering or attempting to broker the sale of the property, the realtors owed the plaintiff a duty of care, including a duty to ensure that the person purporting to sell the property was properly authorized to do so. The plaintiff claimed that by negotiating the contract, the realtors represented to the purchaser that the incorrectly named seller was properly the seller of the property and that the signing owner had authority to sign the contract. The plaintiff claimed that this conduct also constituted slander of title in that the defendants published statements disparaging the plaintiff's title to the property that were false, the reckless publication of the statements was malicious, and the plaintiff suffered actual pecuniary damages as a result.  HELD: Application dismissed.  The ***negligence*** claim did not depend on the enforceability of the agreement of purchase and sale. Whether the plaintiff could establish the required causal nexus between the alleged breach of duty and the loss claimed would depend on the reasonableness of the plaintiff's decision to sell its interest in the property to the other owner rather than deny the enforceability of the contract and gird for litigation. The crux of the ***negligence*** claim was that the existence of the contract, whether ultimately found to be enforceable or not, created a constellation of circumstances that deprived the plaintiff of the opportunity to develop and subdivide the lots or to accept the unsolicited offer. The plaintiff had pleaded each of the requisite elements of the tort of ***negligence***. The plaintiff had also arguably pleaded the facts necessary to support all elements of the causes of action of injurious falsehood and slander of title. Where a false statement disparaged a plaintiff's property, it was sufficient to meet the "special damages" element of the torts that the statement resulted in the actual loss of a specific opportunity to sell the property in question. It was sufficient to expressly allege some specific pecuniary loss such as the loss of a particular sale. The facts pleaded in this case gave rise to an unusual, if not novel, manifestation of the torts of injurious falsehood and slander of title but it was not plain and obvious that the plaintiff had no reasonable prospect of success on these claims. |

**Statutes, Regulations and Rules Cited:**

Supreme Court Civil Rules, Rule 9-5(1)(a)

**Counsel**

Counsel for the Plaintiff: David P. Church, Q.C., Alex Evans.

Counsel for the Defendants Homelife Benchmark Realty Corp. and Randy Evans: Christopher Elrick.

Counsel for the Defendants Northstar Realty Ltd. and Steve Anderson: Scott G. Cordell, Danielle Rondeau.

No one appearing for the Third Parties.

**Reasons for Judgment**

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| **L.A. WARREN J.** |

**Introduction**

**1**  The defendants, Homelife Benchmark Realty Corp. ("Homelife"), Randy Evans, Northstar Realty Ltd. dba Royal LePage Northstar Realty ("Northstar"), and Steve Anderson, apply, pursuant to Rule 9-5(1)(a) of the *Supreme Court Civil Rules*, to strike the plaintiff's claim in its entirety on the basis that it discloses no cause of action.

**2**  By notice of application filed June 15, 2017, the plaintiff sought leave to file a further amended notice of civil claim. The defendants consented to such leave being granted and their applications proceeded in contemplation of the further amended notice of civil claim being filed. In the further amended notice of civil claim, the plaintiff seeks damages against the defendants for ***negligence***, injurious falsehood and slander of title.

**Background**

**3**  The following background summary is distilled from the facts alleged in Part 1 of the further amended notice of civil claim, which, on an application under Rule 9-5(1)(a), must be taken as proven: *International Taoist Church of Canada v. Ching Chung Taoist Association of Hong Kong Limited*, [*2011 BCCA 149*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-DY33-B1RF-00000-00&context=) at para. 21.

**4**  The claim arises out of a real estate transaction involving a large tract of undeveloped land in Abbotsford known as the "Station Road Property". The Station Road Property was owned by the plaintiff, Bentley Aviation Ltd., together with two other parties: First Effort Investment Ltd. ("First Effort") and Fraser Valley Aggregates Ltd. ("Fraser Valley"). The plaintiff held a 25% undivided ownership interest, while Fraser Valley and First Effort held 65% and 10%, respectively. All three owners were registered on title.

**5**  In 2011, the plaintiff, Fraser Valley and First Effort entered into a written joint venture agreement (the "Joint Venture Agreement") with the primary objective of developing the Station Road Property into a 103-lot subdivision. Under the Joint Venture Agreement, any decision to dispose of the Station Road Property, in whole or in part, required the approval of 75% of the ownership interests.

**6**  At all material times, Steve Anderson was a realtor working with Northstar and Randy Evans was a realtor working with Homelife. Mr. Anderson and Northstar were seeking to market the Station Road Property, purportedly at the instruction of Fraser Valley and its principal, Gary Bailey. Mr. Evans and Homelife were actively seeking properties such as the Station Road Property for acquisition by their clients.

**7**  On or about May 15, 2013, Mr. Evans and Mr. Anderson caused a contract of purchase and sale for the Station Road Property (the "Contract") to be drafted. The Contract identified the seller as "Station Road Terraces J.V.", even though there is no such legal entity. The purchaser was identified as Pacific Bay Properties Ltd. ("Pacific Bay"). The Contract provided for a purchase price of $22,866,000 and a closing date of January 28, 2014, or such other later date as agreed upon.

**8**  On or about May 17, 2013, Mr. Bailey signed the Contract on behalf of the seller. He did so unbeknownst to the plaintiff, without its consent, and without the authority to sign on behalf of it or on behalf of First Effort. Neither Mr. Evans nor Mr. Anderson made any effort to confirm that the plaintiff and First Effort were prepared to sell their interests in the Station Road Property on the terms set out in the Contract, or that Mr. Bailey was authorized to sign the Contract.

**9**  After entering into the Contract, Pacific Bay purported to assign some or all of its rights under the Contract to various entities who, in turn, purported to assign portions of their assigned interests in the Contract to other parties.

**10**  On or about September 22, 2013, Herb Feischl, the principal of the plaintiff, received an unsolicited offer from A&G Investments Ltd. ("A&G") to purchase the Station Road Property for $25.5 million with a quick closing (the "A&G Offer"). Mr. Feischl notified Fraser Valley and First Effort of the A&G Offer. Only then did Fraser Valley advise the plaintiff and First Effort of the existence the Contract and the purported sale of the Station Road Property to Pacific Bay.

**11**  The plaintiff objected to the Contract upon becoming aware of it. At the time that Mr. Bailey purported to enter into the Contract, neither the plaintiff nor First Effort had agreed to, or would have agreed to, dispose of the Station Road Property, at the price and on the terms agreed to by Mr. Bailey.

**12**  Pacific Bay took the position that the Contract was legal and binding and, further, that it had completed an assignment of its interest in the Station Road Property to others (the "Assignees").

**13**  It was very likely that had the plaintiff interfered with the performance of the Contract, Pacific Bay, the Assignees, or both, would have brought legal action to enforce the Contract. The plaintiff lacked the resources, and the confidence in its position, to defend such an action. In addition to legal costs, legal proceedings would have inevitably led to a certificate of pending litigation being registered on the title to the Station Road Property, which would have prevented the plaintiff from disposing immediately of its interest in the Station Road Property and from developing and selling the individual lots. In the result, the plaintiff would have been unable to realize any income from the Station Road Property for the indefinite duration of any legal action, all while carrying costs. Further, as a result of the terms of the lending arrangements entered into by the parties to the Joint Venture Agreement, halting performance of the Contract and permitting a certificate of pending litigation to be registered on title would have put the parties to the Joint Venture Agreement in a precarious financial position. The lenders would have likely called their loans, causing severe financial consequences.

**14**  In an effort to mitigate, the plaintiff negotiated a settlement with Fraser Valley by which Fraser Valley acquired the plaintiff's 25% interest in the Station Road Property for $1,522,750. In the result, the plaintiff was not able to develop the Station Road Property or pursue the A&G Offer.

**15**  Had the parties to the Joint Venture Agreement subdivided the Station Road Property and sold the lots as originally intended, the plaintiff would have received $5,770,000 for its 25% interest. Had A&G purchased the Station Road Property on the terms of the A&G Offer, the plaintiff would have received $2,752,700 for its 25% interest.

**Nature of the claims**

**16**  As already noted, the plaintiff pleads three causes of action: ***negligence***; injurious falsehood; and slander of title.

**17**  The plaintiff says that by virtue of their roles, as agents, in brokering or attempting to broker the sale of the Station Road Property, Mr. Evans and Mr. Anderson owed the plaintiff a duty of care, including a duty to ensure that the person purporting to sell Station Road Property was properly authorized to do so.

**18**  The plaintiff says that at the time they drew up the Contract, Mr. Evans and Mr. Anderson knew, or should have known, that there was no legal entity by the name of Station Road Terraces J.V.; title to the Station Road Property was actually held by the plaintiff, Fraser Valley, and First Effort; the plaintiff was a required signatory to any contract of purchase and sale; and Mr. Bailey had no authority to execute the Contract on behalf of the plaintiff or First Effort. The plaintiff says that each of Mr. Evans and Mr. Anderson breached their duty of care to the plaintiff by preparing and proceeding with the Contract in the circumstances.

**19**  The plaintiff says that the ***negligence*** of Mr. Evans and Mr. Anderson caused the plaintiff to suffer loss and damage by creating circumstances that deprived it of the opportunity to obtain a greater return for its interest in the Station Road Property.

**20**  The plaintiff alleges that Homelife is vicariously liable for Mr. Evans' actions and that Northstar is vicariously liable for Mr. Anderson's actions.

**21**  In addition to ***negligence***, the plaintiff says that the conduct of Mr. Evans and Mr. Anderson also constitutes injurious falsehood. Specifically, the plaintiff says that by negotiating the Contract, Mr. Evans and Mr. Anderson represented to Pacific Bay that Station Road Terraces J.V. was properly the seller of the Station Road Property and that Mr. Bailey had authority to sign the Contract. The plaintiff says those representations were untrue and that Mr. Anderson and Mr. Evans acted improperly and recklessly in making them such that their conduct was malicious. The plaintiff says that it suffered actual damage as a result; specifically, the difference between what the plaintiff received from Fraser Valley for the sale of plaintiff's interest in the Station Road Property and what the plaintiff would have received on development and sale of the individual lots or upon the sale of the entire Station Road Property to A&G.

**22**  Finally, the plaintiff says that the above-described conduct of Mr. Anderson and Mr. Evans also constitutes slander of title in that they published statements disparaging the plaintiff's title to the Station Road Property, the statements were false, the reckless publication of the statements was malicious, and the plaintiff suffered actual pecuniary damages as a result.

**Legal principles**

**23**  Rule 9-5(1)(a) provides:

1. At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
2. it discloses no reasonable claim or defence, as the case may be ... .

**24**  The test applicable on an application to strike a pleading for failing to disclose a reasonable cause of action was confirmed and discussed by the Supreme Court of Canada in *R. v. Imperial Tobacco Canada Ltd.*, [*2011 SCC 42*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FH4C-X1XK-00000-00&context=) at paras. 17-25. In order to succeed, the defendants must establish that it is plain and obvious, assuming the facts pleaded are true, that the pleading discloses no reasonable cause of action. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial.

**25**  The application is concerned only with the sufficiency of the pleadings. No evidence is admissible and the motion proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven: *Operation Dismantle Inc. v. The Queen*, [*[1985] 1 S.C.R. 441*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3T1-JJSF-236M-00000-00&context=) at 455.

**26**  An attack on pleadings should be considered with caution, particularly where there is a great deal in issue and the amount of money involved is substantial: *Taoist Church*, para. 25. The court must err on the side of permitting novel but arguable claims to proceed: *Imperial Tobacco*, para. 21. Having said that, where a plaintiff fails to plead the facts necessary to support all elements of a cause of action, the claim has no reasonable prospect of success and should be struck: *Chingee v. British Columbia*, [*2017 BCCA 250*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5NY2-2SG1-F7G6-6014-00000-00&context=) at para. 52.

**Issues**

**27**  With respect to the claim in ***negligence***, the defendants submit that the plaintiff has failed to plead facts that, even if true, could establish the necessary causal nexus between the alleged ***negligence*** and the loss the plaintiff claims to have suffered. They say this is because the facts pleaded by the plaintiff, if true, establish that the Contract was unenforceable and if it was unenforceable it could not have prevented the plaintiff from developing the Station Road Property and selling the lots or taking up the A&G Offer. With respect to the claims in injurious falsehood and slander of title, the defendants submit that the plaintiff has failed to plead facts necessary to establish that any representation or publication by the defendants caused "special damages", which they say is a necessary element of each of those causes of action.

**28**  The following issues arise:

1. Is it plain and obvious that the plaintiff has failed to plead facts that, if true, could establish the necessary causal nexus between the alleged ***negligence*** and the loss the plaintiff claims to have suffered?
2. Is it plain and obvious that the plaintiff has failed to plead facts that, if true, could establish that the defendants' allegedly tortious representation or publication caused damage of the kind that is recoverable through a claim of injurious falsehood or slander of title?

**Decision**

**Issue 1. Is it plain and obvious that the plaintiff**

**has failed to plead facts that, if true, could establish**

**the necessary causal nexus between the alleged *negligence***

**and the loss the plaintiff claims to have suffered?**

**29**  The defendants contend that, if the facts pleaded are assumed to be true (specifically, that Mr. Bailey signed the Contract without the plaintiff's authority; the Contract was not signed by each of the owners, as sellers; and the seller was not accurately identified on the Contract), it is plain and obvious that the Contract was unenforceable. They rely on well-established legal principles concerning the enforceability of contracts.

**30**  First, they cite the general principle that one cannot give more than one has, which is reflected in the Latin maxim, *nemo dat quod non habet*. They say that if, as alleged by the plaintiff, Mr. Bailey had no authority to sign the Contract on the plaintiff's behalf, Pacific Bay would have been unable to enforce the Contract against the plaintiff. Second, they cite what they call the requirement that "contracts for the sale of land must be in writing". They say that if, as alleged by the plaintiff, the plaintiff did not sign the Contract and Mr. Bailey did not sign it on the plaintiff's behalf, then the writing requirement has not been met and the Contract was unenforceable. Third, they cite the general principle that to be enforceable, a contract must contain all essential terms. They say that if, as alleged by the plaintiff, the Contract failed to accurately identify the seller, then the Contract did not contain all essential terms and was unenforceable.

**31**  The defendants then submit that because the Contract was unenforceable it could not have prevented the plaintiff from developing the Station Road Property and selling the lots or taking up the A&G Offer. Accordingly, they say that there is no reasonable prospect of the plaintiff proving that the loss the plaintiff claims to have suffered was caused by any ***negligence*** on the part of the defendants. Rather, they say it is plain and obvious that the plaintiff's loss was caused by its "legally gratuitous" decision to sell its interest in the Station Road Property to Fraser Valley.

**32**  I do not agree with the defendants' submissions.

**33**  First, the defendants' submissions represent an overly simplistic view of the enforceability of the Contract. Whether an alleged contract is enforceable is a question that is heavily dependent upon facts, including facts relevant to the perception and conduct of the person seeking to enforce it. For example, whether an undisclosed principal is liable for a contract entered into by another purporting to be his or her agent depends on whether the undisclosed principal, by words or conduct, held out to the world that the agent had authority to enter into the contract: *Sihota v. Soo*, [*2010 BCSC 886*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7K1-F1H1-22CG-00000-00&context=) at paras. 40-46. Further, an unsigned contract respecting land may be enforced in British Columbia in circumstances where "the person alleging the contract ... has, in reasonable reliance on it, so changed the person's position that an inequitable result, having regard to both parties' interests, can be avoided only by enforcing the contract": *Law and Equity Act*, [*R.S.B.C. 1996 c. 253, s. 59*](https://advance.lexis.com/api/document?collection=legislation-ca&id=urn:contentItem:5F41-1FG1-F4NT-X0C2-00000-00&context=)(3)(c). Thus, the enforceability of the Contract is a question that could depend, at least in part, on Pacific Bay's perception of the plaintiff's conduct or on whether Pacific Bay relied on the Contract and, if so, the reasonableness of Pacific Bay in doing so. Accordingly, the plaintiff's assertions in its pleading to the effect that Mr. Bailey had no authority to execute the Contract on its behalf and that the Contract did not properly identify and was not signed by the actual sellers, if true, are not necessarily determinative of the enforceability of the Contract.

**34**  Second, and more fundamentally, the defendants have mischaracterized the nature of the ***negligence*** claim. The defendants' application, as it pertains to the ***negligence*** claim, rests on the proposition that the loss the plaintiff claims to have suffered could not have been caused by the Contract because the Contract was not enforceable. However, the claim, as pleaded, does not depend on the enforceability of the Contract. Whether the plaintiff can establish the required causal nexus between the alleged breach of duty and the loss claimed will depend on the reasonableness of the plaintiff's decision to sell its interest in the Station Road Property to Fraser Valley rather than deny the enforceability of the Contract and gird for litigation. The strength of Pacific Bay's position that the Contract was enforceable is a factor relevant to assessing the reasonableness of that decision but that does not mean that the plaintiff's claim depends on the court finding that the Contract was enforceable. Other factors are also relevant to an assessment of the reasonableness of the plaintiff's decision including, but not limited to, whether the plaintiff's decision was made after receiving legal advice, and the costs and risks associated with pursuing the alternative course of action.

**35**  The crux of the ***negligence*** claim is that the existence of the Contract, whether ultimately found to be enforceable or not, created a constellation of circumstances that deprived the plaintiff of the opportunity to develop and subdivide the lots or to accept the A&G Offer. Those circumstances include Pacific Bay's assertion that the Contract was binding and that it had assigned its interest under it, the existence of Assignees who likely would have taken the same position, the likelihood that Pacific Bay and/or the Assignees would have commenced legal action and registered a certificate of pending litigation against title to the Station Road Property, the plaintiff's lack of resources to defend such litigation and the likelihood that a certificate of pending litigation would have resulted in the plaintiff's lenders calling their loans. The primary questions to be determined are whether the existence of the Contract did, in fact, create those circumstances and, if so, whether but for those circumstances, the plaintiff would have obtained a greater return for its interest in the Station Road Property. These are questions of fact that cannot be decided on an application to strike pleadings for failure to disclose the cause of action.

**36**  The plaintiff has pleaded each of the requisite elements of the tort of ***negligence***. It is alleged that the defendants, by virtue of their role as agents brokering or attempting to broker the sale of the Station Road Property, owed the plaintiff a duty of care. It is alleged that they breached that duty by, among other things, drafting the Contract without ascertaining that Mr. Bailey was authorized to sell the Station Road Property. It is alleged that the defendants' breach caused the circumstances that compelled the plaintiff to sell its interest to Fraser Valley in an effort to mitigate its loss, which deprived the plaintiff from obtaining a greater return. I am not satisfied that it is plain and obvious that this pleading fails to support the requisite causal nexus between the alleged ***negligence*** and the alleged loss. Therefore, the defendants' application to strike the ***negligence*** claim must fail.

**Issue 2. Is it plain and obvious that the plaintiff has failed to plead facts that, if true, could establish that the defendants' allegedly tortious representation or publication caused damage of the kind that is recoverable through a claim of injurious falsehood or slander of title?**

**37**  Injurious falsehood and slander of title are different names for the same tort. The elements of these torts are: (1) a false statement disparaging a plaintiff's business, goods or property; (2) published to a third person; (3) maliciously and without just cause or excuse; and (4) resulting in special damages in the form of pecuniary loss: *311165 B.C. Ltd. v. Canada (Attorney General)*, [*2016 BCSC 2068*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5M67-1F81-JW5H-X005-00000-00&context=) at paras. 35-36 and 75-76; rev'd in part and on different grounds, [*2017 BCCA 196*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5NP1-5SB1-JX8W-M2B6-00000-00&context=).

**38**  The defendants submit that the plaintiff has failed to plead facts necessary to establish that any representation or publication by the defendants caused "special damages". They say that the plaintiff has not specifically pleaded "special damages" at all. In any event, they say that where a plaintiff in an action for injurious falsehood or slander of title claims damages as a result of the loss of an actual sale of property to an intended purchaser, it is necessary for the plaintiff to allege that the defendants misrepresented or published a false and disparaging statement concerning the property to the intended purchaser, which caused the intended purchaser to balk. The actual sale that the plaintiff alleges was lost was the sale to A&G and there is no allegation that the defendants told A&G about the Contract. To the contrary, the further amended notice of civil claim alleges that Mr. Feischl, the plaintiff's principal, advised A&G about the Contract. In the circumstances, the defendants say that the plaintiff has failed to plead facts that could establish the necessary causal nexus between the alleged tortious representation or publication and any pecuniary loss alleged.

**39**  I do not agree with the defendants' submissions.

**40**  From the authorities to which I was referred, it is apparent that where a false statement disparages a plaintiff's property, it is sufficient to meet the "special damages" element of the torts that the statement resulted in the actual loss of a specific opportunity to sell the property in question. This point is made in an excerpt from Raymond E. Brown, *Brown on Defamation*, loose-leaf (updated 2016, release 3) 2nd ed., vol. 10 (Toronto: Carswell, 1999) at s. 28.1 (15), which was quoted in *311165 BC Ltd*. at para. 76:

Where a plaintiff is pursuing an action for slander of title or slander of goods, the publisher must be identified, the words constituting the slander must be pleaded clearly and precisely, and there must be an express allegation that the plaintiff has suffered some particular special damage as a result of the slander, unless there is some special statutory provision foregoing an allegation of special damages where the words are calculated to cause pecuniary damage with respect to an office, profession or trade. It must be alleged and proved that the words constituting injurious falsehood were followed as a natural and legal consequence by pecuniary damage to the plaintiff. If the plaintiff is claiming special damages as a result of the loss to an intending purchaser of his or her property, particulars must be provided as to the name of the intended purchaser, the date on which he or she received notice of the publication, and the amount of damages claimed to be lost as a result of the slander of title. The plaintiff does not have to allege, as in malicious prosecution, that the defendant acted without reasonable and probable cause. If the plaintiff claims that his title to property was slandered by the defendant shortly before its sale by auction which prevented some persons from bidding on the property, particulars should be provided of the occasions when and where the words complained of were spoken, the persons present on those occasions, and the best particulars that can be given of the persons who were desirous of purchasing the property and were prevented from doing so by reason of the words spoken by the defendant.

It is not sufficient to allege that shares in which the plaintiff has an interest have been depreciated and lessened in value, or that others have been led to believe that the plaintiff has no right to or interest in the shares, or that he or she has been hindered and prevented from selling or disposing of the shares. Nor is it sufficient to allege generally in an action for slander of title that the plaintiff lost the sale of his lands.

**41**  Thus, while it is not sufficient to allege, in general terms, that the value of the plaintiff's property depreciated or that the plaintiff lost the opportunity to sell the property, it is sufficient to expressly allege some specific pecuniary loss such as the loss of a particular sale.

**42**  Here, the plaintiff has alleged that, through the Contract, the defendants published a statement to Pacific Bay that misrepresented the identity of the owner of the Station Road Property; this statement disparaged the plaintiff's title to its property, was false and was made recklessly such as to amount to malice; and, as a result, the plaintiff suffered actual pecuniary loss, which has been particularized as the difference between what it received pursuant to the agreement it reached with Fraser Valley and what it would have received had it been able to pursue the A&G Offer or had it been able to develop and subdivide the Station Road Property as originally intended. All three amounts are specifically quantified in the further amended notice of civil claim. I am satisfied that these allegations amount to a pleading of actual pecuniary loss sufficient to establish the "special damages" element of the torts of injurious falsehood or slander of title.

**43**  The final question is whether it is necessary for the plaintiff to allege that the defendants published a false and disparaging statement to the intended purchaser, which caused the intended purchaser to balk. As noted, in this case the allegation is that the disparaging statement was published to Pacific Bay, through the Contract, and this led to the loss of the sale to A&G or the opportunity to develop and subdivide. There is no allegation that the defendants published the disparaging statement to A&G or to any other third party who in turn prevented the development or subdivision.

**44**  While common sense suggests that a typical manifestation of the tort of injurious falsehood or slander of title would involve a defendant publishing a false statement about a plaintiff's property to a third party who, as a result, backed out of a purchase of the property, I was provided with no authority that stands for the proposition that the false statement has to be published by the defendant to the intended purchaser. It is not apparent from the requisite elements of the torts, as noted above, that there must be a direct link between the party to whom the disparaging statement is published and the pecuniary loss. What is required is a finding that the pecuniary loss was caused, in a legal sense, by the wrongful publication. As noted, the crux of the plaintiff's claim is the assertion that but for the circumstances resulting from the existence of the Contract, which came into existence as a result of the allegedly disparaging statement, the plaintiff would have developed and subdivided the lots or accepted the A&G Offer.

**45**  I accept that the facts pleaded in this case give rise to an unusual, if not novel, manifestation of the torts of injurious falsehood and slander of title but I am not persuaded that it is plain and obvious that the plaintiff has no reasonable prospect of success on these claims. As noted, on an application to strike a claim as disclosing no reasonable cause of action, the court must err on the side of permitting novel but arguable claims to proceed. I am satisfied that the plaintiff has arguably pleaded the facts necessary to support all elements of the causes of action of injurious falsehood and slander of title. Therefore, the defendants' application to strike those claims must fail.

**Conclusion**

**46**  The defendants have not established that it is plain and obvious that the plaintiff's further amended notice of civil claim fails to properly disclose a claim in ***negligence***, injurious falsehood or slander of title. The applications are dismissed.

**47**  If the parties wish to speak to costs, they may make arrangements through the registry, provided they do so within 30 days of release of this judgment. Otherwise, the costs of these applications shall be determined in accordance with Rule 14-1(12)(b).

L.A. WARREN J.

**End of Document**

[***Coburn v. Nagra, [2001] B.C.J. No. 247***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JJD0-G198-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

Stewart J.

Heard: January 22 - 26, 29 and 30, 2001.

Judgment: February 8, 2001.

Victoria Registry No. 98/2403

**[2001] B.C.J. No. 247** | 2001 BCSC 234 | 102 A.C.W.S. (3d) 726

Between Barbara Irene Coburn, plaintiff, and Dr. Saleem Nagra and Dr. Alan Lomax, defendants

(52 paras.)

**Case Summary**

**Medicine — Liability of practitioners — *Negligence* or fault — Surgical operations by doctors — Causation — Damage awards — Injury and death — Special damage awards — Loss of wages — General damage awards — Loss of earning capacity — Necessary services provided by family members — Large awards.**

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| Action by Coburn against Nagra for damages for medical ***negligence***. Nagra was a surgeon who performed an operation to treat a reflux condition. During a subsequent operation, a different surgeon discovered a perforation in Coburn's stomach. Coburn alleged that the perforation was caused by Nagra's ***negligence*** in stitching a part of her stomach. Nagra alleged that a part of Coburn's stomach had migrated into the hiatus and as such there was no ***negligence***. Coburn's expert witness found the migration hypothesis very unlikely, but not impossible. The surgeon who discovered the perforation said that although it was extremely rare, there was a pinching resulting from stitching, as opposed to a migration. After the two operations Coburn spent 24 days in hospital and was unable to return to work for six months. She also had to have her two daughters look after her. She required two remedial operations in consecutive years which caused her to be off work for at least seven weeks each time. After the remedial operations Coburn's condition was about what it was prior to Nagra's operation.  HELD: Action allowed.  The evidence of the surgeon who discovered the perforation tipped the scales in favour of a finding that it was more likely than not that Nagra's ***negligence*** caused or contributed to Coburn's injury. Nagra's ***negligence*** had deprived Coburn of the opportunity to experience the improvement of a successful surgical procedure. Coburn was awarded non-pecuniary damages of $100,000. She was awarded $8,000 for the cost of having to pay others for chores that she should have been able to do herself. She was awarded $50,00 for loss of earning capacity. Past loss of wages and special damages had been agreed in the amounts of $29,336 and $9,412 respectively. The global award was significant but not excessive. In addition, the sum of $10,000 was awarded in trust in recognition of the value of the care provided to Coburn by her daughters. |

**Counsel**

S.J. Harper and R.F. Johnson, for the plaintiff. J.M. Lepp and S. Ion, for the defendants.

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| **STEWART J.** |

**1**   The plaintiff, Barbara Irene Coburn, claims damages for ***negligence***.

**2**  The plaintiff was operated on by the defendant, Dr. Nagra, a surgeon, on July 2, 1996. Dr. Nagra's Operation Report appears at Exhibit 1, Tab 1, page 18. I will take it as read.

**3**  At the end of the day the plaintiff's allegation is of ***negligence*** by the defendant, Dr. Nagra, during the course of the operation itself, i.e., not pre-op or post-op ***negligence***. (The action as against Dr. Lomax was dismissed at the end of the plaintiff's case.)

**4**  I use terms such as "flesh", "chest", "belly", as any lay person would. I am a lay person. I describe the July 2, 1996 surgery as follows. The plaintiff suffered from "reflux". In other words at times the contents of her stomach would flow up from her stomach and through her esophagus. Terribly nasty things resulted. The objective on July 2, 1996, was to eliminate this backflow by wrapping the fundus, i.e. the dome-shaped portion of the stomach, around the esophagus and tightening it. The surgeon "recreates" [as one of the witnesses, Dr. Simpson, put it] the effect of a valve. A second discrete procedure was undertaken by Dr. Nagra. (See Transcript, Evidence of Dr. Simpson, pp. 2-3). It proved to be the first procedure undertaken and completed on July 2nd. This procedure involved pulling together ("approximating") the crura. The crura are best thought of as two pillars, one of which stands to each side of the diaphragm. The diaphragm separates the thoracic ("chest" to the lay person) and abdominal ("belly" to the lay person) cavities. The surgeon draws the crura together with what came to be referred to at trial as "crural stitches" but is careful to leave a small space (an "hiatus") between the top of the now drawn together pillars and the bottom of the esophagus so that the esophagus can expand slightly as a large bit of food moves through it. Having a bit of the flesh that forms the fundus caught up in a crural stitch forms no part of either of the two procedures undertaken, as above, on July 2, 1996. Having a bit of the flesh that forms the fundus move, purely by bad luck, through the hiatus after the operation conducted by the defendant on the plaintiff on July 2, 1996 was completed, was not front and centre in anyone's mind on July 2, 1996. And reasonably so.

**5**  This case drives a judge back to absolutely fundamental propositions.

**6**  The onus is on the plaintiff to prove her case on a balance of probabilities.

**7**  Although that onus rests upon a plaintiff with respect to the whole of her case, it is good law that in a particular case proof on a balance of probabilities of a particular fact may be the determinative issue in the case. (R. v. MacKenzie, [*[1993] 1 S.C.R. 212*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JFKM-609N-00000-00&context=): A criminal case. But the greater includes the lesser.)

**8**  That is the case here.

**9**  The case is one in which it is common ground that on July 6, 1996, a surgeon, Dr. Simpson, opened up the plaintiff and went back to the site of the operation performed on the plaintiff by the defendant on July 2, 1996. It is common ground that by the conclusion of the procedure he adopted on July 6, 1996, Dr. Simpson had discovered a perforation, one centimetre in diameter, in a portion of the plaintiff's stomach. (Dr. Simpson's Operation Report appears at Exhibit 3, Tab 6A, page 18. I will take it as read.)

**10**  The plaintiff's case is that the perforation in the plaintiff's stomach discovered by Dr. Simpson on July 6, 1996, was caused or contributed to by a negligent act of the defendant, Dr. Nagra, during the surgery performed by him on July 2, 1996.

**11**  The plaintiff's case devolves to an assertion that a bit of the plaintiff's stomach was caught within one of a number of stitches put in place by the defendant during the operation conducted by him on July 2, 1996.

**12**  The plaintiff's case on ***negligence*** is made out if the assertion that a bit of the plaintiff's stomach was caught within a stitch is accepted as being so on a balance of probabilities, for there is no doubt that for a surgeon to so catch up the bit of the stomach in question here and end the operation without discovering and addressing the problem, is for that surgeon's conduct to fall below the degree of skill and knowledge of an average specialist in the defendant's field.

**13**  The case at bar is one in which, on the evidence, the only competing rational alternative to the plaintiff's assertion as to the mechanism by which the flesh of the stomach came to be perforated (the stitch theory) is an assertion by the defendant that the evidence reveals that after the surgery was completed on July 2, 1996, a bit of the plaintiff's stomach migrated into the hiatus properly left by the defendant beneath (as I think of it) the plaintiff's esophagus. If this theory of the defendant (the migration theory) is accepted by the trier of fact or, at the least, not rejected on a balance of probabilities, the plaintiff's case must be dismissed for if the mechanism of injury to the plaintiff be "migration" there is no proof of ***negligence*** on the part of the defendant, Dr. Nagra.

**14**  I pause to note that it is common to the plaintiff's theory (stitch) and the defendant's theory (migration) that once the flesh of the stomach was where it ought not to be, the supply of oxygen to some of the entrapped flesh was compromised and, in the result, necrosis (death of tissue) occurred and a one centimetre diameter hole appeared.

**15**  "Proof", for the purposes of the law, is a matter of persuasion, not demonstration or replication at will. And for the purposes of the law, once the trier of fact is persuaded that something in the past was thus and so on a balance of probabilities, a certainty has been arrived at. (Athey v. Leonati, [*[1996] 3 S.C.R. 458*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3S6-00000-00&context=), S.C.C. October 31, 1996, para. 28.)

**16**  The onus is on the plaintiff to prove her case. But only to the standard of proof on a balance of probabilities.

**17**  On the evidence thrown up in this case, the question becomes, has the plaintiff convinced me that it is more likely than not that the mechanism which resulted in a one centimetre hole in her stomach being formed involved her flesh being caught up in a stitch rather than a bit of her stomach migrating through an hiatus properly left by the defendant surgeon at the end of the surgery?

**18**  The answer is "Yes".

**19**  There is no smoking gun in this case.

**20**  As no scientist would, the finder of fact in the case at bar must ask himself whether the persuasive effect of all that, on balance, favours a conclusion that the mechanism by which the plaintiff's flesh was injured is encapsulated in the stitch theory, outweighs the persuasive effect of all that on balance favours a conclusion that the mechanism by which the plaintiff's flesh was injured is encapsulated in the migration theory?

**21**  I begin with what of significance tends to favour the migration theory or is, at the least, not inconsistent with it:

1. The plaintiff's expert, Dr. Simpson, says that necrosis of the plaintiff's flesh having its source in a compromising of the supply of oxygen to a bit of flesh by reason of the pinching of flesh that had migrated through the hiatus, is "very unlikely". But he does not say it is impossible.
2. Dr. Simpson said that if it is possible to have intra thoracic migration, what he saw when he released the last crural stitch, is consistent with migration having occurred in the case at bar.
3. It is the eyeball evidence of the defendant's expert, Dr. Turner, that migration of exactly the sort under discussion here is not just recognized in the relevant literature (Exhibit 10) but occurred in a case of his. It is Dr. Turner's opinion that what occurred in the case at bar is exactly that, i.e., migration.
4. The fact that all of the fluid of interest was found by Dr. Simpson on the chest side of the diaphragm indicates that the hiatus, properly left behind by the defendant, had become plugged. And other than the defendant's migration theory, nothing explains the plugging of the hiatus. [The assumptions made about the relative positioning of different parts of the body affects the force to be given to this point made by counsel during submissions at the end of the case. It is my recollection of the course of the proceedings at trial that this precise point was not the subject of pointed questioning during cross-examination of the plaintiff's experts.]
5. Migration of a bit of the plaintiff's stomach through the hiatus, followed by swelling, compromising of the supply of oxygen, necrosis, a resulting perforation, secretion of a bit of stomach content and production of fluids by the body's defence system is, on the evidence, possible and accounts for all that need be accounted for.
6. The fact that during the operation on July 2, 1996 Dr. Nagra did not find it necessary to divide the short gastric vessels indicates that in its natural state, the plaintiff's stomach was - to use terminology that grew up during the trial - "floppy".
7. The defendant's expert, Dr. Turner, said that the securing of the fundus [after it was wrapped around the esophagus by the surgeon during the second procedure undertaken by Dr. Nagra during the course of the operation on July 2nd] would not rule out migration by a bit of the fundus into the hiatus thereafter.
8. Taking the whole of the relevant portions of Dr. Simpson's evidence together as an assertion that the last stitch he removed on July 6th was the "top" crural stitch (as it was referred to at trial) behind the esophagus, the returning of the fundus to its natural position then and not before is consistent with there being a plug of flesh - migrated flesh - situated between the top stitch and the esophagus.
9. Dr. Turner said that none of the observations Dr. Simpson made on July 6th - as Dr. Turner understood them - was inconsistent with the migration theory having application to the case at bar.
10. The migration theory admits only of a perforation coming into existence on the chest side of the diaphragm and the finding of all fluid of interest only in the chest obviously is consistent with the perforation being on the chest side.
11. Dr. Nagra says that before July 2, 1996, he had read of a case of a stomach migrating into a crural gap with a resulting perforation.
12. The source of the force required to bring about migration is the use by the patient of her abdominal muscles. Not only is demanding that a patient who has been subjected to the surgery of the sort performed on the plaintiff here on July 2, 1996 cough usual and ordinary, but here, in this particular case, there are records that reveal that the plaintiff was in fact encouraged to cough (Exhibit 2, Tab 5, pages 51, 53, 58, 59, 60) and was the subject of "aggressive physiotherapy" to that end. (Exhibit 3, Tab 6, A2, p. 181.)

**22**  I now turn to what of significance tends to indicate that the migration theory is not the answer in the case at bar:

1. Dr. Simpson saw nothing to indicate that there had been any cutting off of the blood supply to the esophagus as one would expect to see in a case of not just migration of the fundus into the hiatus but of swelling, constriction and necrosis. (Transcript, Evidence of Dr. Simpson, pp. 30, 25: Exhibit 3, Tab 6A, p. 4.)
2. If there was a migration of the fundus into the hiatus with resulting swelling and necrosis of tissue in the case at bar, it occurred after the crura had been approximated and the fundal wrap secured, an unlikely but not impossible event. [This is my summary of the evidence of the defendant's witness, Dr. Turner, on this point in general and in connection with his own observations in an earlier case and the import of Exhibit 10, a bit of medical literature.]
3. Dr. Simpson did not speak in his July 6, 1996, Operation Report (Exhibit 3, Tab 6A, p. 18) or in his testimony before me of seeing anything like a knob, protuberance, or mushroom shaped bit of flesh after the fundus slipped away from where it had been anchored prior to Dr. Simpson's releasing the last suture. Absence of confrontation of Dr. Simpson on this point during cross-examination is not necessarily of significance to a trier or fact. It may be. As the trier of fact in this particular case, I say that it is. In addition, Dr. Turner said that in his case of an equivalent migration at the second surgery he did observe a "mushroom slug", to use shorthand that developed during the trial. In addition, Dr. Cleator, one of the plaintiff's experts, said that absence of an observation of a protrusion or anything like it by Dr. Simpson tended to undermine any suggestion that the migration theory has application in the case at bar.
4. The fact that, amongst other things, the plaintiff developed "atelectatic changes" (an abnormal condition characterized by the collapse of lung tissue) according to a Radiologist (Ex. 2, Tab 5, A, p. 19) by July 4, 1996, signals caution in accepting the proposition that at the material time the plaintiff was coughing/huffing/puffing sufficiently hard (Exhibit 2, Tab 5 pages 51, 52. 53) that intra-abdominal pressure produced by her abdominal muscles was available to initiate migration of a portion of the fundus into the hiatus.
5. When on July 6, 1996 Dr. Simpson, before releasing the last stitch, first probed with a finger (Ex. 3, Tab 6A, p. 18), the bit of the fundus which, according to the migration theory, was then being held only by swollen flesh did not move towards its natural position as one would expect, albeit not demand, of the migration theory.
6. A number of experts testified before me. But only one of those experts stood beside the plaintiff in the early morning hours of July 6, 1996 and gazed at her insides. That was Dr. Simpson, an expert witness called by the plaintiff. He told me that: what he alone looked at was not the result of the migration of a bodily part as described in Dr. Turner's report (Ex. 17) or the article that Dr. Turner relied on (Ex. 10); that what he stared at is "not as easily visualized as you might think" (Transcript, Dr. Simpson, p. 15); that "... this was not a migration of the fundus which is what's described in that report. This is a pinching. There was a piece of the fundus not ... you know, a small piece of the fundus that was caught in the stitch ..." (Transcript Dr. Simpson, p. 23.)
7. The evidence of the plaintiff's expert, Dr. Cleator, confirms what common sense would suggest, i.e., the mechanism of perforation is determined by the surgeon who conducts the "repeat surgery". In the case at bar, that position is occupied by Dr. Simpson, the surgeon who conducted the "repeat surgery" in the early morning hours of July 6, 1996.

**23**  I turn to what of significance at the end of the day tends to favour the stitch theory:

1. As noted earlier, Dr. Simpson - the only expert who saw what was there to be seen on July 6, 1996 - said in his evidence: What he alone looked at was not the result of the migration of a bodily part as described in Dr. Turner's report (Ex. 17) or the article that Dr. Turner relied on (Ex. 10); that what he stared at is "not as easily visualized as you might think" (Dr. Simpson, Transcript, p. 15); that "... this was not a migration of the fundus, which is what is described in that report. This is a pinching. There was a piece of the fundus not ... you know, a small piece of the fundus that was caught in the stitch ..." (Dr. Simpson, Transcript, p. 23.)
2. There is the simple observation that it is only when the last crural stitch is cut by Dr. Simpson on July 6, 1996, that the fundus returns to its natural position. That that is so does not rule out a migrated plug of flesh having taken up a position between what I think of as the "top" crural stitch and the esophagus, but it tends to favour the stitch theory when one keeps in mind that Dr. Simpson's probing with his finger before cutting the last crural stitch did not cause the fundus to become dislodged.

**24**  I now turn to what of significance tends to indicate that the plaintiff's theory is wrong, that the mechanism of injury did not involve a bit of the flesh of the plaintiff's stomach being caught up in one of the sutures put in place by the defendant, Dr. Nagra:

1. The plaintiff's case is that a bit of the plaintiff's fundus was caught up in a crural stitch. The evidence is all one way. The crura were approximated first. That procedure was complete - all the stitching done - before the second procedure (the fundal wrap) was commenced. That sequence of procedures, apart from all else, significantly reduces the chances of a bit of the fundus being caught up in a crural stitch.
2. Not only is the fundus naturally positioned away from the site of the stitching of the crura but the retracting of the esophagus (Ex. 8, Figure 4) would tend to move the fundus away from the site of the stitching of the crura.
3. It is clear from Dr. Simpson's evidence that there was no leaking of fluid into the abdominal cavity from the perforation and Dr. Cleator's explanation of how a perforation of the fundus, when caught up in a stitch, could result in fluid being found only in the chest is, I find, not impossible, but rests on a fixing of the flesh of the fundus by happenstance in a particular relationship to its surroundings that is highly unlikely to occur.
4. Dr. Simpson made no observation of a crural stitch passing through the fundus.
5. The plaintiff was not in significant distress until three days post-op. To the extent one can glean anything of value from the timing of significant distress versus the commencement of the restriction of oxygen to a bit of the fundus, the result of that exercise tends to be against what we came to call the stitch theory.
6. Dr. Simpson made it clear that for a bit of the fundus to become caught up in a crural stitch would be extremely rare. Dr. Turner, the defendant's expert witness, said simply that as the crural stitches are being put in place the fundus is too far away from the site of the stitching to be caught up.
7. It is all and everything to the plaintiff's theory that when the defendant took the fundus in hand to make the wrap around the esophagus, the fundus was, unbeknownst to the defendant, caught up in a crural stitch, i.e., tethered. Common sense asks how could the surgeon form the wrap without noting that the fundus was trapped? I accept that Dr. Simpson's saying at Transcript, p. 36/37, that you could make such a wrap with a tethered fundus reduces what initially appears to be an impossibility to something that is very unlikely. But very unlikely it remains.
8. As a matter of simple logic, the failure of the wrap - the fundus - to return to its natural position on July 6, 1996, after Dr. Simpson took down the wrap and all but that which a moment later permitted the fundus to move away from what was behind the esophagus, militates against a conclusion that on July 2, 1996 - as things went the other way - the fundus was tethered but the surgeon, the defendant, simply did not notice the tethering as he made the wrap.
9. None of the experts has ever seen a case exactly like the case at bar, i.e., a case in which a bit of the fundus, having become caught up in a crural stitch, loses its supply of oxygen and in the result necrotizes, thus creating a perforation.

**25**  As the trier of fact who is confronted with the body of evidence thrown up in this particular case, I say that what tips the scales in favour of a finding that it is more likely than not that the one centimetre perforation in the plaintiff's stomach had its source in a bit of the flesh of the stomach being caught within a crural stitch is the weight I, at the end of the day, give to the evidence of Dr. Simpson (summarized above) to the effect that what he and he alone stared at on July 6, 1996, was exactly that.

**26**  In the light of what I said earlier, it follows that the plaintiff has discharged the onus cast upon the plaintiff by the law, of establishing on a balance of probabilities, that ***negligence*** of the defendant caused or contributed to the plaintiff's injury.

**27**  I turn to an assessment - and I emphasize that the word is "assessment", not "calculation" - of the plaintiff's damages. My quest is "to restore the plaintiff to the position she would have enjoyed but for the ***negligence*** of the defendant" to the extent an award of money can do so. But I must not put the plaintiff in a position "better than her original position". (Athey v. Leonati, October 31, 1996, S.C.C.)

**28**  The plaintiff was operated on by the defendant on July 2, 1996, because she suffered from what was referred to in the evidence at trial as "reflux". In brief, at times, and especially at night, some of the contents of the plaintiff's stomach would make their way up through the esophagus. Each such event was unpleasant and the plaintiff's sleep was interrupted. Her sleep being interrupted resulted in her arriving at work later than would otherwise have been the case and that in turn meant that eventually her employer insisted that she make up the lost time on those days when she arrived late. Prior to July 2, 1996, the defendant, Dr. Nagra, found the plaintiff burdened with "very advanced and severe esophagitis", according to my notes of what the doctor told me when he testified before me. He said, in effect, that ulcers were present everywhere. In addition, reflux, if not stopped or controlled, can, as Dr. Nagra told me, over time, result in further damage to the esophagus which is sometimes, but not always, associated with the appearance of pre-cancerous cells and then cancer. Prior to July 2, 1996, the plaintiff had consumed such prescription medications as were then available. But shortly before July 2, 1996, the decision was made to attempt a surgical fix.

**29**  What was contemplated as of July 2, 1996, was perhaps 7 days stay in hospital and 6-8 weeks off work and then a return to normal life. It would be a return to the life the plaintiff had had before, save and except she would no longer be burdened with reflux.

**30**  The result for the plaintiff of her stomach being perforated as a result of the defendant's ***negligence*** on July 2, 1996, was that the stomach secreted a bit of its contents - poison to the flesh it contacted - and the plaintiff's body reacted by producing pus and fluids. The place where this was happening and gathering was the chest. The plaintiff's condition deteriorated. She was flown to Prince George on July 5, 1996, and operated on (as above) by Dr. Simpson in the early morning hours of July 6, 1996. The plaintiff had come perilously near death.

**31**  The plaintiff was admitted to Dawson Creek Hospital on July 2, 1996. The defendant operated on her on July 2, 1996. She was transferred to Prince George Hospital on July 5, 1996. She was operated on by Dr. Simpson during the early morning hours of July 6, 1996. Some time later she was sent back to Dawson Creek Hospital from Prince George Hospital. She was released from Dawson Creek Hospital on July 26, 1996. She had been in one hospital or another for a total of 24 days. She had been subjected to two operations, not one. The second operation had, amongst other things, removed the surgical wrap put in place during the first operation. She was left with nothing that did any good in connection with her reflux problem. The plaintiff was unable to return to work until January 13, 1997. She then returned to work full-time.

**32**  As a direct result of the ***negligence*** of the defendant, Dr. Simpson had to perform surgery (as above) on the plaintiff's body on July 6, 1996. Also as a direct result of the defendant's ***negligence*** and the cumulative effect of the two intrusions upon the plaintiff's body in July 1996, the plaintiff underwent two further operations in 1997 and 1998.

**33**  The plaintiff was off work after the 1997 operation for 7 weeks. She was off work after the 1998 operation for 8 or 9 weeks.

**34**  From July 1996 until January 13, 1997, and her return to work, the plaintiff progressed from a situation in which she could basically do nothing for herself to a point where she was in a position to return to her own home and to her place of work. Her daughters, Anita and Teresa, took turns stepping in and, in a classic exercise involving role reversal, mothered their mother. I accept that the plaintiff - as much as she appreciated what her daughters did for her - disliked and resented having to rely on the kindness of others. In 1997 the plaintiff had a remedial operation as noted above but, as I understand it, the result was not good and in 1998 the plaintiff had to undergo the fourth operation noted above. She had to rest after the 1997 operation. After the 1998 operation she did as she was told, which amounted to nothing.

**35**  The evidence is not all one way as to whether the condition the plaintiff presented with prior to July 2, 1996 - reflux - is amenable to a surgical fix in the future.

**36**  In my respectful view it comes to this: The plaintiff's reflux problem is now about what it was prior to July 2, 1996, and the evidence of the plaintiff's witnesses to the effect that it would be unwise to enter the abdominal cavity again with a view to performing a fundoplication - the procedure conducted by the defendant on July 2, 1996 - is met by unsupported assertions by the defendant and Dr. Turner to the effect that an as yet unascertained specialist could probably do the necessary if he or she went at it from the chest side of the problem. In these circumstances, as the trier of fact, I say the plaintiff has established that her reflux problem is not amenable to a surgical fix in the future and that her damages must be assessed on the basis that, absent the development in the future of drugs that will help her much more than the existing batch of available drugs does, she will be burdened for life with reflux and all its attendant problems and risks. To make clear what I hope is obvious, I say this. Yes, I know that in connection with how the plaintiff's life might have proceeded absent the defendant's ***negligence*** or might proceed in the future, I am to take into consideration all "real and substantial possibilities" and give them "weight according to their relative likelihood". But as the trier of fact I say that on the basis of the evidence placed before me the question of a surgical fix of the plaintiff's reflux problem in the future never rose above mere speculation. (As to all of this see Athey v. Leonati S.C.C. October 31, 1996, para. 26-30).

**37**  The defendant cannot be heard to say that the plaintiff is no worse off now than she was on July 2, 1996, as far as the reflux problem goes because the defendant's ***negligence*** deprived the plaintiff of the opportunity to see what improvement a successful procedure on July 2, 1996, would have brought about. The assumption must be that she would have had total relief from her problem with reflux.

**38**  I was impressed with the plaintiff when she testified before me. The thrust of her evidence and of that of her immediate superior at the Ministry of Forests where the plaintiff works is that the plaintiff is a solid citizen, a dedicated worker, and one who works through her reflux problem rather than succumb to it. The fact the plaintiff returned to work in January 1997 and has worked steadily ever since, save and except for time that she has had to take off work in connection with the operations in 1997 and 1998, does not tell me that her problems in July 1996 to January 1997 were not very serious or that her ongoing problem is not significant. Far from it.

**39**  I accept that absent the defendant's ***negligence*** having its way with the plaintiff, the plaintiff would be now and for the foreseeable future, what she was prior to July 2, 1996, i.e., an energetic, enthusiastic individual who participated in all of the activities of her extended family and her work place to every extent available. (And she would not be burdened with reflux and reduced lung capacity.) She was, as of July 1996, a divorcee, 46 years of age, and in relatively good health. (I know that she had then, and has now, problems with her health other than those that are the subject matter of this litigation.) She had (and has) three daughters. The core of her family life was 20 miles from her home in Dawson Creek where she had worked for the Ministry of Forests from 1991 onward. She was, I find - to put it bluntly - married to her job. She still is. (And happily married, I might add). I accept the proposition that after the events of July 1996 and the course of her recovery was complete, she slowly made her way close to what she was prior to July 1996 but plateaued in the year 2000 and is not now the vibrant individual she would be, absent the defendant's ***negligence***. I accept that she must, at present and for the foreseeable future, have others do things for her, such as yard work, that she would do for herself absent the defendant's ***negligence***.

**40**  I accept that her prospects for advancement within the Ministry in the future are not what they would have been, absent the defendant's ***negligence***. (She is now the Resources Clerk in the office. The next step up is Administrative Services Supervisor.) The short point is that, to move up within the Ministry, she must be available at 8:00 a.m. every day without fail. Her track record in her current job says that she cannot promise anyone to be prompt every morning. Her problem with reflux is the culprit. Right now her position and the nature of her work permits her to make up time lost because of the adverse effect of reflux on her sleep pattern. But at the next level in the Ministry she will not have that luxury.

**41**  In addition, it is a fact that her capacity to earn income - assuming the Ministry of Forests dismisses all of its employees tomorrow - is less than it would otherwise be had the defendant's ***negligence*** on July 2, 1996, not had its effect on the plaintiff. She has been deprived of living a life free of reflux after July 2, 1996, and into the future and, with that, she has been deprived of being able to tell any prospective employer that she can and will be at work on time every morning of every work day. She just could not tell any prospective employer that.

**42**  I turn to the award of non-pecuniary damages. I take into account all that I have said thus far in these reasons for judgment. In addition, I note that the plaintiff's ongoing problems include the problem with reflux noted above and also reduced lung capacity - the plaintiff was "on oxygen" for four months - with resulting fatigue. I make it clear that I reject the defendant's submission to the effect that the award of damages in the case of Domijan v. Telbaerts, [*[1994] B.C.J. No. 449*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S721-F8D9-M0PT-00000-00&context=) (B.C.S.C. 1994) is of assistance here. In my respectful view it is not. I have considered all of the cases placed before me by counsel. It is trite that every case is different and that there is no logical connection between a given plaintiff's loss and a given sum of money. I say that this plaintiff's loss is enormous and that it is permanent. I assess the plaintiff's non-pecuniary damages at $100,000.00

**43**  Past loss of wages is agreed upon by counsel at $29,336.65. Special damages are agreed upon at $9,412.33. The plaintiff's claim for the cost of future care - prescription drugs - is assessed at $13,000. [I pause here to note that Wipli 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=) (B.C.C.A.), cited by the defendant, is no bar to recovery on this head. The plaintiff falls into the class of people referred to by the Court of Appeal at the latter portion of para. 57 of the judgment, i.e., for her there is a cost.]

**44**  I assess the award to be made for the cost of having to pay others in the future to do what she would do for herself - yard work - absent the defendant's ***negligence***, at $8,000.

**45**  The plaintiff is entitled to an award of damages for loss or diminution of her capacity to earn income in the future. In this case the award for loss of or diminution of the capacity to earn income in the future must reflect the fact that her capacity to earn income has been adversely affected in two ways:

1. Her capacity to move up the employment ladder within the Ministry of Forests has been adversely affected;
2. The capital equipment she can bring to bear in connection with any job available to her in the job market has been adversely affected by the defendant's ***negligence***.

**46**  The award for loss of or diminution of her capacity to earn income in the future must also reflect that the plaintiff, as of now, has a secure job which she enjoys and is unlikely to leave. It must also reflect that if she remains at her current level of employment she will make up lost time at work and not suffer a net loss in her wages. [The effect in the past and in the future of her not being able to enjoy her work as much as she might otherwise have done absent the defendant's ***negligence***, and of her having to make use of her own time to make up lost work time, was taken into account by me in my assessment of the award of damages for non-pecuniary loss.] In addition there is a potential for an adverse impact on the plaintiff's position with respect to her pension that must be taken into account. [I emphasize that in what I am about now I am not assuming that the plaintiff would have marched up the ladder in the Ministry of Forests over the next nine months or so during a realignment which is in prospect but only that her chances of doing so whenever there is such a realignment, have been adversely affected.]

**47**  I assess the plaintiff's damages under this heading of loss of or diminution of the capacity to earn income in the future at $50,000.

**48**  This completes the assessment of damages payable to the plaintiff for her own use. The last step is for me to look at the overall amount awarded, i.e. $209,748.98. Is it reasonable? I say yes. The plaintiff's loss is enormous. The award of damages I have made is significant, but not - in my opinion - excessive.

**49**  The last item placed before me by the plaintiff's claim is a claim for a sum to be awarded to the plaintiff, in effect in trust, in recognition of the value of the care provided to the plaintiff by the plaintiff's daughters, Anita and Teresa.

**50**  The case law of interest is McTavish v. MacGillivray, [*[2000] B.C.J. No. 507*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X05N-00000-00&context=) and Kroeker v. Jansen, [*[1995] B.C.J. No. 724*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S731-F60C-X11W-00000-00&context=).

**51**  If ever there was an area of law which demands an appropriate award but also demands caution and a recognition of the futility of attempting to calculate the amount to be awarded, this is it. I assess the amount to be awarded at $10,000, that sum to be split 75% in favour of Anita, and 25% in favour of Teresa.

**52**  If necessary, counsel may get back before me in connection with any issue arising out of the application of the Court Order Interest Act or the disposition with respect to costs. (But do it soon, I say).

STEWART J.

**End of Document**

[***Falconer v. BC Transit Corp., [2013] B.C.J. No. 841***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7N1-DXWW-2088-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

P. Abrioux J.

Heard: May 9,10, 2012; February 12, 2013.

Supplementary Submissions: February 22, 27, 2013.

Judgment: April 25, 2013.

Docket: S093193

Registry: Vancouver

**[2013] B.C.J. No. 841** | 2013 BCSC 715 | 227 A.C.W.S. (3d) 588 | 44 M.V.R. (6th) 305 | 2013 CarswellBC 1069

Between William Watt Falconer, Plaintiff, and BC Transit Corporation, Kamloops Transit System, City of Kamloops, Sheridan Management now known as Gateway Property Management Corporation Defendants

(57 paras.)

**Case Summary**

**Tort law — *Negligence* — Duty and standard of care — Standard of care — Contributory *negligence* — Apportionment of liability — Motor vehicles — Passengers — Stopping — Action by plaintiff for damages for *negligence* for injuries suffered while attempting to exit transit bus allowed in part — Plaintiff slipped and fell while attempting to exit through rear doors of bus — Defendant bus company was negligent — Plaintiff was contributorily negligent — Defendant owed high standard of care and its *negligence* occurred first — Liability was apportioned 75 per cent to defendant and 25 per cent to plaintiff.**

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| Action by the plaintiff for damages for ***negligence*** for injuries suffered while attempting to exit a transit bus. The plaintiff slipped and fell while attempting to exit through the rear doors of the bus, injuring his right ankle. The only issues at trial were whether the defendant bus company was negligent and whether the plaintiff was contributorily negligent.  HELD: Action allowed in part.  The defendant was negligent. The plaintiff's fall was caused by an icy surface in a driveway, which he stepped on because the bus driver stopped short of the bus stop sign. The defendant led no evidence as to why the bus stopped where it did, no evidence from which it could be concluded that it was reasonably safe to debark from where the rear doors opened and no evidence that a warning to passengers was not required. The plaintiff was contributorily negligent. He exited from the rear doors, did not look carefully and, after seeing ice before stepping down, did not use utmost caution or exit from the front. The defendant owed a high standard of care to the plaintiff. The defendant controlled where the bus stopped. Its ***negligence*** occurred before the plaintiff's. Liability was apportioned 75 per cent to the defendant and 25 per cent to the plaintiff. |

**Counsel**

Counsel for the Plaintiff: E. J. McNeney Q.C. and M. Spieker.

Counsel for the Defendants: J. Horne Q.C.

**Reasons for Judgment**

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| **P. ABRIOUX J.** |

**1**   William Falconer seeks damages for the injuries he sustained when exiting from a transit bus on January 29, 2008 (the "Accident").

**2**  The Accident occurred at or near the intersection of Third Avenue and Columbia Street in Kamloops, British Columbia. The plaintiff, while attempting to exit through the rear doors of the bus, slipped and fell, thereby causing an injury to his right ankle.

**3**  The parties have agreed as to the amount of damages. The only issues in the trial were whether the defendant BC Transit Corporation was negligent and if the plaintiff was contributorily negligent. The action against the remaining defendants has been discontinued, as have the third party proceedings.

**II:**  **LIABILITY**

**4**  For the reasons that follow I have concluded the defendant was negligent and its ***negligence*** caused the plaintiff's injuries. I have also concluded the plaintiff was contributorily negligent and liability ought to be apportioned 75% against the defendant and 25% against the plaintiff.

**III:**  **THE EVIDENCE**

**5**  There are no credibility issues to be resolved. Counsel for the defendant described Mr. Falconer as "one of the most honest and direct people I have ever come across". I reached the same conclusion.

**6**  It appears from the evidence that the operator of the bus at the time of the Accident was Mr. Robert Rogers. He did not testify at the trial. He apparently has no knowledge of the circumstances that gave rise to the Accident.

**7**  By way of brief background, Mr. Falconer was born in June 1920 in Aberdeen, Scotland. He came to Canada, unescorted, at age eight, to locate relatives in Saskatchewan. He returned to Scotland, once again alone, a few months later. When he was 15 years old he misrepresented his age in order to join the Royal Air Force. In 1938 he qualified as a pilot. He flew as a fighter pilot in the Battle of Britain, about which he said "I had one or two successes". He then flew Hurricane and Halifax bombers for the remainder of the Second World War.

**8**  Following the War, Mr. Falconer returned to Canada. His principal occupation for many years was as a flight engineer, first for Canadian Pacific Airlines and then the federal Department of Transport. He continued flying until he was a septuagenarian.

**9**  Mr. Falconer is an accomplished athlete. At the time of the Accident, although he was 87 years old, he would perform in track and field activities on a regular basis. His specialties were the discus and hammer. He often cycled for a half hour and did 300 to 400 "crunches" a day. He also, in his own words, "did a bit of running".

**10**  Mr. Falconer had sufficiently recovered from the injuries sustained in the Accident that when Kamloops hosted the World Masters Games in 2010, he was what was described as the "poster boy" for the promotional materials. At age 90 he participated in certain of the track and field events at the Games, including the javelin.

**11**  On January 29, 2008, the day of the Accident, the plaintiff was living at Fourth Avenue and Nicola Street in Kamloops. He took a bus to the Sahali Mall, which is located approximately two miles from his apartment. He intended to go shopping and to see his daughter who worked at a bank located in the mall. He does not own a car. He regularly uses public transport.

**12**  He described the weather conditions that day as "pretty wintry". Upon leaving the mall he took the number seven bus in order to return home. He recalls there being a drift of snow over which he had to step in order to get onto the bus.

**13**  When the bus approached Mr. Falconer's destination, he rang the bell. The driver stopped the bus approximately one bus length from the bus stop sign.

**14**  In direct examination the plaintiff testified that in exiting the rear door he saw there was a "skiff of snow and ice". The road was uneven. The area where he was exiting the bus led to the driveway of a coffee shop. In the process of leaving the bus, he grabbed the handle and stepped down. It felt as if he slipped. He heard a snap and his right ankle twisted.

**15**  A woman who was in the vicinity came over to assist him. She obtained a blanket, covered him and called an ambulance. By this time, the bus had left.

**16**  The plaintiff stated he was wearing boots with a heavy tread. He did not believe his footwear was a factor in the incident occurring.

**17**  On cross-examination, the plaintiff acknowledged he had to walk approximately one block from his apartment to get to the bus stop where he got on the bus to the mall. He agreed there was snow and ice where he walked earlier that day. It was a typical winter day in Kamloops.

**18**  He stated the bus stopped approximately a bus length "and a bit" from the bus stop. He did not believe there was a bus in front of the one he was riding.

**19**  The plaintiff was referred to his evidence given at an examination for discovery, which occurred in March 2010. He agreed the evidence he gave at that time was true. His evidence included:

1. snow and ice on the sidewalks and roads are not unexpected in Kamloops in the winter;
2. when he looked down prior to leaving the bus he saw "mostly snow. There were tire tracks there too. It looked like ice shining through";
3. he stepped off the bus "like I normally do";
4. when asked if he had any reason to be worried about stepping off the bus he responded "not really, but I held onto the door handle any way when I stepped off, and my foot just shot off, I heard this awful crack...";
5. when asked if it struck him that this was an unsafe place to get off the bus he responded "not really". He also agreed there was ice and snow to be seen. He saw pavement and stepped down;
6. the place where he did step down was four or five inches lower than it normally would be since there was no curb;
7. he took the step anyway because "it looked safe enough to me";
8. the difference in height did not really bother him;
9. from what he could tell it was not the pavement that made him trip but the "difference between the roadway and the entrance to the coffee shop";
10. he did not observe any difference in height between the driveway and the roadway before he stepped off. He went on to say "well I didn't notice anything. I would think I knew there was a difference because I was in a driveway and the pavement is higher";
11. he did not believe it was the edge of the pavement that caused him to fall;
12. when asked if his observations caused him to believe the situation was dangerous and it would be better to get off at the front of the bus, he responded he "never gave it a thought";
13. he was well aware of how far down it was before he stepped off the bus. He did not have to let go of the handle in order to do so. His foot was on the ground when it snapped;
14. he did not know what caused him to fall. All he knew was that his ankle twisted and snapped;
15. before the Accident occurred the bus had not moved. Its rear door was still open.

**20**  As part of the plaintiff's case, certain questions and answers from Mr. Rogers' examination for discovery were read into evidence. These included:

1. he did not know who was operating the bus at the time of the incident;
2. the bus stop in question was across from the hospital. He had a policy when dealing with elderly people in snow and ice situations to be very cautious and to keep them in mind as much as possible to facilitate their safe departure from the bus;
3. he had encountered ice and snow situations at this particular stop on prior occasions. What he did would depend on the situation, the amount of snow and ice, and whether there was another bus in front of him. "It's a very busy stop, so from one trip to the next everything changes, conditions change";
4. when asked if he would drive away if an elderly person fell to the ground while exiting from his bus, he answered "I don't know".

**21**  The documents produced by the defendant, which were entered into evidence, have Mr. Rogers named as the driver at the time of the Accident.

**22**  The plaintiff also sought to have admitted into evidence the report of Genevieve Heckman. Ms. Heckman is a "human performance and human factors" expert who operates her business in Los Angeles, California.

**23**  It was the plaintiff's position that Ms. Heckman's report would be of assistance to me in that:

1. it would establish there is no other explanation for the Accident occurring apart from the defendant's ***negligence***;
2. it would establish there were other alternatives available to the driver apart from stopping where he did;
3. it would opine as to what constitutes a "misstep";
4. it would establish the relevance of the uniform stepped-down height. A small decrease in step height would increase the likelihood of an accident occurring.

**24**  The defendant's objections to the admissibility of the report included the following:

1. the report did not constitute expert evidence and the expert was essentially taking the court's place;
2. in any event, the plaintiff had agreed the opinion portion of the report should be withdrawn. That being the case, there was no basis for the report being admitted into evidence.

**25**  Following submissions, I advised counsel I would rule on the admissibility of the report in these reasons for judgment.

**26**  I have concluded the report is of no assistance to me. That is because:

1. the redacted report contains no opinion;
2. what remains are Ms. Heckman's purported findings of fact.

**27**  Exercising my "gatekeeper function" which flows from *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=), and subsequent authorities, the report is not admitted into evidence.

**28**  The manager of Kamloops Transit, Ralph Vanderheide testified. His evidence included:

1. he had never spoken to Mr. Rogers about the Accident;
2. in so far as the bus stop in question was concerned, this stop could accommodate more than one bus;
3. the standard procedure was that if there was already a bus at the stop in question, the second bus to arrive would pull up right behind the first;
4. the bus in question was a "kneeling bus". At the time of the Accident, this function would occur automatically. It was designed to assist passengers getting onto a bus. It did not change the height of the step for the rear exit;
5. drivers receive sensitivity training in order to deal with elderly passengers;
6. the bus in question was equipped with a right side mirror. Drivers were instructed to ensure that the zone of safety next to the bus was clear prior to departing from the bus stop;
7. it was not acceptable practice for the bus driver to drive away if a person had slipped or fallen when getting off the bus;
8. he was aware Mr. Rogers had indicated he had no knowledge of the Accident. That being the case, there was no investigation;
9. had there been a new snowfall it would not be out of the ordinary at the stop in question for passengers to be dropped off near the driveway where there was no flat sidewalk;
10. if the bus in question had stopped behind another bus, the driver had the option of waiting for the first bus to leave before opening the doors on the bus;
11. he was made aware of the Accident by the assistant manager, Mr. Bruce Cameron.

**29**  A transcript of an interview of Bruce Cameron given under oath was entered as an exhibit at the trial. Mr. Cameron's evidence included the following:

1. at the time of the Accident, he was an on-road supervisor. He had also been involved in making changes and updates to the operator's policy manual;
2. most of the buses in the fleet were of the "kneeling" variety. This function, however, only affected the front of the bus;
3. under circumstances where there was an obstruction preventing the operator from using a bus stop in an ideal way, the procedure would be that if the bus was at an unsafe position, then the operator would clear the obstruction prior to allowing passengers to alight;
4. operators are encouraged to communicate with their passengers as to anything unusual that may be going on since "safety is first in the bus";
5. an operator does not necessarily always communicate with passengers. It would only be in situations where he foresaw something, that is a safety issue, that he would probably speak up and advise the passengers;
6. there was no direct training with respect to where a driver could or could not allow passengers off near a bus stop. "Basically we tell the drivers to take every precaution to let the passengers off in a safe place. There is going to be many places in town where you can have three or four buses at one bus stop";
7. it would be a "pretty common practice" for a driver to advise an elderly person to watch his step, although this would not constitute part of the formal training;
8. it would not be common practice for a driver to advise passengers to watch their step if they were stepping down onto the street. That is because "half the city has no curb. So it's just not done. Unless there is an obstruction or some safety issue, the height is never really isn't an issue unless you have a physical problem";
9. it would not generally be the case for a driver to advise an elderly person to exit out the front of the bus if there were icy conditions. That is because "some seniors get very upset when you treat them in a different way than other people". The appropriate thing to do would be to announce "watch your step, folks";
10. after passengers have exited the doors and the doors are shut, the driver should check the right mirror to make sure everyone is clear of the bus;
11. in so far as Mr. Cameron's own practice was concerned, he would generally yell "watch your step as you are leaving the bus". He would do so if he felt there was a safety issue. "If it was just a normal situation where there was no curb, I wouldn't bother saying anything";
12. after the Accident was reported, a driver's sheet was reviewed in order to determine who was driving the bus in question. This revealed Mr. Rogers to be the operator. Although Mr. Rogers had no knowledge of the Accident, "at no time did he deny that he was on that bus";
13. on the assumption that Mr. Falconer took a step out of the bus and fell immediately, "I don't see how a person can drive away in a bus without checking the right mirror to see that they are clear. . . You could have a kid reaching in there for a ball under the tires or whatever".

**30**  Several versions of different policy manuals were entered into evidence. In addition, the plaintiff called a supervisor at BC Transit, Ms. Lorna Cohoe, to give rebuttal evidence with respect to policy manuals. None of this evidence was of any real assistance to me. That is because it did not relate to the policy manual in place in Kamloops in January 2008. Accordingly, I have concluded that the best evidence on the standard of care is Mr. Cameron's.

**IV:**  **FINDINGS OF FACT**

**31**  I make the following findings of fact after a consideration of the evidence as a whole:

1. Mr. Rogers was the driver of the bus involved in the Accident;
2. there were wintry conditions, including fresh snow lying on top of ice at the bus stop area in question. Portions of the ice were visible to passengers exiting the rear door;
3. the bus was not brought to a stop at the bus stop where there was a curb upon which passengers could exit from both the front and rear doors;
4. due to the lack of a curb, Mr. Falconer had a greater distance to step down from the bus than if the bus been brought to a halt right at the bus stop;
5. Mr. Rogers did not issue any form of warning to the passengers who were exiting the bus at this particular stop;
6. Mr. Falconer believed he could step down safely from the rear exit. He was mistaken in that regard;
7. Mr. Falconer's injuries occurred when his right ankle "snapped" shortly after he placed it on an icy surface directly outside the rear exit of the bus;
8. Mr. Rogers drove away from the bus stop without checking in his right side mirror to see if the area was clear.

**V:**  **THE APPLICABLE LEGAL PRINCIPLES**

**32**  The principles that apply to the issues in this case are well known and were summarized this way by Madam Justice Dardi in *Prempeh v. Boisvert*, [*2012 BCSC 304*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7M1-F4W2-6247-00000-00&context=):

[15] The principles that govern the disposition of this case are uncontroversial. The reasonable foreseeability test informs the analysis of liability. The standard of care owed to a plaintiff passenger by a defendant bus driver is the conduct or behaviour that would be expected of a reasonably prudent bus driver in the circumstances. This is an objective test that takes into consideration both the experience of the average bus driver and anything the defendant driver knew or should have known: *Wang v. Horrod* [*(1998), 48 B.C.L.R. (3d) 199*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-FGJR-22SB-00000-00&context=) at para. 39 (C.A.); *Patoma v. Clarke*, [*2009 BCSC 1069*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7J1-JYYX-623B-00000-00&context=) at para. 6.

[16] It is well-settled on the authorities that the standard of care imposed on a public carrier is a high one. However the principle to be derived from the authorities is that the standard to be applied to the bus driver is not one of perfection nor is a defendant bus driver effectively to be an insurer for every fall or mishap that occurs on a bus:  *Patoma* at para. 7.

[17] *Day v. Toronto Transportation Commission*, [*[1940] S.C.R. 433*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3P1-FC6N-X1MN-00000-00&context=), is the seminal case dealing with the liability of public carriers. The plaintiff, a passenger in a street car owned by the defendant, while standing and picking up a parcel in preparation to disembark, was thrown to the floor and injured by the sudden application of the emergency brake. The articulation of the standard of care was stated as follows by Hudson J. at 441:

Although the carrier of passengers is not an insurer, yet if an accident occurs and the passenger is injured, there is a heavy burden on the defendant carrier to establish that he had used all due, proper and reasonable care and skill to avoid or prevent injury to the passenger. The care required is of a very high degree: 4 Hals., p. 60, paras. 92 and 95. In an old case of *Jackson v. Tollett* (1817) 2 Starkie 37, the rule was stated by Lord Ellenborough, at p. 38, as follows:

Every person who contracts for conveyance of others, is bound to use the utmost care and skill, and if, through any erroneous judgment on his part, any mischief is occasioned, he must answer for the consequences.

[18] The principles articulated in *Day* have been interpreted by the courts in this province as endorsing the following analytical approach - once a passenger on a public carrier has been injured in an accident a *prima facie* case of ***negligence*** is raised and it is for the public carrier to establish that the passenger's injuries were occasioned without ***negligence*** on the part of the defendant or that it resulted from a cause for which the carrier was not responsible: *Planidin v. Dykes*, [*[1984] B.C.J. No. 907*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S6W1-JXNB-6262-00000-00&context=) (Q.L.)(S.C.); *Visanji v. Eaton and Coast Mountain Bus Co. Ltd.*, [*2006 BCSC 656*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B225-00000-00&context=) at para. 26.

[19] However it must be noted that in *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=), [*46 B.C.L.R. (3d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-FC1F-M3WJ-00000-00&context=), Major J. in discussing the doctrine of *res ipsa* *loquitur* in the context of a single car accident, observed as follows:

27 It would appear that the law would be better served if the maxim was treated as expired and no longer used as a separate component in ***negligence*** actions. After all, it was nothing more than an attempt to deal with circumstantial evidence. That evidence is more sensibly dealt with by the trier of fact, who 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. Once the plaintiff has done so, the defendant must present evidence negating that of the plaintiff or necessarily the plaintiff will succeed.

[20] In *Visanji*, the court after canvassing the pertinent authorities provides the following helpful formulation of the principles which govern the determination of ***negligence*** against a public carrier:

[29] Whether the burden upon a public carrier in cases of injury or accident sustained by a passenger can be referred to as the shifting of the burden as in *Day*, or a matter of inferences to be drawn from the evidence once the plaintiff has established a *prima facie* case of ***negligence*** against the defendant carrier as articulated in *Fontaine*, it is for the defendant to present evidence to answer, or be found negligent: *Nice v. Calgary (City)* (2000), [*83 Alta. L.R. (3d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9351-FFFC-B31K-00000-00&context=), [*2000 ABCA 221*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9351-FFFC-B31K-00000-00&context=), at para.46, leave to appeal to S.C.C. ref'd, [*[2000] S.C.C.A. No. 483*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SF1-K054-G43D-00000-00&context=) (S.C.C. Mar. 29, 2001).

**33**  In *Visanji v. Eaton and Coast Mountain Bus Co. Ltd.*, [*2006 BCSC 656*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FFFC-B225-00000-00&context=), Madam Justice Arnold-Bailey made the following comments after reviewing the leading authorities:

[29] Whether the burden upon a public carrier in cases of injury or accident sustained by a passenger can be referred to as the shifting of the burden as in *Day*, or a matter of inferences to be drawn from the evidence once the plaintiff has established a *prima facie* case of ***negligence*** against the defendant carrier as articulated in *Fontaine*, it is for the defendant to present evidence to answer, or be found negligent: *Nice v. Calgary (City)* (2000), [*83 Alta. L.R. (3d) 1*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9351-FFFC-B31K-00000-00&context=), 2000 A.B.C.A. 221, at para.46, leave to appeal to S.C.C. ref'd, [*[2000] S.C.C.A. No. 483*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F82-1SF1-K054-G43D-00000-00&context=) (S.C.C. Mar. 29, 2001).

[30] In *Kean v. British Columbia Transit*, [*[1998] B.C.J. No. 2903*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-JX8W-M2MW-00000-00&context=) (December 11, 1998), Vancouver B920195 (B.C.S.C.), the plaintiff established a *prima facie* case against the defendant driver. The plaintiff, standing in the aisle to get off, was thrown forward by the sudden braking of the bus. In that case, Cohen, J. quoted a number of cases dealing with this concept. At para.13 Cohen, J. quoted the decision of *Lawrie v. British Columbia Hydro & Power Authority*, [1976] W.W.D. 137 (B.C.S.C.) at para.31, which in turn referred to an earlier case, *Winder v. Garrett and Jay*, [*[1957] O.W.N. 101*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCC1-F2F4-G01G-00000-00&context=), [*7 D.L.R. (2d) 462*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCC1-F2F4-G01G-00000-00&context=), where at p. 463 Laidlaw, J.A. is quoted as follows:

I prefer, for my part, to say that at the trial the plaintiff established a *prima facie* case as against the defendant. The onus of proof shifted to the defendant to answer that *prima facie* case, and that onus could be discharged by showing that there was no ***negligence*** or breach of duty on the part of the defendant or that the accident was attributable to some specific cause that was consistent only with the absence of ***negligence*** on the part of the defendant.

[31] The rationale for the shifting of the burden of proof to the defendant to show it exercised all due, proper and reasonable care and skill to prevent accident or injury, in cases of accident and injury to a passenger, has been explained variously. One such articulation of the rationale for the application of this principle, relevant to the case at bar, is found in the *Nice* decision, at para.28-31:

We accept that *Day* remains the law in the public carrier cases. Where there is an accident and an injury, a public carrier has the burden of showing it exercised all due, proper and reasonable care and skill to avoid or prevent injury to its passengers. This shift is justified for a number of reasons.

First, passengers on a public carrier are entitled to expect that they will be carried to their destinations in safety and thus, the standard of care for public carriers is high. See: *Day*

Secondly, the driver of the carrier is the person who knows whether the vehicle was being driven in a safe, proper and prudent manner. The passenger cannot be expected to know what happened. For example, in this case, the passenger was still proceeding down the aisle and could have no knowledge of why the bus, having left the stop, suddenly jerked to a stop.

Thirdly, a shifting of the burden will encourage pubic carriers to adopt proper reporting procedures so that facts are ascertainable after an incident occurs. If the party with the knowledge were not called on to answer, the incentive to keep proper records from which the truth can be ascertained disappears. Even worse, there might be an incentive not to keep records.

**34**  Part of a public carrier's duty is to provide passengers with a reasonably safe place to disembark. This duty was expressed as early as 1922 by Anglin J. in *Grand Trunk Pacific Coast Steamship Co. v. Simpson*, [*63 SCR 361*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-YGW1-FFMK-M3C3-00000-00&context=) at p. 370:

The duty of a carrier of passengers to provide a reasonably safe place for them to debark admits of no dispute. It is part of the obligation ordinarily undertaken in the contract of carriage.

**VI:**  **THE PARTIES' POSITIONS**

**35**  The plaintiff's position is that he has established a *prima facie* case of ***negligence*** against the defendant. He was dropped off at a driveway, not the curb, on the edge of an uneven surface. This occurred under wintry conditions. Essentially he was "led to a trap". He fell on his first step onto the ground. This is directly related to the position of the stopped vehicle.

**36**  In addition, the plaintiff submits the fact the driver left the scene contrary to his duty to observe the safe passage of passengers away from the side of the bus provides an inference that he was not paying attention to important duties relating to his driving. These duties included the icy conditions in which he should not have allowed the passengers to disembark onto the driveway.

**37**  The plaintiff argues that there were other options available to the bus driver. These included pulling ahead or to another location where passengers could step directly onto the sidewalk. In addition, it was open to the driver to ask the plaintiff to leave from the front of the bus where he would be able to see whether the conditions posed a hazard and caution was required.

**38**  The plaintiff also submits that an adverse inference should be drawn from the fact Mr. Rogers did not testify. He relies on *Parsons and Sons Transportation Ltd. v. Whelan*, [*2005 NLCA 52*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-T8X1-FBV7-B4MX-00000-00&context=):

[46] In summary,

(1) It is not helpful to speak of shifting the onus of proof to require a common carrier to prove that it was not negligent. The ordinary principles of proof are sufficient to the task. However, given the high standard of care the common carrier must meet, the carrier may be under a heightened need to adduce evidence in response, either to prevent the drawing of adverse inferences or to negate a *prima facie* case, because the threshold the plaintiff must clear is lower.

(2) In this case, the passenger, Ms. Whelan, established on a balance of probabilities that she was injured in the very manner which the Company conceded was foreseeable. She has, therefore, established a *prima facie* case of ***negligence***.

(3) The Company submitted, correctly, that there was evidence regarding precautions that it had taken. Failing to consider this evidence was a palpable and overriding error by the trial judge. However, the nature of the evidence on this point does not require an assessment of credibility of witnesses, and it is appropriate for this Court to determine whether there was sufficient evidence to negate the *prima facie* case of ***negligence*** established by Ms. Whelan.

(4) Given the high standard of care imposed on a common carrier, the evidence adduced by the Company is insufficient to negate the *prima facie* case established by Ms. Whelan. In the result, I conclude that the Company was negligent in the provision of its transportation service, and is liable for the damages resulting from Ms. Whelan's injury.

[Emphasis added.]

**39**  The defendant's position is that no *prima facie* case of ***negligence*** has been established by the plaintiff. Specifically, "nothing done or not done by the defendant caused or contributed to the plaintiff's fall".

**40**  The defendant submits this was simply an unfortunate accident and points to the following:

1. the plaintiff was a physically fit individual who had no vision problems;
2. he was completely aware of the weather and walking conditions;
3. the plaintiff knew the sidewalks and roads were icy and snowy;
4. he was not worried about stepping off the bus, was aware of how far he had to step down and did not believe it was the pavement which caused him to fall;
5. he did not know what made him fall.

**41**  The defendant submits it is relevant that the plaintiff discontinued his action against all the other defendants, including those who were responsible for cleaning the street and sidewalks.

**42**  The defendant submits no adverse inference should be drawn. The defendant does not dispute any portion of the plaintiff's evidence. Since there was no case to be met, there was no requirement to call Mr. Rogers.

**VII:**  **DISCUSSION**

**43**  As was stated in *Prempeh*, the legal principles have been interpreted in this province to mean that once a passenger on a public carrier has been injured in an accident, it is for the public carrier to establish that the passenger's injuries were occasioned without ***negligence*** on its part or that they resulted from a cause for which it was not responsible.

**44**  In my view, a *prima facie* case of ***negligence*** has been established by the plaintiff. Although Mr. Falconer may not have been able to say what caused him to fall, I have found it was the lower level, icy surface upon which he stepped off the bus due to where the bus driver chose to stop the bus.

**45**  The issue then becomes whether the defendant has presented evidence negating the *prima facie* case of ***negligence*** that has been established. In my view it has not. The reasons for this include:

1. it has led no evidence as to why the bus stopped where it did. Perhaps there was another bus which had pulled up at the stop sign in front of it, but there was no evidence to that effect;
2. it has led no evidence from which I could conclude that the location where the rear doors opened was a "reasonably safe place for [Mr. Falconer] to debark". See: *Grand Trunk Pacific Coast Steamship Co. v. Simpson*;
3. viewed within the context of the "very high degree of care" required of a public carrier, the fact Mr. Falconer erroneously believed it was safe for him to debark cannot be interpreted to mean it was in fact reasonably safe for him to do so;
4. the defendant has led no evidence as to whether a warning to passengers was not required under the circumstances.

**46**  In my view, there was a "heightened need to adduce evidence in response, either to prevent the drawing of adverse inferences or to negate a *prima facie* case". See: *Parsons and Sons Transportation Ltd.*

**47**  In addition, Mr. Rogers breached the standard of care expected of a bus driver by leaving the bus stop. An elderly passenger had slipped and fallen in the immediate vicinity of the rear door of the bus. The fact Mr. Rogers left the scene can only mean he did not perform the appropriate check in his right mirror. To quote Mr. Cameron, "I don't see how a person can drive away in a bus without checking the right mirror to see that they are clear.... You could have a kid reaching in there for a ball under the tires or whatever". Although this breach of the standard of care did not cause the plaintiff's injury, it indicates to me a "general lack of care and inattention" by Mr. Rogers in so far as his responsibilities to passengers were concerned. See: *Donald v. Huntley Service Centre Ltd.*, [*(1987) 61 O.R. (2d) 257*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F81-VJW1-JF75-M1MS-00000-00&context=) (S.C.J.) at para. 9.

**48**  I will now turn to whether the plaintiff was contributorily negligent. During submissions, his counsel conceded there was "some potential for contributory ***negligence***". This included:

1. deciding to leave from the rear door of the bus and not the front;
2. failing to look carefully and see the edge of the pavement and the driveway.

**49**  Mr. Falconer's counsel submitted the appropriate range for contributory ***negligence*** would be 15 to 20%.

**50**  In addition to what was stated by counsel, I would add Mr. Falconer's evidence that before he stepped down from the bus, he saw some ice shining through the snow. In my view, this should have prompted him to debark utilizing the utmost of caution. In the alternative, he should have exited from the front of the bus if it was more appropriate to do so.

**51**  The issue then becomes how liability should be apportioned. In considering this question from the perspective of relative blameworthiness, some of the criteria referred to in *Aberdeen v. Township of Langley, Zanatta, Cassels*, [*2007 BCSC 993*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7F1-FBN1-21XT-00000-00&context=), varied on other grounds, [*2008 BCCA 420*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S7H1-FCSB-S3RY-00000-00&context=), are germane. These are summarized at para. 62 and 63:

[62] Thus, fault is to be determined by assessing the nature and extent of the departure from the standard of care of each of the parties. Relevant factors that courts have considered in assessing relative degrees of fault were summarized by the Alberta Court of Appeal in *Heller v. Martens*, [*[2002] A.J. No. 638*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9361-JYYX-63KP-00000-00&context=), *supra*, at para. 34 as follows:

1. The nature of the duty owed by the tortfeasor to the injured person...
2. The number of acts of fault or ***negligence*** committed by a person at fault...
3. The timing of the various negligent acts. For example, the party who first commits a negligent act will usually be more at fault than the party whose ***negligence*** comes as a result of the initial fault...
4. The nature of the conduct held to amount to fault. For example, indifference to the results of the conduct may be more blameworthy... Similarly, a deliberate departure from safety rules may be more blameworthy than an imperfect reaction to a crisis...
5. The extent to which the conduct breaches statutory requirements. For example, in a motor vehicle collision, the driver of the vehicle with the right of way may be less blameworthy... [Authorities omitted.]

See also *Vigoren v. Nystuen*, [*[2006] S.J. No. 293*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8N-K711-FJM6-642G-00000-00&context=), *supra*, at para. 90 (summarizing these same factors).

[63] Many of the above-noted factors are discussed in Chiefetz, *Apportionment of Fault in Tort*, *supra*, at pp. 102-104. Considering that, I conclude it would be appropriate to add the following as relevant factors:

1. the gravity of the risk created;
2. the extent of the opportunity to avoid or prevent the accident or the damage;
3. whether the conduct in question was deliberate, or unusual or unexpected; and
4. the knowledge one person had or should have had of the conduct of another person at fault.

**52**  In *Aberdeen*, it was stated that, "[a]nother important factor in assessing the relative degree of blameworthiness of the parties is the magnitude of the departure from the standard of care" (at para. 66).

**53**  I conclude the defendant's degree of fault is greater than the plaintiff's.

**54**  The defendant owed a high standard of care to the plaintiff, which included providing a reasonably safe place for him to alight. The defendant controlled where the bus was brought to a stop. Its ***negligence*** occurred before the plaintiff's.

**55**  The plaintiff, for his part, believed it "was safe enough" to exit from the rear. He at least addressed his mind to safety issues. It turned out he was wrong.

**56**  In my opinion liability should be apportioned 75% against the defendant and 25% against the plaintiff.

**VIII:**  **COSTS**

**57**  The plaintiff is entitled to 75% of his costs at Schedule B unless there are other factors pertaining to this issue which I should be made aware. If that is the case either party has leave to apply to speak to the matter of costs.

P. ABRIOUX J.

**End of Document**

[***Guerineau (Guardian ad litem of) v. Seger, [2001] B.C.J. No. 333***](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JJD0-G1G1-00000-00&context=)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Boyd J.

Heard: January 15 - 19, 22 - 26 and 29 - 30, 2001.

Judgment: February 23, 2001.

Vancouver Registry No. C982750

**[2001] B.C.J. No. 333** | 2001 BCSC 291 | 103 A.C.W.S. (3d) 78 | [2001] B.C.T.C. 291

Between Jesse J. Guerineau, by his mother and Guardian ad litem, Lydie C. Guerineau, plaintiffs, and Dr. Mark R. Seger, Dr. Sara A. Pedersen and the Fraser-Burrard Hospital Society as operators of the Royal Columbian Hospital, defendants

(191 paras.)

**Case Summary**

**Medicine — Nurses — *Negligence*, patient care — Torts — *Negligence* — Standard of care, particular persons and relationships — Medical doctors and medical personnel — Hospitals — Duty of care — Damages — Special damages — General damages — General damages for personal injury.**

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| This was an action by Guerineau and his parents for damages for injuries resulting from the former's asphyxiation when his mother suffered a uterine rupture during labour. The defendants were the nurses and the hospital. The essence of the claim was that during the course of the mother's labour, the nursing staff ought to have recognized either that the mother was demonstrating signs of a potential uterine rupture or, at the least, ought to have recognized that something unusual was occurring and thus contacted either the family physician or the obstetrician on call. The hospital and nurses' position was that the various signs and symptoms relied on by Guerineau were consistent with a normal labouring patient or were not suggestive of possible uterine rupture. The mother was a VBAC (vaginal birth after ceasarean) patient who faced risks on triple fronts, including that she was 10 days overdue and that labour had been induced. The charge nurse had assigned two nurses who were quite new to the labour and delivery suite, to oversee the mother's care. She testified that she did this because it was the hospital's policy to treat VBAC patients as normal labouring patients. During the labour, which began about midnight, the mother complained of vaginal burning as well as pain over the incision site from her previous ceasarean section. At one point during the labour both the attending nurse and the charge nurse went on break. The obstetrician on call was eventually paged several hours later and performed an emergency c-section. The operative report described that the baby was found in the abdominal cavity. Both the family physician and the obstetrician testified that had they been made aware of the patient's complaint of a burning sensation in the vagina, they would have immediately considered the possibility of uterine rupture and personally attended to assess the patient. Further the expert nursing evidence was highly critical of the nurses' actions and inactions. Both experts were adamant that as soon as the mother began to complain of vaginal burning, a doctor ought to have been notified. Further the experts and the two physicians all testified that the reading from the fetal heart monitor strip was non-reassuring. The nurses had simply accepted that the decreased variability was due to the pain killers that had been administered, rather than considering the possibility of uterine rupture. While the charge nurse and the other attending nurse were on break, the new nurse chose to contact the family physician, who was at home, rather than the obstetrician who was on call. The expert witnesses testified that at this point, a competent obstetrical nurse would have called any physician available in the hospital on a stat basis immediately. The evidence which was adduced on the issue of causation was overwhelming and uncontradicted. Specifically, it was alleged that Guerineau's injuries were caused by the uterine rupture and resulting asphyxiation. The expert neurologist opined that Guerineau had suffered a severe prenatal hypoxic ischemic encephlopathy secondary to maternal uterine rupture. Although Guerineau survived the c-section, he was left with a host of problems including a severe global developmental delay, spastic quadriplegic cerebral palsy, epilepsy, cortical visual impairment, feeding problems, recurrent aspiration pneumonias, development of scoliosis and severe mental retardation. At the time of trial, Guerineau, who was three years old, had only limited cognitive function and the possibility of only minimal future improvement. The evidence was essentially to the effect that his total life expectancy was in the range of 20 to 25 years. With respect to attendant care, it was medically necessary that the family have at their disposal the full gamut of support provided by either a licensed practical nurse or a home care worker. With respect to costs of future care, a report was submitted that included a number of recommendations with respect to accommodation, attendant care, the required level of training of attendants, equipment for daily living, educational support, clinical case management, physical and occupational therapy, pharmaceutical needs, transportation, cellular telephone, respite services, associated travel costs for care provider and membership in the CP association. Economists reports were submitted with respect to the present value of the loss of income claim. Both reports were similar in that they were within seven per cent at each educational level.  HELD: Action allowed.  Guerineau was awarded $200,000 for non-pecuniary damages and $115,000 for modifications to the home. For the most part the recommendations with respect to future care were accepted. The parents were each awarded $50,000 as compensation for the services rendered by them over the past three years. The nurses owed Guerineau a duty of care. Further, there was overwhelming evidence of ***negligence*** on their part and that it was this ***negligence*** that caused Guerineau's injury and loss. The ***negligence*** arose from the time the mother first began to complain of vaginal burning and continued until the obstetrician was finally paged. This single continuing act of ***negligence*** justified a finding of liability against the hospital. The nurses' failure to pursue the matter of the fetal heart monitor strip and their discontinuance of the fetal monitoring also amounted to ***negligence***. For the purposes of this judgment, Guerineau's life expectancy was a total of approximately 23 years, it was assumed he would have completed high school and a post secondary education of more than one year, that the lost years deduction of 50 per cent was applicable and that the Guerineau's report multiplier would apply. The family was entitled to delegate the task of selection and training of caregivers to an agency and to rely on the agency to provide the necessary appropriate personnel. |

**Counsel**

N. Smith, Q.C., for the plaintiffs. R.J. Harper and E.J.A. Stanger, for the defendants.

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| **BOYD J.** |

1.0 INTRODUCTION:

**1**  This is the infant plaintiff, Jesse J. Guerineau's claim for damages for injuries resulting from his asphyxiation when his mother, Lydie Guerineau, suffered a uterine rupture during labour. As a consequence, he was extruded into his mother's abdominal cavity and removed by way of emergency caesarean section on March 15, 1998.

**2**  The action was initially brought against both the mother's treating doctors as well as the Royal Columbian Hospital ("the Hospital") and the nurses who cared for her during the critical labouring period. The two defendant doctors, Drs. Seger and Pedersen, were called as adverse witnesses in the course of the plaintiff's case at trial. On the fourth day of trial, after their testimony was completed, the plaintiffs' counsel advised the Court he had instructions to consent to a dismissal of the claim against the defendant doctors, without costs against the doctors. Those instructions were based on counsel's understanding that no evidence would be called on behalf of the Hospital to suggest that at the critical time, when the nursing staff telephoned Dr. Seger, any information concerning the fetal heart rate was relayed to him. A consent dismissal order was made at that time.

**3**  The essence of the plaintiffs' claim is that during the course of the mother's labour, the nursing staff ought to have recognized either that the mother was demonstrating the signs of a potential uterine rupture or, at the least, ought to have recognized that something unusual was occurring and thus contacted Dr. Seger, the family physician, or Dr. Pedersen, the obstetrician on call within the hospital. The hospital and nurses' position is that the various signs and symptoms relied on by the plaintiffs were consistent with a normal labouring patient or were not suggestive of possible uterine rupture. At most they say the nurses may have erred in the exercise of their clinical judgment, which error cannot found a claim in ***negligence***.

2.0 BACKGROUND FACTS:

**4**  Mrs. Guerineau was born in France but moved to Canada as a child. As a young woman she returned to live in France where she met her husband, Jeremy Guerineau. While living in France, she became pregnant with their first child, Kelly.

**5**  When she was ten days overdue, she was induced and when she failed to progress in labour, the baby was delivered by way of caesarean section on May 27, 1992. At that time, the French physician reassured the Guerineaus he had performed the caesarean section in such a fashion that it would still be possible for Mrs. Guerineau to attempt vaginal delivery in future pregnancies. (I should note here that while no Operative Report relating to that delivery was ever produced or available, Dr. Pedersen testified that in the course of the emergency caesarean section performed on March 16, 1998, she was able to confirm that there was indeed a lower transverse incision of the uterus, such that a vaginal delivery could indeed have been attempted as the French physician had advised.)

**6**  The couple eventually returned to Canada and Mrs. Guerineau became pregnant for the second time. She enjoyed a normal pregnancy. Her family physician, like the French physician, reassured her that she would be able to attempt a "natural" vaginal delivery-that is a V.B.A.C. (vaginal birth after caesarean). In the 39th week of pregnancy, her own family physician suffered a knee injury and she was referred to Dr. Seger. Although Mrs. Guerineau could not recall any of the doctors advising her of any risks associated with a VBAC delivery, and more particularly the risk of uterine rupture, I am satisfied that those risks were in fact raised by her family physicians.

**7**  In the latter phase of the pregnancy, Dr. Seger told Mrs. Guerineau that if she had not delivered by March 15th (when she would be 10 days overdue) she was to call him and arrange for admission to the Hospital to undergo induction of labour.

**8**  The due date came and went and as planned, Mrs. Guerineau attended hospital at 1100 hrs on March 15, 1998. At Dr. Seger's request she was assessed by Dr. Sarah Pedersen, the attending obstetrician on call, to determine whether it would be appropriate to induce labour. At 1200 hrs, Dr. Pedersen examined the patient and confirmed that induction would be appropriate. A normal dose of Prostin, a prostoglandin gel used for the induction of labour, was inserted in the patient's vagina. During the two hours which followed, while the patient experienced some minor contractions, labour was not established. It is noteworthy that Mrs. Guerineau experienced no vaginal discomfort or burning. She was released from hospital with instructions to return once labour was established but in any case, no later than 1800 hrs. Mrs. Guerineau noted Dr. Pedersen's clear instruction that if she felt "any burning sensation" over the previous caesarean incision site, she should advise the nurses.

**9**  No progress was made in the intervening period and Mrs. Guerineau returned to the hospital, in the company of her husband, as instructed at 1800 hrs. At that time Dr. Pedersen performed a second vaginal examination of the patient. In her History and Progress note, she records finding the station of the presenting part, that is the baby's head, either at or one centimetre above the spines. She noted the cervix to be 1.5 cm long and 1-2 cm dilated. She inserted a second dose of the Prostin gel, this dose being half a regular dose.

**10**  Over the next five hours, Mrs. Guerineau remained in hospital with no significant progress in the labour. In the interim a number of family members arrived to visit-specifically her mother and her sister Virginie Olic, who had both just arrived home on a transatlantic flight from France. They arrived while Mrs. Guerineau was in the shower. Mrs. Olic clearly recalled assisting her sister from the shower, drying her off and helping her return to bed. The mother and sister left to return home.

**11**  At 1930 hours, Nurse Miranda Ha, the charge nurse, assigned Nurse Skidmore as Mrs. Guerineau's primary care nurse for the 12 hour shift to follow, ending at 0730 hours on March 16, 1998. Nurse Skidmore acknowledged that the oral nursing report she received at the outset of her shift clearly identified Mrs. Guerineau as a VBAC patient, one who was 10 days overdue and had had a regular dose of Prostin approximately 7 1/2 hours earlier.

**12**  In cross examination, both Nurse Skidmore and Nurse Ha (as well as Nurse McKay and Nurse Luk) acknowledged that a VBAC patient is one who carries the risk of uterine rupture, that uterine rupture is perhaps the most serious possible obstetrical complication and that uterine rupture may result in potentially catastrophic injury to both the mother and the baby unless dealt with quickly. They both acknowledged the risks for a VBAC patient are further heightened when the pregnancy is overdue, since there is some possibility of placental insufficiency and thus the inability of the fetus to withstand the normal rigours of labour. They also acknowledged the risks for a VBAC patient are even further heightened where labour is induced using prostaglandins therapy, since the gel will sometimes stimulate stronger, more forceful contractions which in turn increase the risk of uterine rupture along the previous caesarean incision.

**13**  In effect, Mrs. Guerineau was a VBAC patient who faced risks on triple fronts. Remarkably, despite this presenting scenario, Ms. Ha saw fit to assign the case to a nurse who was, by any description, a neophyte labour and delivery nurse. While she could not recall her precise experience, Nurse Ha admitted knowing that Nurse Skidmore was "pretty new" to the Labour & Delivery Suite. While Ms. Skidmore had completed a two year nursing certificate program in 1977 or 1978, she had no clinical experience as a labour and delivery nurse prior to January 1998. Between January 1998 and March 15, 1998, she had had no more than 12 shifts of experience as a labour and delivery nurse.

**14**  In order to qualify to work in the Labour and Deliver Suite, the nurses at the Hospital were then required to have completed a compressed nine month Low to Moderate Risk Labour Room Delivery course offered at the British Columbia Institute of Technology. The course requires attendance at a weekly class and the completion of a practicum. Nurse Skidmore attended that course which culminated in a practicum involving four 10 hour shifts caring for labouring patients under the supervision of another nurse in May and June 1997. Between the completion of the course in June 1997 and the commencement of her assignment to duty in the Labour and Delivery suite in January 1998, she had no other practical experience caring for labouring patients.

**15**  Nurse Ha explained that it was appropriate to assign both Nurse Skidmore and the even less experienced Nurse McKay (who was assigned to relieve her during a break from 0200 hrs to 0230 hrs.) to care for Ms. Guerineau since, according to hospital policy, VBAC patients are treated as "normal labouring patients". Accordingly, in Nurse Ha's view, both Nurse Skidmore and Nurse McKay had the requisite training and experience to handle the patient. Her conclusion, in my view, obviously ignored the additional attendant risks in this case.

**16**  I find that the prevailing hospital policy, in terms of characterizing VBAC patients as normal labouring patients, and the resulting assignment of a neophyte nurse to such a patient, created an atmosphere of risk in this case. That risk was further exacerbated, in my view, by the overall structure of the nursing hierarchy within the Unit-one which lacked any clear identification of a primary nurse clinician or resource person within the unit.

**17**  Ms. Ha, explained that in her role as charge nurse that night she was responsible to assign nurses to care for particular patients, to organize the times when the various nurses would take their breaks, and finally to act as a "resource person" to other nurses on the Unit. However on being pressed to explain her role as a resource person, she explained that a charge nurse is not really one who is expected to be an experienced senior nurse, dispensing clinical advice to the primary treating nurses. Rather she explained that regardless of their experience, all nurses on the Unit were expected to "take turns" being the charge nurse. The charge nurse is essentially expected to understand and explain to other nurses the physical layout of the Unit, the location of equipment and medications, and any salient telephone numbers. She agreed that if the treating nurse who she had assigned to care for a patient was a less experienced nurse and had any question about patient care, she would be expected to come to her first. If she as the charge nurse could not answer her question, she would perhaps suggest she call the treating physician. If the treating nurse was an even more experienced nurse, she would presumably not turn to the charge nurse as a resource.

**18**  In the final analysis, she explained that "according to our management, the primary nurse should be able to make her own decision." On re-examination, she demurred and explained that regardless of who is the charge nurse, all the nurses, both junior and senior, work together as a team to help each other in their treatment of patients. I take it that in this sense, the charge nurse's actual ability to act as a resource person is not relevant.

**19**  In any case, Mrs. Guerineau's father, his girlfriend and an uncle arrived to visit at approximately 2200 hrs. but were cleared out of the room to accommodate Dr. Pedersen's final visit of the night at 2305 hrs. She noted that the mother was in no apparent distress and that her contractions were occurring approximately 2-3 minutes apart. Since she made no record of the station of the presenting part, she is confident there was no change of station since her earlier examination at 1840 hrs. In her view there had only been a minimal change in the mother's condition since 1840 hrs. She formed the opinion the patient was in the early latent phase of labour. At this time, Nurse Skidmore checked the maternal vital signs and contraction pattern and noted nothing unusual. She auscultated the fetal heart. Being somewhat concerned there was some suggestion of tachycardia, she applied the fetal heart monitor for a period but at Dr. Pedersen's instruction, she removed the fetal heart monitor.

**20**  Dr. Pedersen told Mrs. Guerineau that if nothing happened that night, she would "try something else" the next day. Both Mr. and Mrs. Guerineau testified that to that point, the labour was normal and in many ways, a replay of the previous delivery.

**21**  At 2350 hrs. Nurse Skidmore again checked the mother's vital signs and contractions. She noted, as the Guerineaus have confirmed, that at approximately this time, Mrs. Guerineau's contractions were becoming more uncomfortable. By 0015 hours, Mrs. Guerineau asked for pain medication. In an attempt to ensure that delivery was not imminent (which would prohibit the administration of a narcotic which might depress fetal respiration), Skidmore attempted to perform a vaginal examination of the patient but was unable to reach the cervix. Having noted that at 2305 hrs, Dr. Pedersen had asked the patient to place her hands beneath her hips to assist her in performing the internal examination, Skidmore concluded that the patient's cervix was likely tipped posteriorly, thus making it difficult for her, being limited by her short fingers, to reach the cervix. Although she could not reach and thus assess the cervix, she was satisfied that had delivery been imminent, the cervix would have been tipped much more anteriorly. Accordingly she concluded it was appropriate to administer 100 milligrams of Demerol and 25 milligrams of Gravol at 0015 hrs. At this time she again auscultated the fetal heart and found it to be within a range of 145-150 beats per minute, well within normal limits.

**22**  At this point, she thought the patient might be progressing into a more active phase of labour. She left the room to speak to the charge nurse, Ms. Ha, and specifically to discuss the various options for pain management. According to her, Ms. Ha suggested she use Entonox, a mixture of nitrous oxide and oxygen, commonly known as "laughing gas", which a labouring patient inhales as a contraction begins until the mid point or the end of a contraction, usually with an accompanying relief of pain. Ms. Skidmore's recollection is that she instructed the patient in the use of Entonox and that the patient indeed found it "helpful".

**23**  Skidmore remained at the bedside with the patient. At approximately 0110 hours, she notes in the Nurses Notes that the patient "complained of burning in the vagina". At trial she recalled the patient complained of a "burning sensation". At this point she started the fetal monitor strip. The fetal monitor strip contained in the chart records the strip being attached and beginning operation at 0108 hours. Nurse Skidmore says she palpated the patient's abdomen to assess the contractions and asked Mrs. Guerineau whether she was experiencing any pain over the old caesarean incision site. She says the patient denied any such pain and explained that her only pain was the burning pain in the vagina. She says there was no complaint of abdominal pain. While Mrs. Guerineau agrees that she complained of a "burning sensation" in the vagina, she insists that within a minute or so of making that complaint, she also complained of pain and pressure over the old caesarean scar incision.

**24**  So far as Skidmore was concerned, the patient was not exhibiting any of the classic signs of actual or threatening uterine rupture which she had been taught-that is, there was no abdominal rigidity, no continuous pain over the abdomen, no pain over the old caesarean incision site, no maternal hypotension or tachycardia and no sign of fetal distress.

**25**  Nevertheless, Nurse Skidmore was obviously perplexed and troubled by the patient's complaint so she left the room to consult with the charge nurse, Ms. Ha. On being advised of the patient's complaint of the burning sensation in vagina, Nurse Ha reassured Skidmore that the vaginal burning might simply be the reflection of an irritation of the vaginal tissue caused by the earlier insertion of the prostaglandin gel.

**26**  Nurse Skidmore returned to the patient's bedside and examined the fetal monitor strip. While she believed the strip reflected some decreased variability of the fetal heart, she attributed that variability to the administration of the Demerol some 40 minutes earlier. She testified that in her view while there "may have been some early to variable decelerations" of the fetal heart, they were nevertheless not prolonged and mirrored the patient's contractions. She did not consider the decelerations to be signs of fetal distress.

**27**  Still, the patient was continuing to complain loudly of the burning sensation in the vagina so she returned to the nursing station and asked Nurse Ha to specifically attend and assess the patient. The vaginal irritation theory was clearly not sitting well in Nurse Skidmore's mind and she wanted the senior, experienced nurse to confirm that view by way of her own assessment.

**28**  According to Skidmore, Ha returned with her to the patient's room and conducted her own assessment of the patient. Skidmore says she examined the fetal monitor strip, palpated the patient's abdomen and asked whether she had pain over the abdomen or the incision site. She says the patient said she had no pain in those locations. She says that she then palpated the patient's bladder and asked her, Skidmore, when the patient had last voided her bladder. Skidmore says she could not recall and that at that point, the patient's husband interrupted and told them it had been at least three hours since his wife had last voided.

**29**  At that point Nurse Ha formulated the nursing plan of action-namely that they patient would be instructed to leave the bedside to void in the bathroom following which a vaginal examination would be performed. At that point, the degree of dilatation of the cervix could be assessed and the stage of labour determined, the treating nurse could then telephone the patient's family physician and obtain further instructions. Both nurses believed that the patient might now be entering a more active stage of labour and that the patient was perhaps in need of some other means of pain control. Skidmore expected the doctor would perhaps opt to administer an epidural for pain control. There is no evidence that this nursing plan of action was shared with the patient and indeed, in light of the events which followed, I am confident it was not.

**30**  It is at this stage that both Nurse Skidmore and Nurse Ha insist the patient was helped from the bed to the bathroom where she was encouraged to void. Since she was unable to void any more than a small quantity, and since she complained she still felt she had a full bladder, Nurse Skidmore and Ha say that the patient was encouraged to take a shower to see whether the shower might induce her to void. The nurses' evidence generally is that Mrs. Guerineau was in the bathroom and then in the shower from approximately 0125-130 hours until 0210 hours.

**31**  Mr. and Mrs. Guerineau and Ms. Virginie Olic all emphatically deny this sequence of events. Rather they say that Mrs. Guerineau never showered again after emerging from the shower and returning to bed at approximately 0115 hours. They are adamant that the complaint of the burning sensation in the vagina commenced on that occasion, while she was sitting on the toilet attempting to void, and just before her return to bed. Thereafter they say that Ms. Guerineau remained in bed, complaining of both vaginal burning and pain over the incision site, and presented with her hands clamped between her legs, squeezing the groin area, rocking back and forth and writhing on the bed. They say that she repeatedly pleaded for help and asked the nurses to call the doctor. They say she asked for a c-section to be performed.

**32**  On cross examination Mrs. Guerineau admitted that her only clear recollection was experiencing the vaginal burning pain and the pain over the incision site as she returned to bed. She says that she looked at the clock on the wall which she insists read 0115 hrs. Relatively heavily medicated and using Entonox almost continuously after 0100 hrs, she understandably has no clear recollection of the events after this point. Her husband and her sister were no doubt distraught and traumatized by the events which followed. While they vividly recall the horror of the events as they unfolded, I am not confident that their recollection concerning the specific sequence of events is entirely accurate, particularly in the face of the Nurses Notes which appear to have been charted relatively accurately and sequentially as the events unfolded. For the purposes of these reasons, I will assume that the patient did indeed spend the reported and charted period in the bathroom.

**33**  Notwithstanding this finding, I agree with plaintiff's counsel that this particular divergence in the evidence of the parties is of little consequence. Nurse Skidmore testified that she remained just outside the bathroom door catching up on her charting while Mr. Guerineau remained in the bathroom with his wife. She acknowledged that Mrs. Guerineau remained in considerable pain, so much so that she had taken the tank of Entonox into the bathroom with her. She says that she remained outside the bathroom in the patient's room, "catching up on her charting", until 0200 hrs when she left for her break. By that point, she understood that the patient had moved from the toilet to the shower where she continued in her attempt to void.

**34**  As the charge nurse, Ms. Ha was responsible for the assignment of the nurse who would relieve Nurse Skidmore during her break. Consistent with her apparent view that Mrs. Guerineau, albeit a VBAC patient, was a "normal labouring patient", she assigned Nurse McKay as Mrs Guerineau's new primary nurse. While she could not be precise as to McKay's previous clinical experience, Ha understood that McKay, like Skidmore, was "pretty new" to the Labour & Delivery suite. Indeed, McKay was even less experienced than Skidmore. Although she had completed her nursing certificate training in 1992, she did not undergo any labour and delivery training until she undertook the condensed Low-to-Medium risk labour and delivery BCIT course which she completed in the fall of 1997. She did not actually begin to work as a labour and delivery nurse until March 1998. Apart from her practicum training in the labour and delivery suite, she had no more than 4 shifts of actual clinical experience. In the circumstances, her assignment as the primary care nurse is both remarkable and alarming.

**35**  Doubly alarming is the fact that as Nurse Skidmore left on her break, Nurse Ha, the charge nurse, also left on her own break. While she assigned Nurse McKay to relieve Nurse Skidmore, she assigned Nurse Betty Luk as her own substitute. Nurse Luk was an even more experienced nurse. Like Ha she had trained at a Government Hospital in Hong Kong and had years of experience as a labour and delivery nurse. Nevertheless as at 0210 hours, it is significant that the two nurses who had had any significant exposure to the patient left on their break. In circumstances in which a VBAC patient was in distress, displaying unusual symptoms not entirely understood by the attending nurses, there was a break in the continuity of care.

**36**  Before attending to the patient, McKay had received an oral report from Skidmore, outlining the patient's progress and overall condition. McKay was well aware of the fact this was a VBAC patient, who was overdue and had been induced using Prostoglandin gel. She understood that Skidmore and Ha had together assessed the patient. Most importantly, she understood that they had taken a fetal heart strip, which strip was "reactive". She understood the patient had not voided in over three hours and thus had been encouraged to get up to the bathroom to void and then shower in an continuing effort to do so. She understood that both Demerol and Gravol had been administered earlier and that the patient was using Entonox and was drowsy. Skidmore explained that the patient was complaining of vaginal burning, but that this was not unusual, since it was likely a side-effect of the earlier insertion of the prostoglandin gel. McKay understood Skidmore had specifically discussed that matter with Nurse Ha who had apparently shared the same view. Armed with this apparently senior nursing assessment of the patient's condition, this most junior nurse assumed primary care of the patient.

**37**  At approximately 0210 hours Nurse McKay entered the patient's room. She observed the patient leaning heavily on her husband, moving slowly back to bed from the shower. She appeared drowsy, consistent with the medications administered. Apparently believing that oxygen would assist in lightening the effects of the Entonox, she presented the patient with an oxygen mask. She instructed the patient to use the Entonox during contractions, and between contractions, to use the oxygen mask. She admits the patient was reluctant to part with the Entonox but that she eventually succeeded in having her alternate the oxygen and Entonox between what she believed to be contractions.

**38**  Within minutes, Nurse McKay attempted an assessment of the patient but this proved difficult. Mrs. Guerineau had her hands clamped between her legs, in the groin area, and was moving about in the bed, in distress. At some point during this period McKay says she palpated the patient's abdomen and found the uterus soft to the touch. In answer to her questions, she says the patient voiced no complaint of abdominal pain or tenderness, nor any complaint of pain or tenderness over the prior incision scar.

**39**  She admitted that given the patient's degree of restlessness, she could not assess the pattern of contractions. She repositioned the patient to her right side and auscultated for the fetal heart. She said the patient was too restless to allow for any attachment of the fetal monitor. Using the transducer from the fetal monitor, she said she succeeded in auscultating the fetal heart for a period of approximately one minute and heard a fetal heart beat of 134 which she recorded at 0215 hrs. Despite her insistence that she clearly heard this fetal heart rate, it is significant that her note reads "fetal heart difficult to obtain." She insisted that the fetal heart rate heard was within normal limits and that she had no concern of there being any sign of fetal distress.

**40**  At 0220 hours she notes:

"patient repositioned further on Rt. Side. fetal heart up from 108 to 117 to 125 BM(beats per min). NO PV loss noted".

She attributed the fall of the fetal heart rate, followed by the quick recovery to 125 beat per minute, to either the patient's own position or the baby 's position, resulting in umbilical cord compression. Again, she had no concern that there was any sign of fetal distress. On viewing the patient's perineal area, she saw no sign of fluid, bleeding or other drainage.

**41**  Despite her insistence that all maternal signs were within normal limits and that there were no signs of fetal distress, it is clear that McKay was alarmed by the presenting situation-a highly distressed mother complaining loudly and audibly of vaginal pain, clutching her groin and writhing on the bed. I infer that she took little comfort in the reassuring nursing report she had received just minutes earlier and thus moved to the nursing station and called for her superior, Nurse Luk, the substitute charge nurse, to attend and assess the patient.

**42**  Nurse Luk arrived at approximately 0225 hours. She found the patient as described and immediately asked her to precisely describe the offending pain. She recalled that the patient described a burning vaginal pain. When she asked her precisely where it was, the patient used the tip of her finger to point "right into the area, just above the pubic bone". Luk said that when the patient had a contraction, she palpated the abdomen and like McKay, she noted the abdomen to be soft. She concluded the patient was having mild contractions.

**43**  She ran her fingers over the incision site and asked the patient whether she felt any pain in that location. In response, the patient confirmed she did indeed feel some pressure and pain. Luk says that she followed this up by touching the incision site but that the patient reported she was not tender there. She asked the patient to roll over onto her back so that she could perform a vaginal examination but the patient was too uncomfortable and restless to do so. Faced with this limitation, she attempted to perform the vaginal examination with the patient on her side. Like Skidmore before her, she was unable to reach the cervix and again, like Skidmore before her, she concluded she was faced with a patient with a posterior cervix which was therefore difficult to reach. She noted no vaginal bleeding and no blood on the glove.

**44**  McKay explained that while all of this was underway, the situation was chaotic and confusing, with the patient moving about on the bed and refusing to unclamp her legs for Luk at the foot of the bed, while McKay remained at the head of the bed, alternately administering oxygen and Entonox. In the confusion, McKay says she nevertheless managed to ausculate the fetal heart a number of times. While she could not estimate the number of times she did so, she says she was nevertheless reassured that there was no fetal distress.

**45**  At this point, Nurse Luk left to call Dr. Seger. The Nurse Note records that the call was placed at 0230 hours. Luk reported the patient's complaint of a burning sensation in the vagina and pain and pressure over the incisional scar, although there was no tenderness over the scar site. She reported further that the patient was having mild contractions, that she had been unable to reach the cervix during the vaginal examination and that there was no evidence of vaginal bleeding. She expressed her view that the patient might require an epidural for pain relief. Dr. Seger advised that he would come in immediately to assess the patient. In anticipation of an epidural, Nurse Luk contacted the I.V. nurse to arrange for an I.V. to be started.

**46**  In testimony, Dr. Seger confirmed that he received this report from Nurse Luk. While he could not recall the precise conversation, he testified that it was his practice to ask the attending nurse whether she had any concerns about the fetal heart pattern. After speaking to Nurse Luk, it was his impression that there was no concern about the fetal heart pattern. Although he admitted the information relayed to him was sufficient to raise the possibility of a uterine rupture, he testified that he was reassured by Nurse Luk's characterization of the fetal heart rate. Nevertheless he decided that he needed to attend at the hospital to assess the patient himself.

**47**  He testified that at 0230 hours, had Nurse Luk told him of the deceleration of the fetal heart to 108 beat per minute at 0220 hrs, his suspicion of a uterine rupture would have been heightened and he would have either personally contacted Dr. Pedersen, the obstetrician on call, or left instructions with the nurses to contact her directly in the hospital where she was sleeping. However in light of the information received, he saw no need for an urgent clinical assessment of the patient. There was no evidence from Nurse Luk to suggest that she relayed any information concerning the deceleration to Dr. Seger.

**48**  Nurse Luk returned to the patient's room to advise that Dr. Seger had been called and would be attending. At that point she and McKay tried unsuccessfully to pass the fetal monitor belt under the patient and reattach the fetal monitor. The patient was on her side, restless, writhing and unable to comply with their directions.

**49**  Eventually at 0248 hours the fetal monitor was applied. At that point a fetal heart of 140 was heard, followed by at note at 0250 hours which reads "poor pick up of the fetal heart transducer." After this point, Nurse Luk testified they could not hear the fetal heart on the monitor. They tried without success to reposition the patient and the transducer so as to improve pick up of the heartbeat. In effect, no fetal heart could be traced. (I should note here that one of the plaintiff's nursing experts, Nurse Bushinski, described the tracing from 0248 until approximately 0308 hours as a "terminal agonal tracing-meaning the baby is suffering from severe acidosis and is dying".).

**50**  During this time frame, and prior to 0254 hrs., the patient announced that she felt the urge to urinate and push. She announced she believed she had urinated. Mr. Guerineau and Virginie Olic were standing at the foot of the bed. Mr. Guerineau testified he could see that his wife was bleeding from the vagina. He saw what he described as a "large ball" or a large swelling on the inside of her right thigh. Virginie Olic described seeing "blood gushing from everywhere" and "a big ball of blood" on her sister's leg. She recalls screaming and the nurses rushing to the bedside and struggling to find the fetal heartbeat.

**51**  I have been asked to essentially ignore the husband's and sister's evidence as the reflection of panic and emotional overload and in the sister's case, the additional factor of jetlag. Yet I note that even according to Luk, at the point the patient believed she had urinated, Luk indeed found "some dark red tinge..like diluted blood around the area, right outside the external genitalia". She referred to finding "scanty blood" on the patient's body. Whatever occurred, it appears that some quantity of blood was actually expelled under some pressure. Further it is significant that while none of the medical evidence touched on the issue of the swelling on the thigh, for some time post delivery Mrs. Guerineau suffered from extreme perianal pain caused by external thrombosed hemorrhoids, which ultimately required incision under local anaesthesia. In addition she was treated for a laceration of the bladder. I mention this evidence to put the husband's and sister's evidence in context. I do not at all reject their evidence that some form of swelling of blood was apparent in the upper inner thigh area near the perineum. (While Dr. Pedersen could not recall any blood in the general vicinity, it was clearly not the focus of her examination in the medical emergency in which she found herself.)

**52**  Luk's Nurses Note records that she placed a STAT call to Dr. Pedersen at 0254 hrs. At this point she also charts a fetal heart of 90-100 beat per min. although a question mark appears in the record next to the recording of the fetal heart.

**53**  At 0300 hrs (within 6 minutes of being paged) Dr. Pedersen, who was on call and had been sleeping in the hospital one floor above the Delivery Suite, was at the patient's bedside. She performed a vaginal examination and noted there had been a loss of station of the fetal head. She was unable to find any fetal heat beat. She immediately concluded that there had likely been a uterine rupture and that the baby had been extruded from the uterus. She ordered a STAT c-section. She successfully delivered the baby by emergency c-section at 0323 hours. As the Operative Report describes, the baby was found in the abdominal cavity.

3.0 THE DUTY OF CARE:

**54**  As I noted at the outset, the issue in this case is whether the individual nurses breached the duty of care they owed to Mrs. Guerineau and her unborn infant by failing to recognize and to report to the attending physician or the obstetrician on call, various possible signs of uterine rupture. The Hospital's position is that the signs relied on by the plaintiffs as signs of uterine rupture were consistent with a normal labouring patient or were not suggestive of possible uterine rupture. The Hospital submits that the nurses may have erred in the exercise of their clinical judgment, which error does not however found an action in ***negligence***. (Wilson v. Swanson [*(1956) 5 DLR (2d) 113*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3R1-JNS1-M12J-00000-00&context=) (SCC)); Heidebrecht v. The Fraser-Burrard Hospital Society ( [*[1996] B.C.J. No. 3042*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S741-DXPM-S17F-00000-00&context=), Vancouver Registry No. C933456).

**55**  Both of the physicians involved in this case--- Dr. Seger and Dr. Pedersen---testified as adverse witnesses on behalf of the Plaintiffs. They each provided detailed evidence as to what information they expected the nurses would have conveyed to them and what they would have done in each case, had that information been relayed.

**56**  Specifically, Dr. Seger testified that had he been aware of the patient's complaint of a burning sensation in the vagina at 0110 hrs, he would have immediately considered the possibility of uterine rupture and personally attended at the hospital to assess the patient. Further he testified that during the telephone call from Ms. Luk at 0230 hrs, had he been informed of the deceleration of the fetal heart at 0220 hrs., he would have either personally contacted Dr. Pedersen or he would have asked the nursing staff to do so on his behalf.

**57**  Dr. Pedersen testified to similar effect. She testified that had she been informed of the complaint of the burning sensation in the vagina at 0110 hrs., either with or without a complaint of pain or tenderness over the previous caesarian incision line, she would have personally attended. Assuming she would have then viewed what she described as the non-reassuring fetal heart monitor strip recorded between 0108-0120 hrs, she testified she would, in all likelihood, have conducted an urgent caesarean section-that is she would have been prepared to wait no more than 10-15 minutes before commencing surgery.

**58**  The Hospital's counsel has submitted that the Court ought to place little reliance on these physicians' testimony. Relying on the decision in Heidebrecht (supra) Ms. Harper submits that nursing is an independent profession with its own practices, procedures and standards of competence. There Henderson J. held that "The fact that (the treating physician) would expect to be notified by a nurse of these new symptoms does not, standing alone, demonstrate that the nursing staff was guilty of anything more than a possible error in judgment in failing to bring them to (the doctor's) attention."

**59**  I note the qualifying words "standing alone". Here, there is indeed expert nursing evidence which is highly critical of the nurses' actions and inactions. While the treating doctors' expectations will not set the applicable standard of care, I find that those expectations are highly relevant and probative in determining whether the nurses' standard of care has been met. This is particularly so in the context of an obstetrical ward where the physicians and nurses work together as a close team.

**60**  That dynamic was eloquently articulated by Cunningham J. in the Granger v. Ottawa General Hospital, [*[1996] O.J. No. 2129*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8P-SCY1-JTNR-M3GT-00000-00&context=) (June 14, 1996) Ontario Registry, 18473/90 at page 16-17:

Whether or not this relationship exists elsewhere, more particularly in some parts of the United States, it seems to me that one of the hallmarks of the Canadian health system in a tertiary care hospital such as the Ottawa General Hospital with all of its attendant teaching responsibilities, is that those involved in obstetrics work as a team and that the interaction between members of the team is vitally important particularly in terms of reliance on one another for the provision of accurate information. Looking carefully at the evidence of all obstetrical experts called, I have little doubt that our system of health care, with its obvious concerns for patient care as well as its defined budget considerations, could not function in any other way. We simply do not have the financial resources to enable every professional to double check the work of other professional and because each professional within the obstetrical team has a defined role, it is essential that each person's role be carried out within a standard of care and training appropriate to the professional involved.

If staff obstetricians, for example, cannot rely upon the staff obstetrical nurses to provide accurate assessments, given all the constraints under which they are operating, I am satisfied our system would fail... It is not the responsibility of the staff obstetrician, assigned, during a particular shift, coverage of a number of patients including labouring mothers to sit with the mother and monitor her throughout her labour and then deliver the child. We simply do not have the resources nor would it be necessary for this to be done. That is why we have presumably well-trained and competent staff nurses who have a defined role within the obstetrical team. It is not for the obstetrical nurse to fully understand all of the subtleties that may be determined on a fetal heart monitor strip, but it is the responsibility of that nurse to understand and report problems to someone else on the obstetrical team, problems such as severe persistent variable decelerations...."

**61**  This judicial description of the dynamic was accepted by both of the defence nursing experts in the case at bar. I find that the statement accurately describes the dynamic between the nursing staff and the physicians at the Hospital.

4.0 LIABILITY:

**62**  On a review of all of the evidence in this case, I have concluded that there is overwhelming evidence of ***negligence*** on the defendant nurses' part. I find that that ***negligence*** arose from the time Mrs. Guerineau first began to complain of vaginal burning between 0110 hrs. and 1115 hrs. and continued until Dr. Pedersen was finally paged at 0254 hrs. I agree with Mr. Smith's submission that while the ***negligence*** was continuing, it can be broken down into three discrete points in time:

4.1 The initial Complaint of Vaginal Burning at 0110 hrs:

**63**  Both nursing experts, Ms. Radmonovic and Ms. Buchinski, were adamant that as soon as the patient began to complain of the vaginal burning pain a doctor ought to have been notified. It is significant that this was not a pain in the nature of a minor irritation. Rather as Ms. Radmonovic notes even as of 0110 hrs., the patient "was obviously distressed to the extent that the attending RN was unable to get a toco pickup of the contraction pattern." As Ms. Bushinski opines in her report of November 6, 2000:

Nurse Skidmore should have then assessed the entire clinical picture and identified that Mrs. Guerineau's degree of pain was inconsistent with what would be expected in her circumstances. She should have, as a result of her assessment, reattached the fetal monitor in order to evaluate the fetal well being, assessed the mother thoroughly-ie. vital, signs, etc.- and ensured that the charge nurse and Dr. Seger or Pedersen were informed of the disturbing clinical picture. This is particularly true because of the fact that Mrs. Guerineau had had a previous C-section and thus was more at risk for a uterine rupture.

**64**  Although she did indeed consult with the charge nurse, Ms. Skidmore was apparently content to accept Ms. Ha's opinion, which apparently mirrored her own, that the patient was likely experiencing vaginal irritation caused by the earlier insertion of the prostaglandins gel. Nurse Ha coupled that erroneous assumption with her own erroneous assumption-that the patient had a full bladder and that the emptying of the bladder would somehow alleviate the patient's complaint. Accordingly the patient was instructed to void and failing in that attempt, instructed to shower to again assist in voiding. Any ongoing attempt to monitor the patient and more particularly the status of the fetal heart was discontinued-held hostage to the assumption to which the nurses held fast-that the complaint of vaginal burning was not associated with uterine rupture.

**65**  I am satisfied that on any reasonable analysis, this assumption could not be supported. As Ms. Radmonovic testified, while the prostoglandin gel might cause some burning sensation in the vagina within 20-30 minutes of insertion, this is not likely the case where the first dose of gel was inserted almost 12 hours earlier and the second dose some 6 1/2 hours earlier. This was all the more so where there had been no complaint whatsoever of vaginal irritation or burning in the intervening period.

**66**  Indeed, the Hospital's own nursing policy concerning the administration of prostoglandin anticipates that following insertion of the gel, the patient will be monitored for one hour, while the nurses look for a variety of potential side effects, including "vaginal irritation". (see Ex. 1, Tab 3, page 3-4). Assuming no labour ensues and no such side effects are encountered, the patient may be discharged home. The fact that the Hospital's own policy anticipates any degree of vaginal irritation is somewhat surprising given that the drug manufacturer's pharmacological insert information sheet (Ex. 12) makes no mention whatsoever of vaginal irritation or burning in its list of adverse reactions.

**67**  Thus in the context of both the Hospital's policy, the anticipated drug reactions to the gel, and this patient's own history following two separate insertions of gel some hours earlier, the sudden onset of this complaint of intense vaginal burning constituted an obvious change of circumstances. It was a pain which was unusual and by definition, one which ought to have put the nurses on high alert and caused them to immediately contact either the patient's attending physician or the obstetrician on call. As I mentioned earlier, both Dr. Seger and Dr. Pedersen testified that they would have expected such a complaint to be reported, justifying an immediate attendance on the patient and a reassessment of her clinical condition.

**68**  The sudden complaint of an unusual pain was particularly ominous in the case of a VBAC patient. As both Dr. Kinney (the expert obstetrician) and Dr. Seger testified, where a VBAC patient is undergoing a trial of labour, any unusual pain should immediately arouse suspicions of potential or actual rupture.

**69**  This evidence and the evidence of the nursing experts called on behalf of the plaintiffs was entirely consistent with the Hospital's own nursing policy concerning the care of VBAC patients (NPT1000 Vaginal Birth After C-Section). That policy list as a "reportable condition":

1. Pain
2. Localized or generalized which persists or becomes more severe with contractions.
3. Severe pain followed by sudden cessation of pain

**70**  The policy does not describe or limit in any way the nature or location of the "reportable" pain-that is whether it must be located in the abdominal area or in the area of the previous Caesarian incision-which the defendant nurses said was the locale of the pain they were looking for.

**71**  In defence of the attending nurses' reaction to the situation at hand I heard the expert evidence of Nurse Porter and Nurse Stam. Nurse Porter, who is a very experienced obstetrical nurse, testified it was reasonable for the nurse to assume that the vaginal irritation was related to the insertion of Prostin many hours earlier. I found her explanation entirely conclusory in nature and somewhat facile, with no explanation of her underlying reasoning. This same witness' marginal note in her own copy of Ms. Radmonovic's report, contained in her own file, recorded that it was "possible" the RN had failed to immediately notify the Obstetrician of "reportable complaints " within the Hospital's own policy. She attempted to deflect the significance of her note, stating that she made the note in the course of her initial review of the file, but before she had received the fetal monitor strips and copies of the Hospital's policies.

**72**  Since it might be inferred that her review of the fetal monitor strip somehow allowed her to resile from her first impression of the case, her evidence relating to the fetal monitor strip at this critical time bears examination. In this context it is significant that her report (Ex. 11) makes almost no reference to the fetal heart monitor strip, except in the body of the assumptions she made in reaching her opinion. There she assumes that at 0115 hrs, when the fetal heart monitor was commenced:

good reading of Fetal heart at first- baseline 145-155, variability average however patient was moving + + therefore it became difficult to pick up either fetal heart or contractions on monitor strip.

|  |  |
| --- | --- |
| (my emphasis) |  |

The "assumption" contains no reference to nor any analysis of the "non-reactive non-reassuring " fetal heart pattern described in the Radmonovic report to which Porter was responding. No specific opinion concerning the issue of whether the strip is assuring or non-reassuring is offered. Accordingly at trial, while I allowed the witness to expand her evidence in terms of fleshing out or explaining the assumption she made, I sustained plaintiff's counsel's objection that she not be allowed to expand her evidence into an opinion as to whether or not what was recorded on the strip reflected signs of fetal distress, sufficient to necessitate reporting the matter to the attending physician.

**73**  In the final analysis, Ms. Porter's evidence offers no reasonable explanation of how the complaint of intense vaginal burning, which arose suddenly at 0110 hrs and continued unabated for almost two hours thereafter, could possibly have been rationalized by any competent nurse as a "vaginal irritation", and merely a side effect of prostoglandin gel.

**74**  The Hospital's second nursing expert, Mr. Robert Stam, also opined that the nurses were reasonable in attributing the patient's complaint of vaginal burning to the earlier insertion of the prostoglandin gel. He recalled treating a patient who was discharged home following induction who returned to hospital some 4-6 hours later complaining loudly of vaginal pain. While the anecdote is interesting, it is of little assistance in the absence of any information concerning how those symptoms progressed during those earlier 4-6 hours and whether or not there was a sudden, intense onset of pain as in the present case.

**75**  In any case, I can not give any substantial weight to Mr. Stam's evidence given his history as a nurse largely occupied with the analysis of equipment and technologies and the compilation and analysis of nursing care standards, in his capacity as a nursing manager. He admitted that he had little or no experience as a bedside clinical nurse in a labour & delivery suite. His opinion as to what a reasonable nurse, exercising her clinical skill and judgment, ought to have done in this case is of little assistance to the Court.

**76**  On a review of all of the evidence, including the evidence of Dr. Seger, Dr. Pedersen, Nurses Radmonovic and Bushinski, and the Hospital policies, I am satisfied that the nurses' failure to report this single symptom-the sudden onset of intense vaginal burning pain-which persisted for almost two hours thereafter, amounted to ***negligence*** on their part. This ***negligence*** continued throughout the balance of the patient's labour up to the time of the uterine rupture and emergency c-section. I am satisfied that this single continuing act of ***negligence*** justifies a finding of liability against the hospital.

4.2 The fetal heart monitor strip:

**77**  As may already be apparent, the onset of the patient's complaint of vaginal burning is overlaid by the recording of the fetal heart from 0108 to 0130 hours. Quite apart from rationalizing the complaint of vaginal burning as a side effect of the prostoglandin gel, the nurses have, to some extent, defended their analysis by pointing to the fetal heart strip recorded at this time, which strip they characterize as a "reactive" and "reassuring " strip.

**78**  Nurse Skidmore admitted that the strip in fact reflected reduced variability but she discounted any concern in this regard, attributing the reduced variability as an effect of the Demerol administered at 0020 hrs. Her view was apparently supported by her superior, Ms. Ha.

**79**  Nurse Skidmore at least conceded that if the decreased variability she had recognized, had been accompanied by decelerations or lack of accelerations, she would have reported the strip to the doctor. It appears the strip did in fact contain those features but that Nurse Skidmore simply failed to recognize them.

**80**  The nursing expert evidence from both Nurse Radmonovic and Bushinski, adduced on behalf of the plaintiff, was clear that the fetal heart monitor strip was non-reactive, that is-there were no accelerations of the fetal heart noted. Accelerations are an indicator of fetal wellbeing. In addition there are questionable late decelerations-that is the fetal heartbeat does not appear to rise as expected following a contraction.

**81**  Nurse Bushinski notes that there was a pick up of a fetal heart of 60 at 0122 hrs. She notes:

It is probable that the recording of 60 beat per minute represents a deceleration of the fetal heart rate. The transducer that would pick up any maternal contractions was adjusted at approximately 0118 hrs-there is no clear contraction pattern evident on the monitor strip. It is probable that any markings picked up and which appear on the tracing at this time were caused by Mrs. Guerineau rocking and moving about on the bed in pain.

At 0125 hrs Nurse Skidmore's main concern was that Mrs. Guerineau had not voided. A reasonable and competent nurse would have placed any concern over a full bladder well below the possibly much more ominous causes of Mrs. Guerineau's pain and overall clinical picture.....Nurse Skidmore should also have prioritized her concern for the fetus' current well being, which would prompt her to continue carefully monitoring the baby. Nurse Skidmore instead removed the fetal monitor and assisted Mrs. Guerineau to the bathroom. A prudent nurse would have continued monitoring the fetus and called the physicians, requesting them to attend immediately. Nurse Skidmore's actions indicate that she did not recognize the significance of the clinical picture with which she was faced, whereas a reasonable and competent nurse would have done so.

While Mrs. Guerineau was in the bathroom and then the shower, attempting to void for 40 minutes (from 0130 hours until 0210 hours)-the fetal heart was not monitored in any way. It could have been checked while the patient was in the bathroom, by way of doptone, fetascope, or even with the monitor if the cord was long enough. The physicians were not called.

**82**  Both Dr. Seger and Dr. Pedersen (the obstetrician called as an expert witness on the plaintiffs' behalf) echoed this evidence. Dr. Pedersen testified that the strip was clearly non-reassuring and that she expected she would have been notified in these circumstances. She testified she would have immediately attended on the patient, examined her, continued fetal heart monitoring (by placement of a scalp electrode) and if there was a continuing concern of late decelerations and the patient was not fully dilated, she would have performed an urgent c-section.

**83**  I have already commented earlier on the evidence of Nurse Porter, the defence nursing expert, as regards her interpretation of the fetal heart monitor strip recorded at this juncture. I will say no more. Nor do I find it necessary, for the reasons outlined earlier, to address Nurse Stam's evidence.

**84**  I entirely reject the defendant nurses' submission that their failure to properly interpret the fetal heart monitor strip was simply a matter of differing clinical judgment. While it may be that various nurses would have differing interpretations of the strip and might have attributed the decreased variability and poor pick-up to the earlier narcotics administered and the mother's restlessness and distress-it behooved Nurse Skidmore, the primary treating nurse in this case (who on her own evidence admits the decreased variability), to follow up the matter and pursue continued fetal monitoring in an effort to obtain clear reassuring evidence of the fetus' wellbeing, thus ruling out any danger to the mother and baby. This is all the more so in the case of Nurse Ha, the much more senior experienced nurse. In effect both nurses short-circuited the process of differential diagnosis, immediately accepting the simplest explanation of the decreased variability (ie. narcotics) without clearly ruling out the perhaps less likely, but much more dangerous possibility of uterine rupture. I find that the nurses' failure to pursue this matter and their discontinuance of the fetal monitoring amounts to ***negligence***.

4.3 The Period between 0210 hrs and 0254 hrs:

**85**  As I noted earlier, notwithstanding the continued unabated pain of the patient, Nurse Ha apparently saw fit not only to replace Nurse Skidmore with Nurse McKay, an even more junior nurse, but she also saw fit to chose this time to leave on a break herself. The two nurses who had had the most significant contact with the patient to this point were now off the scene. Left to contend with this state of affairs and apparently deal with the distraught patient as she emerged from the bathroom, was the unfortunate Nurse McKay. Although armed with all of the erroneous assumptions made by her senior nurses, she nevertheless realized quite quickly that the situation was beyond that earlier reported.

**86**  She struggled in her attempt to obtain a fetal heart rate and eventually recorded a fetal heart rate of 134 at 0215 hours followed by a deceleration to 108 at 0220 hours. At trial she admitted that while she believed the deceleration was caused by cord compression resulting from either the patient's or the baby's position, it was impossible to draw this conclusion with any certainty in the absence of a fetal heart monitor strip and with no ability to assess the contraction pattern.

**87**  Both Nurses Radmonovic and Bushinski opined that a competent nurse would have commenced fetal heart monitoring immediately, that is as at 0210 hrs, so as to determine fetal well being. They criticize the time wasted trying to instruct the mother in the use of oxygen-since there was no question of maternal oxygenation. Further they say that Nurse McKay ought to have called for assistance in placing the fetal monitor properly and locating the fetal heart beat. If that proved difficult, then a reasonable and competent nurse would have checked further for the fetal heart using either a fetascope or a doptone, if unable to locate it by way of the monitor.

**88**  As I noted earlier, the deceleration to 108 at 0220 hours was not considered ominous, notwithstanding the nurse's inability to determine whether the deceleration was related to a contraction or not. By this point she had still neither recommenced monitoring nor had she called a physician. While I have every sympathy for Nurse McKay, who stumbled quite innocently into the situation in which she found herself, I find that due entirely to her complete lack of clinical experience, compounded by the erroneous judgment of her superiors, she failed to act in accordance with the standards of a reasonable competent obstetrical nurse.

**89**  I note however that she did seek the advice of her superior, Nurse Luk.

**90**  Notwithstanding her own ominous findings on examining the patient at 0225 hrs., Nurse Luk compounded the problem, first by calling the general practitioner rather than the obstetrician on call in the hospital at 0230 hrs, and then by failing to even inform Dr. Seger of the earlier deceleration at 0220 hrs. As Nurse Bushinski has opined, on viewing the patient at 0225 hrs, a competent obstetrical nurse would have called any physician available in the hospital on a "stat" basis immediately. The time had long passed for a call to a physician at home, that physician not likely being able to attend on the patient for another 20-40 minutes. As Nurse Radmonovic has noted, the patient's complaints at 0225 hrs. constituted "an emergency situation and had in fact been so for some time".

**91**  Then at 0254 hrs, after a relatively rapid examination of the patient and a determination that the patient was complaining of both a burning vaginal pain and pain over the incision scar, Nurse Luk placed a STAT call for Dr. Pedersen from the patient's bedside, on the overhead intercom.

**92**  The time frame from 0210 hours until 0254 hrs., when Dr. Pedersen was paged, constitutes a valuable 44 minute period -- in which time was lost and the uterus was either in the process of rupturing or had ruptured, and the baby was in the process of being extruded into the abdominal cavity. I find that both Nurse McKay's and Nurse Luk's actions and inactions during that time frame constitute ***negligence*** on their part.

5.0 CAUSATION:

**93**  While the issue was never conceded by the defendant Hospital, there was no evidence of any kind adduced on the defendants' behalf to suggest that the infant's injuries were caused by any process other than the uterine rupture and resulting asphyxiation. The evidence which was adduced on the issue of causation was overwhelming and uncontradicted.

**94**  Dr. Pedersen and Dr. Kinney (the expert obstetrician called on behalf of the plaintiff) testified that the major injury to a baby occurs not when the uterus ruptures but rather after the baby has been extruded from the uterus and the flow of blood and oxygen through the placenta and the umbilical cord has been cut off or seriously compromised. There is therefore a time period between the initial rupture and the extrusion, during which prompt delivery will prevent or minimize hypoxic injury. The length of this period of time will depend on the size of the initial rupture and how quickly it grows.

**95**  Dr. Selby, the paediatric neurologist called on behalf of the plaintiff, opined that Jesse has suffered a "severe prenatal hypoxic ischemic encephlopathy secondary to maternal uterine rupture." (Ex. 1, Tab 4) He explained how, once the hypoxic process begins, the severity of the resulting injury depends on how long the hypoxia is allowed to continue. As he noted, the longer the time frame from the event (the uterine rupture) until the delivery of the baby, the greater the physiological changes in the baby which occur as a result of the lack of oxygen and blood supply. The resulting acidosis results in a build up of lactic acid which in turn results in a greater impairment of neurological function. At some point, the process reaches a point where it is irreversible-as was the case here.

**96**  In the absence of an earlier emergency C-section, it is impossible for any of the medical experts to know exactly when compete extrusion occurred in this case. Mr. Smith concedes that that event might not have occurred even by 0225 hrs. when Nurse Luk palpated Mrs. Guerineau's abdomen. At that point in time, she was apparently unable to feel any fetal parts in the abdomen - one of the signs of complete extrusion. If that is so, then as at 0225 hrs, or even shortly thereafter, there may still have been an opportunity to interrupt the hypoxic process and minimize hypoxic damage. Even post extrusion, there is still time to interrupt the hypoxic process and minimize damage. In this case, each minute counts. As Dr. Hahn, an expert physician in paediatrics and physical medicine and rehabilitation opines in his report (Ex. 1, Tab 5):

...The episode of acute hypoxaemic ischaemic encephalopathy, sustained for a number of minutes ex-utero prior to emergency Caesarean Section, compounded by several more minutes required to establish reasonable neonatal cadiorespiratory status, has produced the classically recognized partial loss of structure and function in the base of the brain which, in embryonic, fetal and neonatal life constitutes the most metabolically active part of the brain.

**97**  The only way to prevent or minimize the injury in question is to perform an emergency C-section as quickly as possible, so as to remove the baby from the dangerous environment. As I have noted earlier, had Dr. Pedersen been informed of the patient's condition, at any time after 0110 hrs, when the complaint of vaginal burning first arose, that C-section would have been performed, likely within a half hour. Even if Dr. Pedersen was not called until 0230 hrs, (when Nurse Luk instead called Dr. Seger), the injury could still have been prevented or at least minimized.

**98**  On a review of all of the evidence and on an application of either the "but for" test or the "material contribution" tests 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=) (SCC), the plaintiffs have overwhelmingly proven on a balance of probabilities that the nurses' ***negligence*** has caused the plaintiffs' injury and loss.

6.0 ASSESSMENT OF DAMAGES:

6.1 Non Pecuniary Damages:

**99**  By any account, Jesse has suffered a catastrophic injury. The plaintiffs' submit that although his severe injuries may limit his ability to appreciate what he has lost, his condition cannot be equated to a "vegetative state". Accordingly they say that the award for non-pecuniary damages ought to be at or near the upper limit, which is approximately $265,000.

**100**  The defendants submit that adopting the functional approach described in Lindal citation, the purpose of an award for non-pecuniary damages is to substitute other amenities for those which have been lost. In the circumstances of this case, the defendants say that since Jesse does not have the capacity to appreciate the provision of other amenities through an award of non-pecuniary damages, an award in the order of $75,000 would be appropriate.

**101**  When Jessie was removed from his mother's abdomen he was "clinically dead" but vigorous efforts succeeded in establishing a cardiorespiratory supported status. While he survived, he has been left with a host of problems including a severe global developmental delay, spastic quadriplegic cerebral palsy, epilepsy, cortical visual impairment, feeding problems, recurrent aspiration pneumonias, development of scoliosis and severe mental retardation.

**102**  Jesse weighs 27 lbs.-a weight which apparently puts him at the 5th percentile level amongst his peers. He cannot stand, walk, crawl or weight bear in any way. He is usually positioned in a small wheelchair with a specially adapted support form, or is held on one's lap, with his neck in slight extension with the upper extremities extended at the elbows and wrists. Even in bed, he is kept in a somewhat raised position. He has no bowel or bladder control. His feeding is accomplished almost entirely by way of a G tube connected to his stomach. He cannot talk. He cannot hold objects. He can hear. While he has some degree of vision and demonstrates some degree of visual tracking, it is impossible to determine the precise degree of his vision.

**103**  Dr. Joschko, the clinical child psychologist and neuropsychologist who evaluated Jesse on behalf of the defendants, details the following observation of Jesse's behaviour during his home visit (see report dated October 27, 2000, page 7-8):

...According to Mr. and Mrs. Guerineau, Jesse shows pleasure and enjoyment by smiling or laughing- he does this for example when he is about to be tickled (and sees a hand approaching him) or when he hears the familiar voice of a family member. During the time I spent in his home, Jesse clearly showed such positive reactions to his mother clapping her hands or gently stroking him; on one occasion he turned his head toward his mother when he heard her voice. Although his parents are uncertain whether he can recognize them by sight, they are quite certain he responds differently to their voices than he does to the voice of a stranger. I observed Jesse smile and respond to his parents' voices and interactions with him; he did not show the same reaction to my presence or to my voice when I was off to the side or behind him.

With the exception of the reactions to his parents' voices or interactions with him, I did not observe any indication that Jesse was aware of, or interested in, what was happening around him. He was very content simply to sit in his tumble form, lay on the floor, or to be held in his parents' or' therapist's arms. During the time I spent in his home, Jesse, ...did not make any movements or sounds to call attention to himself or his needs; that is he did not appear to initiate any contact with his parents or others. He was clearly a very passive recipient of whatever attention those around him might provide. ....

I did not observe any indications of Jesse using eye contact or gestures to communicate. Neither Mr. or Mrs. Guerineau, nor Jesse's therapists, provided any examples of Jesse attempting to communicate or initiate interaction with others. His parents and therapist report that Jesse likes stimulation and attention in the way of tickling, holding, rocking or being pushed in his stroller. He apparently makes a "grumpy" sound or shows some physical reaction if he is unhappy, and his facial expression clearly changes if he is happy or upset, but he does not otherwise provide any indication of the ability to communicate. Jesse apparently reacts negatively with a startle reaction to loud noise or a cold wash cloth, and he seems to indicate that the enjoys music by making some positive response such as a pleasant, laughing sound or a physical reaction like a smile.

There is no reliable indication that Jesse actually visually recognizes people as different from one another. Mr. and Mrs. Guerineau stated that Jesse most likely could not discriminate one person from another if people approached him without speaking.

....Other than seeming to enjoy being held tickled or moved, Jesse did not appear very alert or responsive to his parents or therapist during the time I spent observing him. To the extent it was possible for him given his physical limitations, Jesse did not exhibit any curiosity about me as a stranger; that is, he did not react at all to my presence, or to my voice or my touch.

Concerning his estimated cognitive abilities, Dr. Joschko further notes at p. 9 of his report:

....I did not observe any evidence of age-appropriate levels of attention at any time during my evaluation.. Mr. and Mrs. Guerineau reported that Jesse does not attend to television-he doesn't watch or appear to notice if his sister, Kelly, is watching television. However, he apparently will watch the cat or people walk by. He has also been observed to "focus" on his cousin ...or other children for short periods of time (a few minutes). Although his parents put on audio tapes for Jesse to listen to, they said that he does not react differently to tapes of different types of music.

During my evaluation, Jesse did not show any evidence of attending to what was happening or being said unless he was being directly stimulated and touched-even then he seemed to "drift off" at times.

...With the exception of Mr. and Mrs. Guerineau's comments that Jesse enjoys being held and tickled, there were no indications in the reports I reviewed and in the comments of his parent or therapist that Jesse's attentional abilities are significantly better or worse during auditory, visual, or tactile activities.

Attentional ability is a very important component of intelligence and is crucial for the development of cognitive skills and abilities. On the basis of my observations and the reports of his parents and therapist, it appears that Jesse is only minimally aware of his surroundings, and that he is mostly withdrawn and inattentive. ..

...Mr. and Mrs. Guerineau could not provide examples of Jesse having any memory ability beyond some simple associations of voice with person, the presence of a hand with tickling, or being picked up with movement. His therapists, however, report that he may show some preference for certain toys (ie. a Ernie doll that makes noise and flashes lights) - I did not observe Jesse react to this toy until it began making some noise. His aunt said to me that Jesse laughs when he hears her voice over the phone, and that when he is in the hospital he responds better to his parents than to nurses....

**104**  Dr. O'Donnell, the developmental paediatrician who testified on behalf of the defendants, opined that it was unlikely Jesse would ever develop the cognitive ability to use communication devices or initiate any simple switch device, since he has not demonstrated any cognitive awareness of cause and effect to date. Dr. O'Donnell conceded that in the future, it may be possible that Jessie could use a simple switch-that is touch a switch with his leg or knee and thus perhaps activate a music tape. However she doubted he would ever use a switch to turn a TV on or off. While he might activate a communication-loop tape to attract other children to him (ie a tape which said "come play with me"), she testified that he has not demonstrated the cognitive ability to choose to use such a switch. While it was possible he might develop that ability, she believed it was not highly likely.

**105**  Nevertheless Dr. Hahn described Jesse as a rather visually attentive child. He states at p. 19 of his report:

It is fortunate, at last in early life, Jesse's cerebral hemisphere were relatively spared. That may be the reason why he has been a rather visually attentive child. The visual pathway's conduction and interpretation of vision are at the level of the cerebral hemispheres. In view of more recent lateral cerebral infarction, however, it may be that part of his visual field may have been compromised.... The fact that his cerebral hemispheres and a good portion of his limbic pathways have been relatively intact may also explain that he does have, considering the extent of his hindbrain dysfunction, some expressive ability and ability to interact in a pleasing social sense with his family.

**106**  The issue is, given the present level of his limited cognitive function and the possibility of only minimal future improvement, is this an appropriate case for an award of non-pecuniary damages at the upper limit?

**107**  Mr. Smith submits that in a number of recent cases, where infant plaintiffs have suffered a similar array of global injuries, awards at or near the upper limit of damages have been made. (M.D. (Guardian ad litem of) v. British Columbia, [*2000 BCSC 700*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JWBS-61CX-00000-00&context=), [*[2000] B.C.J. No. 915*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JWBS-61CX-00000-00&context=); Brimacombe v. Mathews, [*[1999] B.C.J. No. 90*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S761-F81W-21NR-00000-00&context=) (Jan 18/99) Victoria Registry 95/4862, BCSC; Granger v. Ottawa General Hospital (supra) and Bauer v. Seager, [*[2000] M.J. No. 356*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DJ1-JJSF-22W3-00000-00&context=) (Man Q.B.))

**108**  In Delaronde, where the infant apparently suffered almost identical injuries, an award at the upper limit was made. In Brimacombe, where the infant suffered similar injuries but was described as a "very social and responsive little fellow" who demonstrated curiosity and an awareness and enjoyment of his environment and social interaction, the award was also at the upper limit. In Granger, where the child exhibited certain cognitive features (ie. turning to sound, following simple commands, laughing at television and enjoying certain stories, recognizing the names of favourite students at school), the award was also at the upper-limit.

**109**  In Bauer, the child had suffered very similar injuries to Jesse, yet was described as an "alert, visually and socially active girl able to follow commands, reaching for toys...". The Court rejected the plaintiff's physicians descriptions of the child as either overly optimistic or overstatements of the child's abilities. He accepted that while she was not in a vegetative state, she had suffered a severe neurological injury, that she was able to respond only minimally and that she was not likely to enjoy any significant future improvement in her condition. The Court noted the general approach adopted by Lissaman J. in Chow (following Cunningham J. in Granger (supra)) at para 285:

It has now been suggested very strongly that awarding the 'Trilogy" amount of damages to Michael Chow would clearly be overcompensating. In cases such as these, where the trial judge necessarily has to be somewhat arbitrary in her or his decision, it seems to me that a trial judge should only award nominal amounts for general damages when he or she is absolutely certain that such monies will not be needed for the plaintiff's benefit. I intend in this regard to err on the side of caution and compensate Michael Chow in the full amount of non-pecuniary general damages dictated by the 'Trilogy'.

The Court went on to say:

This general approach, on the evidence before me with respect to Ellen's ability to at least respond, albeit minimally....is reasonable. Faced with the obvious difficulties in determining, on balance, a reasonable probable life expectancy for Ellen, there is a risk that this court could "under compensate" in the very important area of future care costs. Non-pecuniary general damages will, in my view, provide some degree of solace for Ellen and will enable her parents to acquire any necessary additional care, equipment and facilities that may develop or become available from time to time and may not be included in the court's award for future care costs. Taking into account that the current value of the "trilogy" awards is $263,000 +/-, I would award non-pecuniary general damages to Ellen, recognizing the reality of her limits as attested to by many of the experts in this trial, of $200,000.

**110**  In my view, the circumstances at bar, are much closer to those in Bauer, than to those in either Granger or Brimacombe. I have no complete understanding of the child's actual level of awareness in M.D. (Guardian ad litem of) v. British Columbia.

**111**  While I am satisfied that Jesse will demonstrate very little improvement in the future and will remain minimally aware of his environment, he is nevertheless a responsive child and an apparently visually active child. Dr. O'Donnell conceded that even the most minuscule achievement in functional improvement may result in a dramatic leap forward in terms of his ability to interact with his environment. I expect that the huge technological advances in the recent past, which have so vastly improved such childrens' lives, will continue into the future and perhaps some day, will allow Jesse at least some further, although perhaps a minimal, levels of enjoyment.

**112**  Like Lissaman J. in Chow I am also concerned that given the dire predictions regarding Jesse's future life expectancy, there is also the possibility Jesse may outlive those predictions and that this Court's award for future care costs may possibly "under-compensate" him.

**113**  In these circumstances, I award $200,000 for non-pecuniary damages.

6.2 Life Expectancy

**114**  There is no huge dispute relating to the issue of life expectancy. All of the experts agree that because of the severity of the injury suffered, Jesse has a greatly reduced life expectancy. The plaintiffs submit that the calculation of damages ought to be based on a life expectancy of 25-30 years (ie. a further 22-27 years), while the defence submits a range of 20 years is most appropriate (ie. a further 17 years).

**115**  The starting point is the evidence of Dr. Strauss, a statistician who directs the University of California Life Expectancy Project. That project has been ongoing since 1980 when Dr. Strauss' predecessors began to receive data concerning developmental disabilities. At this point in time, the data base contains information on some 194,168 individuals. The data base is recognized as being the largest and most comprehensive of all such data bases, and has been the principal source in more than 100 scientific reports and articles published by the study group.

**116**  Relying on a questionnaire completed by Dr. Hill, in which he outlined the essential elements of Jesse's functional capacity, Dr. Strauss has calculated Jesse's life expectancy at 17.8 further years (assuming he cannot consistently lift his head while lying prone) and 22.1 further years (assuming he can lift his head in the prone position). As Dr. Strauss explained, the research to date supports the conclusion that there are several key predictors of the mortality rate, one being the individual's ability to mobilize and lift his head, while in a prone position. Dr. Strauss conceded that his estimate of future life expectancy might be on the generous side since he did not consider the "episodes of chest infection" which Jesse suffers from time to time, as noted by Dr. Hill. He conceded that respiratory infections are one of the most common cause of death in children with disabilities.

**117**  By the same token, in cross examination, Dr. Strauss also conceded that in predicting Jesse's life expectancy, he used a "life table" method based on the average of a hypothetical group. He agreed that this process is very similar to that which an insurer would use to determine an average risk and cannot be used to support an assumption about what will happen to a specific individual in the group. Indeed he admitted that even amongst the most disabled children, a number will live much longer than the projected average and will even live into middle or possibly, old age.

**118**  In cross examination, Dr. Maureen O'Donnell, the developmental paediatrician who testified on behalf of the defence, conceded that while the literature (including the California studies) supported a life expectancy of less than 20 years, she believed a range of early adulthood (20-25 years) was more appropriate, given the fact that (i) Jesse lived with a loving, knowledgeable family intimately involved in his care, (ii) that he was a Canadian citizen and therefore lived in an environment where medical services would be available to him and finally; (iii) that further medical technologies had been developed since the California studies first began and could indeed be expected to be forthcoming in the future.

**119**  In his report, (Ex. 7, Tab 4) Dr. Allan Hill, the paediatric neurologist who also testified on behalf of the defence, opined that it was probable Jesse's life expectancy would be "to approximately 20 years of age". In cross examination, he explained that he meant "a couple of years either side of 20" and that while he would be surprised, Jesse might survive to age 25. As he put it "anything is possible".

**120**  In his report, Dr. Hahn opined that "I do not think it likely that Jesse will reach young adulthood, though not impossible." At trial Dr Hahn adopted Dr. O'Donnell's opinion that Jesse's life expectancy was indeed in the range of early adulthood (20-25 years). He acknowledged that his testimony, at least on its face, appeared to contradict the opinion contained in his written report. He agreed that at the time he wrote his report he had conducted a full assessment of Jesse in his parents' home and that there was no information he was unaware of nor any changes in Jesse's condition since his authoring of the report which would account for his apparent change in opinion. Nevertheless he insisted that all along he had thought of Jesse as either reaching very late adolescence or young adulthood. He noted that in medical terminology "young adulthood" includes a period ranging up to age 25 years.

**121**  While there is no significant dispute, the evidence is essentially to the effect that Jesse's total life expectancy is in the range of 20-25 years-with Dr. Hahn and Dr. O'Donnell adopting the 25 year figure as the top of the range, while Dr. Strauss and Dr. Hill are at the lower end of the range. I am satisfied (as the physicians have testified) that the California study figures are not necessarily reflective of what might be expected for this child, in British Columbia, enjoying superior day-to day care and medical benefits. The 25 year figure goes well beyond the predicted range articulated in the literature and specifically reflects the superior parenting and medical care which Jesse enjoys, coupled with the expectation of some future technological advances. In my view, however, there is no strong evidentiary foundation for any finding of life expectancy beyond 25 years. The evidence supports the conclusion that 25 years represents the top end of the range. Accordingly, for the purposes of this judgment, I find that Jesse's life expectancy is a total of approximately 23 years, meaning that there is an expectation Jesse will live another 20 years from trial.

7.0 COSTS OF FUTURE CARE:

7.1 Accommodation

**122**  Ms. Landy has set out various recommendations for various housing modifications, which modifications Mr. Evan Stregger of Costex Management Inc. costed out at $159,515 for renovations and $145,000 for new construction. While the defendants have not presented any alternate cost estimates, they question the necessity for a variety of the costs including: an ensuite bathroom for Jesse, the need for a hydrotherapy tub (which may overstimulate him and trigger spasms), the need for both a large storage area, and the need for a separate exercise area. Other than the exercise room, I agree that these items do not appear to be necessary. Other items such as the larger mirrors, lowered kitchen cabinets and wiring for assistative electronic devices would also appear to be unrelated to Jesse, given his limited functioning. Deducting approximately $30,000 from the cost of new construction, results in a claim of approximately $115,000 which I will award as the appropriate amount under this head.

7.2 Attendant Care:

**123**  While it is agreed that Jesse is and will remain severely disabled and will always be totally dependent on his caregivers, the real issues concerns the amount of caretakers' time which is required, whether large amounts of that care can be provided either within the school system or through publicly-funded services, whether any night-time care is required and finally, the caretakers' required level of education and training and their resulting cost.

7.3 Attendant Care from now until Age 6:

**124**  Ms. Janice Landy, an expert rehabilitation consultant, testified on behalf of the plaintiffs. Her opinion is essentially that from trial until age 6, Jesse requires 40 hours of care during the weekdays (8 hours per day) plus an additional 4 hours daily for evening care and 8 hours of weekend care.

**125**  At present, the Ministry of Children and Families funds the Guerineau's own hiring of Ms. Guerineau's sister, Virginie Olic, who works 8 hours a day, plus an additional 12 hours per week-which the Guerineaus divide between Thursday evenings and all day Sunday, when Ms. Guerineau's second sister, Melanie Medonic, cares for the child...Accordingly Ms. Landy's plan offers an additional 16 hours per week, largely supporting the family in their day to day care of the child.

**126**  Ms. Shulstad, also a rehabilitation consultant, testified on behalf of the defence. She essentially adopts Dr. O'Donnell's opinion that during the time frame from trial until age 4, a child would typically be cared for by a babysitter or nanny or a day-care facility during the working day and that accordingly the in-home support costs should be limited to those of "respite care" of approximately 60 hours per week at $15 per hour. Ms. Shulstad accepts Dr. O'Donnell's opinion that no night-time care is required, based on the assumption that Jesse indeed sleeps through the night. Further she opines that "flexibility and continuity of care can best be delivered by a nanny", whom she characterizes as an "unregulated care provider" who would be taught the necessary specific delegated tasks by a Registered Nurse.

**127**  In my view, it would be a complete fallacy to consider this portion of the claim as simply limited to an amount to supplement the care or the costs which a parent would otherwise provide or finance for a well-bodied child who would likely attend day-care while his parents went to work. By virtue of Jesse's condition, the Guerineaus are essentially providing 24 hour care to the child, something well beyond what any parent would experience with a pre-school child.

**128**  They have specifically structured their working lives such that they work back to back shift work, with the result that one or other of them (or the caretaker) is within Jesse's earshot, close at hand and capable of addressing a medical emergency at any time of day. Ms. Guerineau works full-time as a bookkeeper clerk. Mr. Guerineau works as a forklift operator. He works the night shift, returning home at approximately midnight or sometimes as late as 2:00 am. Ms. Guerineau who either remains awake or sleeps lightly, can then sleep soundly. On his arrival home, Mr. Guerineau often attends to Jesse and if he vomits, attends to cleaning up the baby and the bed linen. His wife wakes at 5:00-5:30 am and leaves for work, so that she can arrive home earlier in the day and relieve her sister. Mr. Guerineau then rises at 6:30 am, attends to Jesse's needs, readies his daughter for school, and attends to Jesse's morning feed, before Ms. Olic arrives at approximately 10:00 am. He leaves for work at 2:45 pm and Ms. Olic is left to care for the baby alone until approximately 5:30-6:00 pm. Ms. Guerineau then resumes caring for the baby until she goes to bed late, shortly before her husband's arrival home from the night shift.

**129**  This situation is untenable. Since there are no other affordable options, this regime has remained in place. In my view, it has exacted great costs for the family. The Guerineaus have been robbed of the opportunity to enjoy time together as a couple. Nor have they had much opportunity to interact as a family. Their 8 year old daughter Kelly has essentially been shunted to the side. Her evenings after school are spent either observing her mother care for Jesse or performing the child care duties herself. Her extra curricular activities have been reduced to a single dance class on Saturday mornings, which she often misses or is late for as the family struggles to cope with Jesse's condition. While the Guerineaus have tried valiantly to provide her with the necessary attention and emotional support, this child's needs have been overshadowed if not displaced by her brother's more pressing needs, with the result that negative dysfunctional behaviours have emerged. More recently she bit another school mate and was suspended from school for a period.

**130**  While the medical evidence is to the effect that Jesse sleeps through the night, I am satisfied that in fact, this is not the case. He is not a sound sleeper. He is often coughing or agitated during the night (due to recurring chest infections) and is therefore at almost constant risk for night time vomiting-a risk for which both parents share a heightened awareness.

**131**  Both Mr. and Mrs. Guerineau testified that they considered Jesse underweight and that he would profit from the addition of a night time feed. However, they said they could not proceed with such a feed at 12:00 pm, since that would heighten the risk of night-time vomiting-a risk they could not deal with, given their already limited sleep. While Jesse is very small, I heard no medical evidence that he was other than well-nourished or that there was indeed some need for a night-time feeding.

**132**  Regardless of this finding, I am still persuaded that there is evidence to support the finding that from time to time, Jesse will indeed require a night-time caregiver. While I accept the preponderance of the medical opinion is that Jesse should undergo the surgical insertion of a J-tube at some point in the near future and while I find that such a tube will in all likelihood be inserted in the near future (despite the Guerineaus' insistence to the contrary), it remains the case that even once the J tube is inserted, trouble free nights cannot necessarily be counted on. As Dr. Selby notes in her report, while the fear of night-time vomiting may be alleviated, children such as Jesse, particularly those with cortical visual impairment (and therefore no capacity to clearly distinguish night and day) can be expected to display disrupted sleep patterns. I expect this will continue to be the case during Jesse's childhood and adolescent years, with perhaps some abatement as he matures. Further, there will continue to be periods when Jesse suffers one of his recurrent chest infections and again, he cannot be expected during those periods to sleep through the night.

**133**  Accordingly, I reject the assumption that a notional 50 hours of "respite care" over and above what would normally be day-care hours is sufficient to meet this child's needs. In my view, this assumption ignores the full breadth of the special care which is required to cope with Jesse's pressing disabilities. Further, the assumption ignores the fundamental underlying notion that an award for damages for future care is designed to compensate the plaintiff and his parents and essentially return the family to the position it would have been in, but for the injury suffered.

**134**  In the end result, I find that the structure of care outlined in the Landy report (that is 8 hours a day, Monday to Friday, plus 8 hours on Saturday, 4 hours on weekend) plus an additional 4 hours per day of night-time care) is both reasonable, appropriate and medically necessary.

7.4 Attendant Care - Age 6-21:

**135**  After Jesse reaches school-age, there is no real dispute between the experts concerning the required care except that Ms. Landy's recommendation is based on 3 hours of school per day, whereas Ms. Simpson and Ms. Shulstad assume attendance at school for 6 hours per day. Ms. Landy bases her recommendation on the assumption that Jesse will have neither the physical stamina nor the endurance to tolerate a full day at school. Ms. Shulstad's and Ms. Simpson's recommendations are based on Dr. Joschko's opinion that, Jesse, like other children with physical and mental disabilities, will be able to attend school for a full day.

**136**  There was no medical evidence to support the notion that Jesse will not be able to attend school. While there is an expectation that he will spend some of that time sleeping, the evidence is that a disabled child is apparently easily accommodated within the school's physical plant where the necessary arrangements are made to find an appropriate room for the child to sleep or eat or otherwise be attended to.

**137**  My sense of the evidence was the plaintiffs' concern that in the future the public school system may not be sufficiently funded to allow Jesse's special needs to be met. Dr. Lee, the child psychologist retained by the plaintiffs, testified that in recent years he has experienced a number of cases in which funding for disabled children within the school system has been cut back in various school districts. He testified that while the school districts have an obligation to develop an individual education program (IEP) for each such child, and while such IEP's are indeed developed, there is very little evaluation of whether the objectives of the IEP's are actually being met in most cases, for simple lack of funding and personnel. He testified that more recently, various School Districts are attempting to set up segregated classrooms for disabled children in order to more efficiently share the resources financed by the block funding available within each District.

**138**  He was familiar with one case in which a private attendant was allowed to work within a school, caring for a particular child-that being a case where the parents paid the funds to the School District which in turn hired a union member for the specific attendant role.

**139**  While I accept the defence theme that some measure of public funding will always be available for children as profoundly disabled as Jesse, in today's climate, I am not confident in assuming that that funding will necessarily be as fulsome or as extensive as it has been in the past.

**140**  Accordingly, outside of the assumed 3 hours per day which he will spend in school, I find that Jesse will require an additional 9 hours of attendant care from Monday to Friday, rather than the 6 hours assumed by Ms. Shulstad and Ms. Simpson. Even if Jesse does ultimately spend an additional 3 hours per day at school, I believe it is more realistic and more prudent to structure this award on the assumption that that additional 3 hours will require private funding-either because Jesse is ill and not able to attend school on a substantial number of the scheduled days, or because the school itself may not have the necessary resources. In my view, structuring those 3 additional hours per day as "private attendant care" hours removes the need for Jesse or his family to depend wholly on the school system and further provides the necessary flexibility to allow for attendant care on the days he is ill and unable to attend.

**141**  In addition, Jesse will require an additional 10 hours of care over the weekend (either on Sat or Sunday or a combination of both days), for a total of 55 hours of care per week. This structure will be in place during the 40 weeks of instructional time each year.

**142**  During the other 12 weeks of non-instructional time each year, I find that Jesse will require 10 hours of care daily (Mon to Friday) plus an additional 10 hours over the weekend.

7.5 Attendant Care - Age 21 onwards:

**143**  There is no dispute that once he has completed his educational program and presumably lives outside his parents' home, Jessie will require 24 hours of care daily, based on live-in care for 12 hours per day.

7.6 Required level of Training of Attendant:

**144**  The larger issue concerns the necessary training level for the caregiver(s) who will attend to Jesse.

**145**  Because Jesse is a child who is completely dependent on others and presents a number of risk factors, Ms. Landy recommends that his caregiver either be a licensed practical nurse or a certified home support worker with the medical training and background necessary to meet his special needs. Further she recommends that the Guerineaus hire such an individual through the Paramed Home Services agency at an hourly rate of $28.25 per hour. While Ms. Landy acknowledged that there are other agencies which also hire such individuals, she testified that since Paramed currently holds the Provincial Government contract for care in the community, it is widely regarded as the agency with the largest pool of persons with the necessary training and background required to deal with children with severe disabilities.

**146**  The defence position is essentially that the services of an agency are not required. This position largely rests on the evidence of Dr. Joschko, Dr. O'Donnell, Ms. Shulstad and Ms. Simpson, that there is no particular background needed for caregivers who are able to attend to children like Jesse. Rather they say the most important factors are the compassion of the caregiver and his/her willingness and ability to learn how to care for such a child. The defence submits that a privately hired caregiver with no training could be hired at an hourly rate of $14.50 per hour (which including UIC, WCB and CPP contributions would equal $17.20 per hour). That individual would then be trained by a Registered Nurse to perform the specific tasks involved in Jesse's daily care.

**147**  While Ms. Simpson made no allowance for the costs of the RN's involvement, (except as a case manager), she assumed the teaching and supervision of the caregiver would all be available through a government home care nurse, although there was no evidence to support that assumption. She acknowledged that any ongoing supervision of the nurse would not necessarily be provided by such a nurse. Ms. Shulstad also acknowledged that for such a system to work, the family would have to hire a Registered Nurse to act as the case manager. In her capacity as a case manager, the nurse would recruit, hire, train and supervise the personnel. The defence reports do not provide for any costing for either a case manager or a supervisory nurse to perform such a function.

**148**  In the end result, in the case of this family, I find that it is both medically necessary and appropriate that the Guerineaus have at their disposal the full gamut of support provided by either a licensed practical nurse or a home care worker hired and trained as necessary by a private agency such as Paramed at a cost of $28.25 per hour. In my view it is unreasonable to expect that this family will undertake the difficult task of recruiting, screening, hiring, training and supervising staff as well as coping with the stress of finding replacement staff at those times when staff are ill or otherwise unable to attend.

**149**  This family has been overwhelmed by the burden of caring for Jesse. While family members have indeed undertaken that task to this point, the role has become increasingly complex. Ms. Olic, who has no special training, admitted she no longer feels competent to address Jessie's complex needs. All of these stresses can be addressed and coped with within the structure of a specialized agency. In my view Paramed will best meet the Guerineaus' needs in a professional and consistent manner, with the least stress to the family.

**150**  Applying the test set out in Thorton v. Board of School Trustees, I am satisfied that this expense is one that a reasonably minded person of ample means would be prepared to incur in caring for Jesse. The family, in my view, is entitled to delegate the task of selection and training of caregivers to an agency and to rely on the agency to provide the necessary and appropriate personnel. There can be no suggestion, in my view, that financing attendant care in this fashion, amounts to a squandering of funds, such as to not meet the necessary legal test.

7.7 Equipment- Bathing and Personal Care; Daily Living:

**151**  I do not intend to address each item in the Landy report. I will award the amounts necessary for the purchase of the items set out in that report, save for the toileting chair which I agree is a speculative item. There is no evidence to suggest that it is at all likely Jesse will develop any kind of bowel control, let alone a toileting schedule in the future.

7.8 Educational Support:

1. Preschool:

**152**  During his pre-school years, Ms. Landy recommends that Jesse attend preschool three days per week and be provided with educational support for 2.75 hours per day. Having heard the evidence of all the experts involved, I am satisfied that at least before a disabled child reaches school age in the Lower Mainland of B.C., his needs for a fully funded 1:1 worker is provided through the Ministry of Children's "Supported Child Care Program". I will make no award for such additional educational support.

1. Kindergarten/ Grades 1-12:

**153**  While I accept the plaintiffs' submission that it may well be necessary at some point to retain a special education assistant to attend in Jesse's classroom to provide him with the support which may not be available through the Ministry of Education, the evidence here is not sufficiently strong to support the conclusion that the hiring of such an individual could be arranged within the school district's teachers' collective agreement and further that the school board would necessarily tolerate what would effectively be a two-tier situation (that is with some disabled children being privately supervised while others were not). Nevertheless, as in Krangle v. Brisco [*2000 BCCA 147*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X03F-00000-00&context=), [*[2000] B.C.J. No. 465*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7T-S771-JSJC-X03F-00000-00&context=) (BCCA), I find that the evidence of Dr. Lee at least justifies the award of a contingency fund to cover the possibility that private funding may indeed be required to supplement the services generally available to special needs children in the public school system. The award ought to be calculated based on 10% of the present value of services at a cost of $15,000 in the kindergarten year plus $17,500 per year from age 6 to 21, assuming a total life expectancy of 23 years.

7.9 Clinical Case Management:

**154**  Ms. Landy recommends that Dr. Douglas Lee, provide the Guerineaus with ongoing psychological consultation and clinical case management. She recommends 6 hours per month in the first year, 4 hours per month for the next 4 years, and 25 hours annually in next years, for the remainder of Jessie's life.

**155**  There is no question, as Dr. Joschko concedes, that this family very much requires some counselling and psychological support. However, like Ms. Simpson, I find it difficult to mix the concept of case management support and clinical psychological counselling support as set out in Ms. Landy's report. While Dr. Lee might well be the individual retained by the family to play this dual role, I believe it is more likely that some other member of Jesse's care team will assume this role.

**156**  I adopt the global figure of 150 hours of counselling for the family, and 100 hours of counselling for Jesse, as set out in the Simpson report. Further I adopt Dr. Joschko's recommendation of a contingency fund of 8-12 hours per year to cover the costs of school related psychological consultation in the event that this is not provided by the local school district.

**157**  Further, I accept that some case management services will be required -as intensively as 4 hrs per month in the first year, 12 hours per year in the second year and then 6 hours per year in the years thereafter.

**158**  I will assume the provision of case management and psychological services with the frequency and at the rates provided in the Simpson report.

7.10 Physical Therapy and Occupational Therapy:

**159**  As I did earlier, I reject the plaintiffs' submission that any additional support for physiotherapy and occupational therapy is required while Jesse attends pre-school. I am satisfied the necessary care is presently provided through the Step by Step program and through Sunny Hill hospital.

**160**  However relying on the evidence of Dr. Hahn and Dr. Selby, I find there is ample evidence to support the conclusion that after a disabled child reaches school age, it becomes far more difficult to obtain the necessary level of physical and occupational therapy support or at least that the level of therapy provided within the school requires supplementation.

**161**  I accept the evidence of both Drs. Hahn and Selby that the public services are very much strained. In his report, even Dr. Joschko questions the ready availability of physiotherapy within the school system. He notes that such care may be available through the Ministry of Children and Families' "services to the mentally handicapped". However as Dr. Hahn notes, the Guerineaus "should not have to plead with any Ministry or Agency for services that should be funded in a planned, proactive way." No one was able to say whether Jesse's receipt of an award in these proceedings would negatively affect his eligibility for participation in such a program for publicly funded services.

**162**  I am satisfied that with regard to these forms of therapy, the public system is indeed strained. Jesse and his family are entitled to have these services in place, without regard to the vagaries of the publicly funded system. Accordingly, I award an amount sufficient to pay for 40 hours of physical therapy per year while Jesse is in school (to age 21yrs) followed by 20 hrs annually for the balance of his life at an hourly rate of $75 per hour.

**163**  Regarding occupational therapy, I award an amount sufficient to provide him with 20 hours of occupational therapy annually (including home and school visitations), while he is in school (to age 21), followed by 12 hours annually for the balance of his life, at a rate of $75 per hour.

7.11 Pharmaceutical needs:

**164**  I adopt the amounts set out in the Landy report.

7.12 Transportation:

**165**  I award the amount set out in the Landy report. With all due respect, Ms. Simpson's evidence concerning the likely trade-in value of an adapted used vehicle struck me as somewhat speculative and unreliable.

7.13 Cellular Telephone:

**166**  I award the amount set out in the Landy report.

7.14 Respite Services:

**167**  There is some degree of overlap in the Landy report regarding respite care. As I noted earlier she recommends the provision of attendant care for 1 day weekend care. At page 28 of her report, she also recommends respite services for 20 days annually, which I assume includes to some degree some of the weekend care provided by the attendants. I therefore award funding for respite care from the present date until Jessie is 21 years old at the rate of at the rate of $240 per day for 20 full days LESS the weekend care referred to earlier in these reasons.

7.15 Associated travel costs for care provider.

**168**  I award the sums set out in the Landy report.

7.16 Membership in Cerebral Palsy Association.

**169**  I award the sum set out in the Landy report.

8.0 FUTURE LOSS OF INCOME CLAIM:

1. Level of education:

**170**  Mrs. Guerineau completed her high school education while Mr. Guerineau did not. As a couple, they impressed me as extremely hard working, directed individuals, very much focused on their children's success. I have no difficulty assuming that but for his injury, Jesse would likely have completed high school and some post secondary non-university education of at least one year in duration.

1. Lost years deduction:

**171**  Adopting that assumption, the plaintiffs submit that Jesse's future loss of income claim ought to be calculated on the basis of a "lost years deduction"-that is a deduction of approximately 50% for the lost years, representing the proportion of Jesse's income he would have spent on personal expenses had he been capable of working during those years. In the Taunton report, the lost years deduction is calculated by multiplying the average BC male's labour market contingencies adjusted income by the percentage of that income which is spent by the average male on food, shelter, clothing, personal and health care and half of private and public transportation. The share of these expenses is then "grossed-up" by the average tax expense incurred by members of the cohort. The difference between the plaintiff's survival rate and the survival rate for BC males with normal life expectancy is multiplied by the total annual expenditure on personal living expenses and taxes. The present value of the lost years deduction is roughly 50% of the total lost income award.

**172**  The defence submits that the plaintiff should be awarded only that proportion of income which would have been saved in the lost years. In Table 7 of his report, Mr. Hildebrand of Columbia Pacific Consulting sets out the after-tax expenditure allocation for one person households, organized by income quintile. According to his data, the majority of such households save none of their income. Only those in the highest income quintile allocate any of their after tax income-an average of 15.8%-to savings. While the lost years deduction ought to be at least 85%, for the purposes of this case, the defence submits that a more conservative lost years deduction of 75% would be appropriate.

**173**  I am persuaded that the case authorities essentially support the plaintiff's approach to the lost years deduction. In Toneguzzo-Norvell v. Burnaby Hospital, [*[1994] 1 S.C.R. 114*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F8T-N3V1-JF75-M3BV-00000-00&context=), at para 31, the Supreme Court of Canada concluded that "logical and functional considerations combine to suggest that it is appropriate to make a deduction for personal living expenses from the award for lost earning capacity" and upheld the 50% deduction imposed by the B.C. Court of Appeal. In her reasons, McLachlin J. (as she then was) recognized that "in order to earn an income one must live and incur the attendant expenses" and that not deducting living expenses would put the plaintiff in a better position than he would have been in had he actually earned the income.

**174**  The defence position's "savings approach" was adopted by the Manitoba Queens Bench in Webster v. Chapman [*[1996] 9 W.W.R. 652*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DH1-FCK4-G0TG-00000-00&context=) where the Court refused to allow compensation for loss of income in the lost years for a plaintiff who would not have saved any of her income. However the drastic deductions seemingly mandated by the "savings approach" have not been made from most damage awards, even in Manitoba. (ie see for example Bauer v. Seager, [*[2000] M.J. No. 356*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F7V-3DJ1-JJSF-22W3-00000-00&context=) (Q.B.) Indeed , more recently the "savings approach" was expressly rejected by the Alberta Court of Appeal in Duncan Estate v. Baddeley [*(2000) 192 DLR (4th) 53*](https://advance.lexis.com/api/document?collection=cases-ca&id=urn:contentItem:5F16-9361-K0HK-21MH-00000-00&context=). There the Court accepted the "available surplus approach" in which "the amount deducted must reflect a realistic assessment of the expenses the individual, at that income level, would have spent in order to live".

**175**  Since Toneguzzo, the standard deduction has been approximately 50%. The Court will deviate from this standard where the evidence indicates that more of the plaintiff's income would have been spent on personal expenses, as it did in Brimacombe (supra), in which a 2/3 deduction was imposed.

**176**  In this case, I am satisfied that the facts support a 50% deduction. The Taunton report estimate of pre-tax spending for personal living expenses include the costs of food, shelter, clothing, health care and half the transportation costs. Although the categorization of living expenses is somewhat arbitrary, the overall approach appears reasonable. No significant non-discretionary costs appear to have been excluded form the calculations. Taunton's estimation of expenses is supported by the after-tax allocation chart (Table 7) contained in the Hildebrand report. According to that Table, a one person household spends an average of 49% to 66.7% (depending on their quintile) of their after-tax income on the necessities identified in that report. Given that Mr. Taunton has based his calculations on pre-tax income, I am satisfied that the Taunton and Hildebrand estimate of the percentage of income spent on personal living expenses are comparable.

1. Multiplier:

**177**  One last issue remains, which is the applicable multiplier to be adopted in calculating the present value of the loss of income claim.

**178**  The multipliers adopted by each of the economists is somewhat different. I should note here that neither of the parties' economists appeared at trial for cross-examination. I am essentially left with their reports, which were touched on briefly in closing submissions.

**179**  Mr. Taunton has prepared tables which set out a year by year analysis of the average income of males who have completed various levels of education. For each year, deductions are calculated for a number of negative contingencies, based on the average risks faced by B.C. males including: non participation in the labour force, unemployment, part-time employment and premature death. Lost income is calculated by subtracting the risk of the first three contingencies (labour market contingencies or LMC) from the total employment income to obtain a LMC-adjusted income, then subtracting a survival contingency percent to obtain the average mortality-adjusted income. The average mortality income is then reduced by 2.5% (pursuant to the Law and Equity Act Regulations), yielding the present value of the future lost income.

**180**  Rather than adding the current value of lost income for each year the plaintiff would have been in the workforce, Mr. Hildebrand provides income multipliers which indicate the present value of a $1000 income in any year. These multipliers incorporate the 2.5% discount mandated by the Law and Equity Act and the normal survival risks for Canadian males. They do not apparently include adjustments for labour market contingencies. Rather they apply to annual income figures which have already been adjusted for such contingencies.

**181**  In closing submissions, defence counsel characterized the multiplier used in the Hildebrand Report as the "mortality ratio method" although there was no explanation of the method, nor the reason for this characterization. The report itself does not appear to make an explicit reference to the mortality ratio method.

**182**  As is perhaps evident, there is very little material before the Court to assist in distinguishing between the multiplier approach adopted by Mr. Hildebrand and the year-by-year calculations employed by Mr. Taunton.

**183**  Defence counsel relies on Brimacombe (supra) as authority for the proposition that the "mortality ratio method" ought to be applied here. However there is no evidence before me that that was the method adopted by Mr. Hildebrand in that case. In its reasons in that case, the Court indicates a preference for the "mortality ratio method" over the mortality rates calculated by another expert. Since the methods employed in the case at bar have not been compared with those employed in Brimacombe, I am reluctant to rely on the reasons in Brimacombe as authority for the proposition that that is the preferred method of calculation.

**184**  In any case, I note that the final calculations proposed by both Taunton and Hildebrand are very similar, that is within 7% at each education level. The calculation of the future income claim is not a pure arithmetical exercise. Rather the exercise is an assessment of damages. Thus, in the end result, since the selection of one expert's opinion over that of another on this issue will have very little impact on the damage award, and since no material has been provided in distinguishing between the two approaches, I intend to simply adopt the Taunton approach since I have largely relied on that report.

**185**  Thus for the purposes of calculating the loss of future income claim I assume (i) that Jesse has a further life expectancy of 23 years; (ii) that he would have completed high school and a post secondary education of more than one year in duration ; (iii) that the lost years deduction of 50% is applicable and that (iv) the Taunton report multiplier shall apply.

9.0 IN TRUST CLAIM:

**186**  Here "in trust" claims are advanced on behalf of each of the Guerineaus as compensation for the services rendered by them over the past three years.

**187**  The plaintiffs position is that since each of the parents has been directly involved in Jesse's care, relieved only by family members who have been paid $10 per hour under a Ministry of Children's At Home Care program, each of them ought to receive an in-trust award. Relying on the decision 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=) (March 4, 1999) Vancouver Registry No. B961315, in which Harvey J held that the damages ought to reflect the wage of the substitute caregiver, the plaintiffs say that here, assuming each of the parents has delivered roughly 8 hours of care daily, and adopting a $10 per hour rate, each of their claims should be valued at $87,000. They submit that a reasonable award would be in the order of $75,000 each.

**188**  The defence position is that $75,000 per parent represents an over-estimate of the actual care provided by each parent on a daily basis to this date. Both of the Guerineaus have worked full-time over most of the last 3 years, with 8 hours of support from the At-Home program from Monday to Friday, with respite care one evening per week and one day on the weekend. Further the defence notes that while some of the time the Guerineaus have spent with Jesse amounts to actual compensable care, much of the care would form part of the normal parental duties assumed by a parent caring for a very young child. Accordingly the defence position is that the Guerineaus should effectively divide a $75,000 award between them.

**189**  While I accept that parents usually spend a good deal of their free time caring for a child in early infancy, these parents have virtually spent all of their free time over the last three years caring for a child who is often very ill or medically vulnerable. While something in the order of 5 hours per day has spent by each parent intensively caring for Jesse during weekdays, the weekend care is more likely 6 hours each per day.

**190**  In the circumstances, I believe a fair award to be $50,000 for each parent.

10.0 CONCLUSION:

**191**  There are a number of outstanding matters which remain to be addressed-specifically the award for tax gross-up on the future care award, investment management fees, taxable costs and the approval of legal fees. The parties have agreed that these matters are best addressed once the main award is finalized. I will leave it to counsel to calculate the awards set out herein. If they are unable to resolve the balance of the issues by way of agreement between themselves, I invite them to contact the Registry to arrange dates for further submissions on the outstanding matters.

BOYD J.

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